

## **APPRAISING THE VEXED QUESTION OF ABSOLUTE IMMUNITY ON STATE EXECUTIVES UNDER NIGERIAN LAW**

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### **ABSTRACT**

Absolute immunity conferred on State Executives is covered by section 308 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides immunity from trials in civil and criminal matters, except in electoral matters on the President and his Vice, the Governors of the States and their Deputies. The sole justification for this is that these State Executives should enjoy absolute immunity to enable them to perform official duties without distractions. However, recent conducts of some State Executives have rekindled the need to amend section 308 by depriving them immunity from criminal prosecution as practiced in the United States while still in office. In the long run, the author concludes by supporting this view absolutely.

**Keywords:** Absolute Immunity, Court proceedings, State Executives, Amendment

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## INTRODUCTION

Absolute immunity conferred on State Executives is vexed question that keeps reverberating, heating the Nigerian polity and greatly interfacing legal issues in politics based on the provision of section 308 of the Constitution<sup>2</sup> of the Federal Republic of Nigeria (as amended) which provides immunity for court proceedings in civil and criminal for the President, Vice-President, the Governors of the States and their Deputies.

The concept of immunity began with Sovereign immunity or Crown immunity. It is a legal doctrine that prevents the Sovereign or State from committing a legal mistake and is immune from civil action or prosecution. This doctrine is commonly expressed in the legal maxim “*rex non potest peccare*” meaning “the king can’t do wrong”.<sup>3</sup> This concept had existed in the earliest recorded histories<sup>4</sup> of human society such as Babylon from about 2,000 BC, in ancient Egyptian dynasties and in Athens around 430 BC.

Further, immunity which is from the Latin language “*immunitas*”<sup>5</sup> was used by the ancient Romans when describing an individual’s exemption from service or obligation from the State. Immunity can also be traced to the ancient feudal structure<sup>6</sup> roots in England which later became a principle of common law. The idea flourished at the time of absolute monarchies<sup>7</sup> in medieval England, when it was the norm that the individual on the throne of England was personified by Sovereignty and regulatory powers. The individual who occupied the English Crown was at the top of the feudal ladder and was not subject to the Court within the realm. It was thought at that time that the King as a result of the status of his office and position in society as the Sovereign<sup>8</sup> could not do any wrong. The idea remained in place in England until democratic thoughts<sup>9</sup> and institutions made the idea to lose its moral strength. The idea of immunity however came hand in hand with the English when they

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<sup>2</sup> Hereinafter simply ‘CFRN’ in this article.

<sup>3</sup> CG Cooper ‘Act of State and Sovereign Immunity: A Further Inquiry’ <[lawcommons.luc.edu/cgi/view\\_content.cgi?article=2105^context=lucj](http://lawcommons.luc.edu/cgi/view_content.cgi?article=2105^context=lucj)> accessed 19 May 2021. This should not be confused with the principle of public international law on state immunity that the government of a state is normally not amenable before the courts of another State. As the King enjoyed absolute immunity, he could neither be impeded in his own courts nor subject to any foreign jurisdiction. Hence Louis XIV of France once declared ‘I am the State’.

<sup>4</sup> A Silverstein ‘The History of Immunology’ in Paul, W.E. (ed.) *Fundamental Immunology* (Lippincott-Raven Publishers, 1999) 55.

<sup>5</sup> *Ibid* 19.

<sup>6</sup> E Malemi *The Nigerian Constitutional Law* (Princeton Publishing Co 2006) 446-458.

<sup>7</sup> See F Falana ‘Official Corruption and Immunity in Nigeria’ *THIS DAY* <<https://www.thisday.com/index.php/2016/07/19/official-corruption-and-immunity/>> accessed 11 June 2021. Even though the Crown Proceedings Act was abolished in England in 1947, its ghost continued to haunt Nigeria several decades after independence. For instance, the law was invoked to cover up the atrocities perpetrated by the armed soldiers who destroyed the Ransome-Kuti family house at Idi Oro, Lagos on February 18, 1977. In *Chief (Mrs) Olunfunmilayo Ransome Kuti v Attorney-General of the Federation [1985] 2 NWLR (Pt 6) 211* at 236-237, the Supreme Court held that the federal government was not vicariously liable for the arson and willful damage to property carried out by its armed agents. But the apex court took advantage of the case to declare that section 6 of the Constitution has abolished the anachronism of State immunity.

<sup>8</sup> P Oluoyede *Constitutional Law in Nigeria* (Evans. 1992) 465. He states: “Under feudal system no lord could be sued in the court which he held to try the cases of his tenants. It is simply not that the King could do no wrong, but that no action could be brought against him in his Court without his consent. Ironically however, the often cited expression that ‘the King can do no wrong’ has been completely misunderstood. Another reason for the development is that the true meaning of the King can do no wrong is that the King has no legal power to do wrong. The King’s legal position, the powers and prerogatives which distinguish him from an ordinary citizen is given to him by law and the law gives him no authority to commit wrong. Much too often it was not appreciated that the King as a human being had a personal as well as a political capacity. In his personal capacity he was just as capable of acting illegally as was anyone else.”

<sup>9</sup> *Ibid*. Civil actions by and against public authorities and officials in connection with acts or omissions which normally give rise to cause of action between two citizens are now on the same footing. There is no difference in procedure adopted.

conquered new lands and the new territories acquired the idea of the English legal system of immunity.<sup>10</sup>

Given allegations of corruption against some of these office holders who enjoy absolute immunity, such as the President, Vice President, Governor and Deputy Governor, there have been calls in Nigeria to remove their constitutional immunity, making such State Executives liable for prosecution in court while in office. Others have contended that the immunity provision also known as the immunity clause should be preserved.

This paper in lieu of the above deals with seven interrelated parts beginning with the introductory part. Part 2 highlights absolute and restrictive immunity. It mentions cases such as *Mighell v Sultan of Jahore*, *1 Congress Del Parside* and conventions such as the 1919 and 1920 Paris Peace Treaties which denied any defeated States rights, privileges or immunities in foreign trade which have correlation with the doctrine. Succinctly, part 3 examines the applicable law and judicial authorities on absolute immunity in Nigeria. It states that cases such as *Colonel Rotimi and others v. Mac Gregor, Tinubu v. IMB securities PLC* have given credence to section 308 CFRN which confers absolute immunity on State Executives. Under part 4, abuse of absolute immunity was discussed. Two instances of these abuses were given concerning the alleged misappropriation of funds by two States Executives. Vital leads that would be lost which would have led to a proper prosecution of the alleged infractions committed by these State Executives after the end of their tenure, occasioned by the protection of section 308. Pointedly, part 5 discusses limitation of immunity under international law and states that the only one cognizable Sovereign Head in Nigeria as at that time which enjoys Sovereign immunity is the President and not the Governor and this is what still persists till now. Part 6 examines the concept of absolute immunity in the United States. It posits that the United States practices qualified absolute immunity. The President is only immune from civil liability for acts performed in the discharge of his official responsibilities. Finally, part 7 concludes by stating that section 308 CFRN should be amended so that State Executives become answerable for criminal acts committed while in office.

## ABSOLUTE AND RESTRICTIVE IMMUNITY

One of the salient issues pertaining to the doctrine of absolute immunity is whether it embraces all state acts or only some of them. In time past when government restricted themselves purely to governmental functions, it was easier to concede them immunity. A Head of State travelling abroad has the right to absolute immunity. If he travels incognito, his immunity commences as soon as he declares his identity. In *Mighell v Sultan of Jahore*<sup>11</sup> under the assumed name of Albert Baker, the Sultan while in Britain contracted to marry Miss Mighell. On failing to do so, she sued for a breach of promise. The Sultan's claim of immunity was upheld on his revealing his true identity. In the *Arantzazu Mendi Case*,<sup>12</sup> the statement from the British foreign office recognized *defacto* the government of General Franco and conferred immunity on the ship which was held on the orders of that government, as against the *dejure* claim of the Republican Government.

There is no consistent practice<sup>13</sup> with respect to which organ of a foreign State or sub division such as a province or region should be entitled to immunity. Certain municipal systems grant immunity to

<sup>10</sup> GO Arishe 'Reconsidering Executive Immunity under the Nigerian Constitution' <[www.nials-nigeria.org/journals/NCLR10.pdf](http://www.nials-nigeria.org/journals/NCLR10.pdf)> accessed 29 April 2021.

<sup>11</sup> (1894) QB 149.

<sup>12</sup> (1939) AC 256.

<sup>13</sup> S Fabamise 'Constitutional Immunity Clause and the Fight Against Corruption in Nigeria' <<https://www.ajol.info/>>

political sub divisions while others do not. France denies such immunity. Britain recognized the Sultan's immunity of Jahore. The European Convention on State Immunity 1972 does not recognize the immunity of political sub division by providing that contracting States may declare that constituent parts may invoke their provision and bear the corresponding obligations. Government in commercial activities led to an increasing number of States differentiating between purely governmental functions *acta jure imperil* and commercial activities *acta jure gestonis* and restricting immunity to the former. Lord Wilberforce in *1 Congress Del Parside*<sup>14</sup> puts the rationale succinctly thus:

..... It is necessary in the interest of justice for individuals having transactions with State to allow them bring each transaction before the courts. To require a state to answer a claim based upon each transaction does not involve a challenge to the governmental act of that State. It is unaccepted phrases, neither a threat to [the] dignity of that state, nor any interference with its sovereign function.....

This distinction has led to absolute immunity and restrictive immunity's doctrine. This distinction has been adopted in a number of multilateral treaties. The 1919 and 1920 Paris Peace Treaties denied and defeated States rights, privileges or immunities in foreign trade. The Brussels Convention on the Unification of Certain Rules on States' Vessels Immunity 1926 and the Additional Protocol 1934 also made the distinction. The same principle applies to the General Convention of the High Seas 1958, the Convention on Territorial and Contagious Zone 1958, the Convention on the Settlement of Investment Disputes between States and Nationals of the other States 1965, the Convention on Civil Liability for Oil Pollution Damage 1969 and the United Nations Convention on the Law of the Sea 1982.

The European Convention on State Immunity with its Additional Protocol 1972 adopts the distinction as does the Convention of Immunity of States in respect of Commercial and Other Transactions of a Private Character 1960, the Convention on Jurisdictional Immunity of States of OAS 1983, the Harvard Draft 1932, the German Society of International Law 1968 and the Montreal Draft Convention on State Immunity of the International Law Association 1982. Britain too adopted the distinction in 1978.<sup>15</sup>

Under absolute immunity doctrine, in all instances the Sovereign is immune from foreign jurisdiction irrespective of the circumstance. However, the flurries of activities of States have led to the modification of the absolute immunity rule which has culminated to the adoption of the restrictive immunity's doctrine. In the *Parliament Belge case*<sup>16</sup>, the Court of Appeal emphasized that:

The principle to be deduced from all the relevant preceding cases was that every State declines to exercise, through its courts, any of its territorial jurisdictions over the person of any Sovereign or Ambassador or other State or over the public property of any State intended for public use even though such Sovereign Ambassador or property be written its jurisdiction.

The doctrine was equally applied in the case of *Porto Alexandre*.<sup>17</sup> The extension of the doctrine to an agent was established in *Krasina v Tass Agency*<sup>18</sup> where the Court of Appeal held that the Agency

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index.php/jsdlp/article/download/163328/152815> accessed 20 June 2021.

<sup>14</sup> (1981) 3 WCR 329.

<sup>15</sup> State Immunity Act 1978.

<sup>16</sup> (1880) 5 PD 19).

<sup>17</sup> Full text of 'The Photo Alexandre' < [https://archive.org/stream/jstor-2187856/2187856\\_djvu.txt](https://archive.org/stream/jstor-2187856/2187856_djvu.txt)> accessed 20 April 2021.

<sup>18</sup> (1949)2 ALL ER 274.

was a State organ of the USSR and was thus entitled to immunity from local jurisdiction.<sup>19</sup> However, in *Dralle v Republic of Czechoslovakia*,<sup>20</sup> the Australian's Supreme Court declared that in the light of the increased commercial activity of nations, the classic doctrine of absolute immunity was no longer a rule in international law.<sup>21</sup>

The doctrine of restrictive immunity was accepted in Nigeria in *Trendtex Trading Co. Ltd v Central Bank of Nigeria*<sup>22</sup> where the Court of Appeal accepted the validity of the restrictive immunity as being in consonant with justice and international practice. The court held that the Central Bank of Nigeria was a governmental department but a "legal" entity of its own right and therefore not entitled to jurisdictional immunity.<sup>23</sup> Several States have reflected the doctrine of restrictive immunity in their domestic legislations.<sup>24</sup>

## THE APPLICABLE LAW AND JUDICIAL AUTHORITIES ON ABSOLUTE IMMUNITY IN NIGERIA

Section 5 of the CFRN<sup>25</sup> confers executive powers on the President at the Federal level and on the Governor at the State level respectively. Section 308 of the CFRN<sup>26</sup> confers absolute immunity on certain categories of State Executives. Succinctly, it provides immunity from proceedings of court, that is, proceedings that will compel the attendance of the President and his Vice and the Governors of the States and their Deputies. This immunity applies to actions carried out in their official capacity<sup>27</sup> so they are not liable for acts carried out on behalf of the State<sup>28</sup>. This immunity shall not apply to acts committed in abuse of the powers of their office for which they are responsible when their tenure expire.

The rationale for immunity is that Heads of government should enjoy absolute immunity to enable them to perform official duties without unnecessary interferences. They should be free from distractions and harassments while carrying out their duties from fear of civil or criminal litigation or prosecution. However, the justifiability of this assertion is questionable and doubtful as recent events have proved otherwise regarding this. In *Colonel Rotimi and others v. Mac Gregor*,<sup>29</sup> a civil action was commenced against the 1<sup>st</sup> appellant in his personal capacity. The suit continued 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 because the immunity clause afforded protection to the 1<sup>st</sup> appellant by virtue of his current position as a military Governor.

Contrariwise, in *Chief Onabanjo v. Concord Press of Nigeria*,<sup>30</sup> the plaintiff, Governor of Ogun State, the defendant, publishers of Concord Newspapers was sued by the plaintiff in his personal capacity

<sup>19</sup> See the case of *Duff Development Co. Ltd v Kelantan Government* (1924) 17 AC 797.

<sup>20</sup> (1950) 17 ILR 155.

<sup>21</sup> See *Alfred Dunhill of London v. Republic of Cuba* 15 ILM 1976.

<sup>22</sup> (1977) QB 529 CA.

<sup>23</sup> Several other cases have reaffirmed this decision. See for example, *I Congresso del Parside supra note 13*.

<sup>24</sup> See for example, the United State Foreign Sovereign Immunities Act 1976, the South African Foreign States Immunities Act 1981 and the United Kingdom Immunity Act, 1978.

<sup>25</sup> Constitution of the Federal Republic of Nigeria 1999 as amended.

<sup>26</sup> In the 1963 Constitution of Nigeria, provisions for immunity for the President, Vice-President, Governor and Deputy-Governor of a region existed under section 161 subsection 1 (a-c) and sub section 2. Under the 1979 Constitution, they existed under section 267 subsections 1 (a-c), and subsections 2 and 3. Under the 1989 Constitution, they were codified under section 320 subsections 1 (a-c), 2 and 3.

<sup>27</sup> CN Okeke *The Theory and Practice of International Law in Nigeria* (Fourth Dimension Publishers, 1986) 103.

<sup>28</sup> UO Umorzurike *Introduction to International Law* (Spectrum Law Publishing, 1993)56.

<sup>29</sup> (1974) 11 SC 133.SC

<sup>30</sup> (1981) 2 N.C.L.R. 399.

for libel. Kolawole J held that since no provision of the constitution expressly incapacitated the Governor, he could sue in his private and personal capacity.

Pointedly, the court took the same view as it had earlier taken in *Rotimi's*<sup>31</sup> when in *Tinubu v. IMB Securities PLC*,<sup>32</sup> the court adjourned the appellant's appeal before it *sine die* until the appellant vacates office as Governor of Lagos State as the provision of section 308 was invoked. 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 according to the Court 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.

On the above issue, Falana<sup>33</sup> submits that if those included in the immunity clause can institute libel suits or enforce their rights, it is unjust to prevent other persons from suing them while in office. He continues that given that there is equality before the law, it is grossly unfair to allow government officials covered by the immunity clause to bring civil suits when their opponents are prevented from suing them by issuing or serving proceedings against them. The injustice in this discriminatory practice becomes apparent when it becomes clear that the defendant cannot appeal the cases if they are decided in favour of government officials.

We concur with the above position<sup>34</sup> but add that justice must be seen to be manifestly done judiciously and judicially practically and proactively in the temple of justice in all matters brought before it for adjudication. Aggrieved persons should also enjoy reciprocal rights to sue elected officials covered by immunity.

The case of *Alamiyeseigha v. Yeiba*<sup>35</sup> is worth illustrating and falls on the principle enunciated in *Tinubu's* case.<sup>36</sup> The plaintiff sued 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 1<sup>st</sup> to 3<sup>rd</sup> respondent to apply for an order compelling the 4<sup>th</sup> 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 1991 at the College of Command and Staff while he was still in service. The Court granted an order of mandamus to the 1<sup>st</sup> to 3<sup>rd</sup> respondent compelling the 4<sup>th</sup> 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 held that 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. 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. It is the interference and the effect of the order sought against him from the court that the Constitution prohibits.

*Fawehinmi v. Inspector General of Police*<sup>37</sup> was a milestone decision on absolute immunity. In this case, the appellant sought an order of mandamus to compel the respondents to investigate the then Governor of Lagos State Bola Tinubu on criminal allegations of forgery and perjury. Though, the order of mandamus was refused on lack of *locus standi* by the appellant, the Supreme Court held that the

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<sup>31</sup> *Colonel Rotimi and others v. Mac Gregor supra note 28*

<sup>32</sup> [2001] 16 NWLR (Pt. 740) 670.

<sup>33</sup> F Falana 'Official Corruption and Immunity in Nigeria' *THIS DAY supra note 6*.

<sup>34</sup> What is good for the goose is good for the gander.

<sup>35</sup> [2002] 7 NWLR (Pt. 767) 581.

<sup>36</sup> *Tinubu v. IMB Securities PLC supra note 31*.

<sup>37</sup> [2002] 7 NWLR (Pt. 767) 606. See also *Inspector –General of Police v. Fayose* (2007) 9 NWLR (Pt 1039) 263.

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.

In *FRN v Dariye*,<sup>38</sup> at the material time, the Court of Appeal dismissed the charges against appellant the sitting Governor on the ground that he had become the main party to the criminal case. According to Tur JCA, the appellant's learned counsel should have seen the impracticability, futility and absurdity of initiating criminal proceedings against Chief Dariye as the Governor of Plateau State, or in his name since he is not a nominal party pursuant to section 308 (2) of the Constitution but the main offender alleged to have conspired with the other co-accused persons to commit the offences.

It is trite law that section 308 of the CFRN bars the instituting of civil suits and criminal proceedings against a sitting Governor. It is deducible from the plethora of cases examined that there was an advancement of the principles of law on immunity when the court stated in *Fawehinmi's*<sup>39</sup> case that States Executives covered under section 308 of the CFRN can be investigated over criminal misconducts alleged to be committed during pendency in office. This was laudable and a great contribution to legal jurisprudence in this area of law thereby eliciting an elixir for the clamour for the removal of the immunity clause on criminal proceedings conferred on State Executives pertaining to election petitions. Thus, in *Obihv Mbakwe*<sup>40</sup>, the 1<sup>st</sup> respondent who was Governor of Imo State from 1979 contested for a second term in an election held in 1983 and was declared duly elected. The appellant, another contestant challenged the election of the 1<sup>st</sup> respondent. While the petitioner/appellant's appeal was pending at the Supreme Court on a different ground, the 1<sup>st</sup> 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.

This position was amplified further in *Turaki v. Dalhaltu*<sup>41</sup> when the Court of Appeal per Oguntade JCA held that if a Governor were to be regarded as immune for court trials, that would generate a situation where a sitting Governor could flout electoral laws and regulations to the detriment of another individual contesting with him. This will render the election process absurd and run counter to our national Constitution which offer for free and fair elections in its tenor.

The same principle of law was reiterated by the court in *Alliance for Democracy v. Ayodele Fayose*.<sup>42</sup> The respondent challenged the issue of a subpoena on him on the ground that as a Governor section 308 gave him immunity. In rejecting the objection, the court of Appeal ruled that the immunity granted to a State Governor by section 308 is suspended when his election is challenged before an Election Tribunal in order to enable him to be obliged by a summons to tender papers or to provide proof before the Election Tribunal. A commendable decision by the court removing the veil of injustice often sought under absolute immunity by State Executives.

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<sup>38</sup> [2011] 13 N.W.L.R (Pt 1265) 521.

<sup>39</sup> *Fawehinmi v. Inspector General of Police supra note 36.*

<sup>40</sup> (1984) SCNLR 192.

<sup>41</sup> (2003) 38 WRN 54 at 168.

<sup>42</sup> (No 1) (2004) 26 WRN 34.

## **ABUSE OF ABSOLUTE IMMUNITY**

Alleged abuses committed by State Executives while in office have made it imperative for removal of the immunity clause. Some of these abuses are epitomed by the following instances. The first issues pertains to the alleged claim by the Economic Financial Crimes Commission (EFCC) to have traced<sup>43</sup> a huge sum of ₦1.2 billion transferred from the National Security Adviser's office to Zenith's bank account belonging to the former Ekiti State Governor Mr. Fayose. The EFCC froze it to stop the Governor from transferring the fund and subsequently obtained an *ex parte* seizure order. In challenging the claim of the EFCC, the Governor said that his immunity had been violated. The second issue is the allegation by the EFCC that Governor Yari<sup>44</sup> of Zamfara State stole \$3m from London-Paris Club loan refund to Nigeria States. The Governor who is the chairman of the Governor's forum is alleged to have diverted 19 billion naira reportedly meant for Consultants from the Paris club loan refund.

Further, hitherto to this, the effectiveness of the continued retention of the absolute immunity in the Nigeria Constitution had been condemned when in line with his policy of zero tolerance for corruption, Yar' Adua<sup>45</sup> declared his support for the removal of the immunity clause from the Constitution.<sup>46</sup> He was reported as saying that the immunity clause which shields some group of elected State officers from being prosecuted for any act of corruption while in office has become a cover for non-performance, ineptitude and corrupt practices.

The National Judicial Commission (NJC) made a recommendation to the National Assembly Committee on the Review of the 1999 Constitution that the clause be amended to confer immunity on concerned political office-holders on civil matters only and not on criminal matters as a way of mitigating its negative outcomes. Momoh believes<sup>47</sup> that the clause is inconsistent with the ideal of democracy and should therefore be removed from the Constitution. He advances three reasons for this view thus:

First, he argues that the provision constitutes a rude and reckless assault on and a violation of the independence and powers of the judiciary.... He noted that the immunity clause was not provided for under "The Executive" (Chapter VI), suggesting that it was only mentioned only as an after-thought under "Miscellaneous" and therefore is untenable. Second, he argues that equity holds sway between two equally formidable and contending provisions and positions. He submits that: The ouster clause in section 308 is a matter of criminality, immorality and jurisprudence is yet to record a case where criminality supercedes innocence and piety.....equity ought never to support criminality over civility, morality, culturedness and civilization.<sup>48</sup> Third, he noted further that: If a Governor commits a crime during his period

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<sup>43</sup> Banker Links Fayose to ₦1.2 billion Allegedly Collected from Dasuki'. < <https://punching.com/banker-links-fayose-to-n1-2bn-allegedly-collected-from-dasuki/>> accessed 29 July 2021.

<sup>44</sup> This allegation was vehemently denied by the Governor. See Vanguard "Leave Gov Yari Alone, NGF tells EFCC" <<https://www.vanguardngr.com/2017/07/06/leave-gov-Yari-alone.ngf-tells-efcc> > accessed 31 July 2021.

<sup>45</sup> He was President of Nigeria from 2007 to 2010.

<sup>46</sup> At the Partnership against Corruption Initiative which held Davos, Switzerland in January 2008. Later in the year, President Yar' Adua reiterated his call that the immunity be expunged from the Constitution by the National Assembly at the launch of Anti-Corruption revolution (ANCOR) campaign of the EFCC in December 2008.

<sup>47</sup> CS Momoh 'The Self Nullification of the Immunity Provision', Paper presented at the Workshop on 'An Agenda for a New Nigeria' Organized by the Department of Political Science, University of Lagos and the Ford Foundation, Excellence Hotels. Ogba, Lagos on 29 and 30 June 2005.

<sup>48</sup> *Ibid* at 4.



of office, he is not performing the functions of his office, and so he is not covered under section 308 (3). Indeed such an action will be contrary to the oath that he swore to find and the code of conduct contained in the Fifth schedule to the Constitution. He concluded<sup>49</sup> that since 'section 308 excuses and immunises damnable and criminal executive conduct and behaviour;... it is a constitutional vagabond and bastard, lawless area boy and legal miscreant, without any abode and without a home.

Furthermore, in tandem to the above, we submit that the under-mentioned salient points have also made the clamour for the removal of absolute immunity clause in the Constitution imperative.

When State Executives commit alleged acts of criminal infractions against the States, relevant security agencies<sup>50</sup> are authorized only to investigate such infractions and thereafter keep such investigation reports until their tenure expire. They cannot prosecute a sitting Governor as the provisions of section 308 bars them from doing so. The first major pitfall discernable on the continued retention of absolute immunity clause is that when eventually the tenure of the Governor comes to an end, he may defect to the new government in power and begins to share same political ideology or political affiliation with that government. In this situation, the new government may decide not to persecute him; it may direct the relevant investigation body to carry out a fresh investigation in other to exonerate him or it may even prosecute him but it may not be done diligently because of the lack of interest on her part. The second is that vital leads that would have led to a proper prosecution of the alleged infractions would have been lost or goes into obscurity. Some witnesses would have died while those alive would have lost total impression of vital facts of the case because of time lapse as a result occasioned by the protection of section 308 on the State Executives. Some witnesses would have relocated outside the jurisdiction of the court but within Nigeria or overseas. Therefore, procuring such witnesses to testify against such State Executive maybe very difficult as they may not be able to be traced to their new locations. Likewise, some of the exhibits procured during investigation would have changed radically in nature or texture because of time lapse.<sup>51</sup> Some would have been tampered with or occasion outright lost.

Therefore, the enabling provision of the Constitution should be amended pertaining to absolute immunity on the institution of criminal proceedings enjoyed by State Executives. Those who inspire to public offices and who are at the echelon of leadership in government should strive to live above board as the confidence and trust reposed on them in the discharge of their duties during the pendency of their tenure is sacrosanct.

Issues bordering on allegation of criminal breach of trust on those covered under section 308 should be urgently investigated and if found culpable, such State Executives be made to face trial while still in office. This will augur well for a corrupt free society, good governance, ethical conducts and standards in the political space which invariably will translate to other strata of the society. We therefore frown at and condemn the non-instituting of criminal proceedings on the President, Governor *etcetera* because they enjoy absolute immunity. It has lost its relevance in the polity.

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<sup>49</sup> *Ibid* at 10.

<sup>50</sup> Notably, the Economic Financial Crimes Commission (EFCC) and Independent Corrupt Practices Commission (ICPC).

<sup>51</sup> See *Federal Republic of Nigeria v Attahiru and ors* SS/33C/2019, *Federal Republic of Nigeria v Chimaroke Nnamani and ors* FHC/09C/2007, *Federal Republic of Nigeria v Rasheed Ladoja* FHC/L/336C/2008 and *Federal Republic of Nigeria v Saminu Turaki* FHC/ABJ/CR/86/2007. These are on-going cases in courts involving some former Chief Executives. Only three Governors namely Lucky Igbinedion, Joshua Dariye and Jolly Nyame have been convicted at the end of trial by Nigerian Courts after they left office. Dariye and Nyame have gone to the Court of Appeal to challenge their conviction.

## LIMITATION OF IMMUNITY UNDER INTERNATIONAL LAW

In September 2005, Diepreye Alamiyeseigha, the then Governor of Bayelsa State, one of the 36 constituent States that make up the Federal Republic of Nigeria was arrested, detained and charged<sup>52</sup> for the criminal offence of money laundering in the United Kingdom. He challenged his arrest and detention on the grounds that as the Governor of Bayelsa State, he enjoyed Sovereign immunity in international law. The question before the British Court was whether a Governor and Chief Executive of a State that is part of the Federal Republic of Nigeria had the right to immunity in criminal trials? Counsel to the claimant had brought a claim by judicial review to quash the decision to prosecute the claimant on the basis that he was entitled to Sovereign immunity as Governor and Chief Executive of Bayelsa State of the Federal Republic of Nigeria. The Court ruled that Bayelsa State was not entitled to State immunity and that the applicant was also not entitled to State immunity.

In reaching its decision, the Court took into consideration reports of experts from both the claimant and the defendant. The Court reached its decision on the following grounds:

- a) Bayelsa State does not have the legal authority to conduct foreign relations on its own behalf because “external affairs” are reserved solely to the Federal government.
- b) The Secretary of State for the Foreign and Commonwealth Office had issued a certificate under Section 21 of the 1978 Act dated 26 September 2005, which records that: The Federal Republic of Nigeria is a State for the purposes of Part 1 of the Act, Bayelsa is a constituent territory of the Federal Republic of Nigeria, a Federal State for the purposes of Part 1 of the Act.

The claimant is the Governor and Chief Executive of the State of Bayelsa and shall not be considered as Head of State of the Federal Republic of Nigeria for the purposes of Part 1 of the Act. (c) The Nigerian Constitution demonstrates that a State such as Bayelsa has no authority on a number of issues usually connected with a Sovereign State. (d) That there are provisions in the Nigeria Constitution which show limited powers in relation to federal sub-states like Bayelsa State to the Federal Republic of Nigeria. The Court considered the judgment of the Supreme Court case of *Attorney-General of the Federation of Nigeria v. Attorney-General of Abia State*<sup>53</sup> where Uwais CJN said that the 36 constituent states of Nigeria are not members of the comity of Nations and so the provisions of international law do not directly apply to them but the Federation. Several jurists took positions on the decision of the Court. Oditah, a counsel to the Governor was of the opinion that the Governor was entitled to absolute immunity in Britain.<sup>54</sup> He posited that like the Federal Government, Bayelsa State has three arms of government, the executive, legislature and judiciary. Accordingly, as the Head of Bayelsa State, the Governor had immunity from criminal jurisdiction under all applicable

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<sup>52</sup> The Governor was eventually charged by the Crown Prosecution Service with three count offences as follows: In the first charge, the claimant allegedly received £420,000 on or about 14 December 2001 in a bank account kept at HSBC in London contrary to section 93C (1)(A) of the Criminal Justice Act 1988 as amended. The cash, it was claimed, was the proceeds of a corrupt payment received from a Nigerian oil and property merchant. In the second charge, the claimant was alleged to have laundered the sum of £475,724 in contravention of section 93C(1)(A) of the Criminal Justice Act 1988 as amended by paying on or about 22 March 2003 to the account of the firm of Solicitors (Nedd & Co) for use at 68-70 Regent Park Road, London, N3 for the purchase of the property. The third charge concerns a cash sum £920,000, which was discovered on September 15, 2005 at the claimant's home. Again, the CPS claimed that this amount was the proceeds of criminal conduct contrary to section 327 (1) of the 2002 proceeds of criminal conduct contrary to section 327 (1) of the 2002 Proceeds of Crime Act.

<sup>53</sup> (No. 2) (2002) 6 NWLR 728 – 729.

<sup>54</sup> See ‘Alamiyeseigha’s Detention and Arraignment Violate International Law’ *The Guardian* (4 October 2005) 69.

laws including the laws of Nigeria, England and International Law. Fawehinmi in his contribution opined that:

no immunity would avail the embattled Governor, According to him, 'under International Law, immunity is enjoyed by the head of a Sovereign State. State here means nation State and not a geographical or political division within the nation State like Bayelsa State. The Customary International law recognizes nation division within a nation State as deserving immunity for the head of that nation State. In Nigeria, the head of the nation was President Obasanjo. According to the political division in Nigeria, there were 36 geographical States with 36 Governors but none of them is the head of the nation state of Nigeria. None of the 36 Governors enjoys immunity under the Customary International law, consequently, the Bayelsa State Governor; Chief Alamieyeseigha does not enjoy immunity outside Nigeria.<sup>55</sup>

On his part, Ijalaye held an opinion that coincided with Fawehinmi. He stated that Sovereignty belonged to the Head of President of a nation-State. He further declared that ".....Foreign heads of State, whether Monarchs or Presidents embody in their persons the Sovereignty of their States and when they visit or pass through the territory of another Sovereign and Independent Country, they are wholly exempted from the local jurisdiction, both civil and criminal.<sup>56</sup> He concluded that no Sovereign immunity would avail Alamieyeseigha".

We submit that the judgment delivered by the British Court is laudable and apt with the principles of public international law in this area of legal jurisprudence. The judgment is at par with the views elucidated by Gani and Ijalaye. There is only one cognizable Sovereign Head in Nigeria as at that time which enjoys Sovereign immunity and it is the President. This is what still persists till this moment.

## **IMMUNITY CLAUSE IN UNITED STATES**

The immunity clause is not enshrined in the United States Constitution as in the case with Nigeria's Constitution. Candidly, as a common law principle, the Courts have recognized certain types of immunity.<sup>57</sup>

The President has complete civil liability immunity for his formal acts. The leading case on this is *Nixon v. Fitzgerald*.<sup>58</sup> In November 1968, Ernest Fitzgerald, an Air Force Management Analyst testified before congressional sub-committee that aerospace developmental projects would necessitate an increase in cost of over US\$2 billion. In January 1970, the Pentagon fired him in a cost-saving re-organization. Fitzgerald, who believed he was, fired from his defense department job in retaliation for testimony in which he had criticized military cost overruns sued President Nixon and some of his administrative officials for violating the first amendment and statutory rights. The Supreme Court of the United States in its lead judgment held that the President has absolute immunity to civil harm actions for all acts within the 'outer perimeter' of his authority. The Court held that since the President has authority to prescribe how the business of the Armed Forces will be performed, including the authority to dismiss personnel, Nixon was immune from liability for firing Fitzgerald even if he caused

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<sup>55</sup> See Sovereign Immunity *The Punch*, 4 October 2005, 46.

<sup>56</sup> 'Sovereign Immunity and Governor DSP Alamieyeseigha'. *The Guardian* (11 October 2005) 67.

<sup>57</sup> SL Emmanuel *Constitutional Law* (Emmanuel Publishing Corp., 1992)36.

<sup>58</sup> 457 US 31 (1982).

it maliciously or in an illegal manner. However, the President does not have immunity at all for acts that are completely unconnected with his official duties.

In *Clinton v. Jones*,<sup>59</sup> Paula Jones brought a suit for private damages against President Bill Clinton while he was in office. Jones claimed that while Clinton was Governor of Arkansas, he made sexual advances to her. Clinton contended that as President of the United States, he should have temporary immunity to last while he is in office against virtually all civil litigations that happened before he took the oath of office. The Court unanimously rejecting the contention held that no immunity of any kind is expressed in the Constitution and that by the decision in the *Fitzgerald's* case, unofficial acts such as the one in this case was based on, are not within the perimeter, not even the outer perimeter of the President's official responsibility.

The American President is also not immune from court processes. The President could be subpoenaed to produce relevant documents in criminal matters. In *United States v Nixon*,<sup>60</sup> a federal grand jury indicted seven Nixon's aides on charges of conspiracy to obstruct justice and other Watergate-related offences. The President was named as an un-indicted co-conspirator.

The Watergate Special Prosecutor convinced the Federal trial Court to issue a *subpoena duces tecum* to the President requiring him to create multiple recordings and records related to the President's conferences. During the indictment trial, these papers and tapes were to be used. The President published some of the recordings, but declined to produce the recordings himself and moved to quash the *subpoena*. The trial Court rejected the President's claim of privilege. On appeal, it was held that the President is amenable to a *subpoena* to produce evidence for use in a criminal case despite the general immunity. The Court noted that under all conditions, neither the doctrine of the separation of powers nor the need for high-level communications, confidentiality without more could maintain an absolute, unqualified Presidential privilege of immunity from legal proceedings. From the foregoing, the United States practices qualified absolute immunity; the President is only immune from civil liability for acts performed in the discharge of his official responsibilities.

## CONCLUSION

So far, we have looked at a variety of judicial authorities and academic viewpoints to capture the reasons against keeping the executive immunity clause in the Nigerian Constitution. Their viewpoints rightly have the potential to bring about openness, accountability and probity in Nigeria's polity on the part of State Executives in the country's governance.

Candidly, the deliberate venturing into judicial cases delivered by Courts in United States is that the Nigerian State can learn from this. Immunity from criminal proceedings is not absolute in United States as compared to the Nigeria situation.

Amending the absolute immunity clause provision in the Constitution in respect of criminal proceedings on State Executives in accordance with 308 is long overdue in the Nigeria State. This can be achieved through amendment<sup>61</sup> by removing the words 'criminal proceedings' in section 308 of the CFRN as amended so that State Executives in Nigeria can become liable and be prosecuted for criminal acts committed while still in office.

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<sup>59</sup> 65 USLW. 437 2 (27 May 1997).

<sup>60</sup> 418 US.683 (1974).

<sup>61</sup> This could be through a legislative or executive sponsored bill.

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