

**PRACTICABILITY OF WAIVING CONSTITUTIONAL
IMMUNITY UNDER THE CONSTITUTION OF FEDERAL
REPUBLIC OF NIGERIA 1999 (AS AMENDED)**

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Abstract

Jurists and other Nigerians concerned have advanced a lot of arguments on the issue of the practicability of constitutionally immune officials' powers to waive the protection granted to them by the constitution while they are in office. These have produced at least two schools of thought. One school argues that, the affected officials lack the power to waive such protection as it will amount to a breach of the constitution while the other school who may be referred to as moralists argue based on the moral view and the law as it ought to be that the officials should be allowed the liberty to waive the immunity since that might serve the society's interest. This paper aims at discussing the constitutional immunity, its scope, limitation and the arguments for and against the practicability of its beneficiaries' power to waive it. This will be achieved through the use of doctrinal method of research by making reference to both primary and secondary materials. It concludes with a finding

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that it is not possible for the officials concerned as the position of the law stands presently to strip themselves of the Constitutional immunity.

Keywords: Immunity, Waiver, Applicability.

Introduction

The concept of executive immunity provided by the Nigerian Constitution¹ shielding the occupants of the offices of President, Vice-President, Governors and Deputy Governors has been a subject of discussion among the legal practitioners and other members of the general public. Some clamour for its repeal and some argue that at least the shielded officers should be allowed the right to waive the immunity when the need arises. However, some scholars and practitioners argued against this position citing the public policy reasons. This is the position that the Nigerian Judiciary appeared to have adopted in deciding cases involving the issue of waiver of constitutional immunity. This paper discusses the concept of constitutional immunity looking at the practicability or otherwise of the immune officers' right to waive such immunity. This will be achieved through reference to both primary and secondary materials. The paper ends with conclusion, findings and recommendations based on the law as it presently stands in the country.

Meaning and Nature of Immunity

Immunity as a legal term is defined as any exemption from a duty, liability, or service of process especially such an exemption granted

¹ Section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

to a public official or governmental unit.² Immunity has also been defined as ‘is the exemption of a person or body from legal proceedings or liability’.³ Simply put, immunity may be seen as lawful or legitimate protection or exemption given to a person from legal liability. The term has been divided into various categories or types such as executive immunity and diplomatic immunity etc. However, our discussion here is limited to executive immunity. The latter term was defined as the absolute immunity of the US President or a State Governor from civil damages for actions that are within the scope of official responsibilities.⁴

On the historical aspect of the term, it is said to have originated from the doctrine of sovereign immunity which means the immunity of government from being sued in its own courts without its own consent.⁵ Falana observes that ‘it was basically founded on the anachronistic legal principle of *rex non potest peccare* (the king can commit no wrong). As the king enjoyed absolute immunity in his own courts and not subject to any foreign jurisdiction’.⁶ On the nature of immunity in the Nigerian constitution, the provision made by the constitution confers an absolute protection on the personality of the federal and component States chief executives and their deputies namely; President, Vice-President, Governors and the Deputy Governors against all civil and criminal court actions throughout their period of office. Any action brought against the foregoing officers in their person during their term of office is

² Brayan A. Garner, *Black’s Law Dictionary* (9th edn, Minnesota: Thompson Web Publishers 2009). p.817.

³ Ese Malemi, *The Nigerian Constitutional Law*’ (3rd edn, Princeton Publishing Company 2012), p.315.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Femi Falana, ‘Official Corruption and Immunity in Nigeria’ *Premium Times* (07 July 2016) <www.premiumtimesng.com> accessed 21 November 2019.

liable to be declared a nullity. Thus in *FRN v Dariye*⁷ the Court of Appeal Kaduna Division held thus:

Learned counsel to the appellant ought to have seen the impracticability, futility and absurdity of instituting criminal proceedings against Chief Joshua Chibi Dariye either as the Governor of Plateau State or in his name since he is not a nominal party under section 308 (2) of the Constitution but the principal offender alleged to have conspired with the other co accused persons to commit the offences.

The immunity provided under the constitution covers only the named officers without extending to their family members and it ceases upon their vacation of the respected offices.⁸ Thus, the *raison d'être* for the immunity clause entrenched in section 308 of the Constitution of the Federal Republic of Nigeria 1999 is to enable the person to whom the section applies, while in office, to conduct the affairs of governance free from hindrance, embarrassment and the difficulty which may arise if he is being constantly pursued and harassed with court processes of a civil or criminal nature while in office....⁹ Lastly, immunity does not extend to prohibit actions against the named officers in their official or in a nominal capacity and election petitions.¹⁰

⁷ *FRN v Dariye* (2011) 13 NWLR (Pt. 1265) p. 521 (CA).

⁸ *Abacha v FRN* (2014) 6 NWLR (Pt. 1402) 43 (SC) per Onnoghen, J.S.C as he then was.

⁹ *FRN v Dariye* (2011) 13 NWLR (PT. 1265) p. 521 (CA).

¹⁰ *Amaechi v INEC* (2008) ALL FWLR pt. 407 p.48 (SC).

Immunity under the Constitution

The provision of immunity for the named Executives pre-dates the 1999 Constitution as it originates from the 1963¹¹ which is the same provision that found its way to the present Constitution in this fourth republic. The provision as it stands presently is stated in section 308 of the constitution (as amended):

- (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.¹²

¹¹ Section 161 of the Constitution of the Federal Republic of Nigeria, 1963.

¹² This provision is to allay the fears that time does not run against the wrong committed by the immune official if immediate action is not taken. So time will only start to run from the time the official vacates the immune 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.¹³

The provision has the effect of absolute prohibition on any court proceeding or litigation which in its nature affects the personality of the above named officers. The scope of the section is that, it provides a protection in favour of the persons enumerated in subsection (3) thereof, so long as each of them holds the office provided in the section. The immunity provided in the section connotes that actions for civil or criminal cannot be instituted or continued against him and also has the immunity from arrest or imprisonment during that period, it can be either in pursuance of the process of any court or otherwise or the application for or issuance of the process of court by any court requiring or compelling the appearance of a person to whom the section applies. It is settled law that any breach of the provisions of section 308 of the constitution renders such process or proceedings either civil or criminal null, void and of no effect.

¹³ Constitution of the Federal Republic of Nigeria, 1999 (as amended).

The Court of Appeal held that the only way to give effect to the provisions of section 308 of the Constitution is to decline jurisdiction in any process or proceeding which is capable directly or indirectly of affecting the persons occupying the offices stated.¹⁴ The above indicates the seriousness and the jealousy with which our superior courts guard or give effect to the provisions of section 308 of the Constitution. This was also strongly worded by another panel of the Court of Appeal in Kaduna Division when they declared as impracticable, futile and absurd the commencement of criminal proceedings against the Governor of a State or any constitutionally immune officer in his name and not as a nominal party under section 308 (2) of the constitution but the principal offender.¹⁵

However, as it is with almost every principle of law that, in every general rule there is an exception, the same is also true with the constitutional provision for executive immunity. The immunity provided by the constitution under section 308 is not without limit as many exceptions have been identified thereunder. The first exception is as provided by the Constitution itself under section 308 (2) which provides thus ‘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’. This exception is to the effect that the immune officers are not shielded against court actions in their official capacity or when they are only nominal parties in the suit.¹⁶ Nominal party is defined

¹⁴ *D.S.P. Alamiyeseigha v Chief Saturday Teiwa and 3 ors* (2001) 33 W.R.N (CA) per Oduyemi, JCA.

¹⁵ *FRN v Dariye* (2011) 13 NWLR (pt. 1265) p. 521 (CA).

¹⁶ Ogunua V.C. Ikpeze, ‘The Imperative of Removing Immunity Clause in the Constitution of the Federal Republic of Nigeria 1999’ (2013) Vol. 4

to mean a person who is usually made a party by virtue of office even though he may not necessarily have been actively involved in the transactions that gave rise to the cause of action¹⁷

The second exception is also contained in the constitution under section 308 (3) which limits the period of the immunity to the end of the tenure of office of the immune persons. This provision has the effect that the immunity terminates when the person who enjoys the immunity ceases to hold the office by which he enjoyed immunity provided by relevant constitutional provision. It is therefore not an enjoyment for life, once the beneficiary left the office by whatever means he stands stripped from the Constitutional immunity.¹⁸

The two other exceptions are not expressly provided by the constitution but were developed by courts' precedence through judicial interpretations. The first is that the immunity provided by the constitution to the named offices does not preclude the security agencies from carrying out investigations against the officials during the pendency of their tenure of office. The Court of Appeal Ekiti Division held¹⁹ that the section does not protect an Executive Governor from being investigated by security agencies for possession of funds in bank suspected to be stolen from Government coffers. In arriving at this, the Court cited and relied

NAUJILJ <www.ajol.info/index.php/naujilj/article/view/136302> accessed 21 December 2019 p.140 citing *Shugaba v Minister of Internal Affairs* (1981) 1 NCLR 25 (SC)

¹⁷ M.M. Stanley Idum and J.A. Agaba, *Civil Litigation in Nigeria*' (Rev edn, Nelag & Company Limited 2017).p210.

¹⁸ This was also affirmed in *Dasuki v Muazu* (2002) 16 NWLR (pt793) (CA).

¹⁹ *The Economic and Financial Crimes Commission v Mr. Ayodele Fayose & anor* (2018) LPELR-44131 (CA).

on the dictum of the Supreme Court²⁰ where it was held that ‘while a sitting Governor cannot be arrested nor proceeded with in court either by civil or criminal proceedings he can be investigated while in office and evidence gathered/assembled may be useful preparatory for use in impeachment proceedings against him or for prosecution when he vacates office’. The second exception developed by judicial activism is that the immunity under the Constitution does not preclude or prevent the officials from being sued in election petitions as it was held thus:

The immunity clause in section 308 of the Constitution of the federal republic of Nigeria does not find succour in election matters. The provisions of the section do not protect a President or Governor from legal proceedings in a matter of his election and in a matter connected therewith even when he has been , as a contestant, declared duly elected and sworn in as such. This is because election petition and election related proceedings are sui generis, that is are species of proceedings that are distinct and independent of civil or criminal proceedings.²¹

Meaning and Nature of Waiver

Waiver is a noun which has its root in the verb ‘waive’. The Black’s law Dictionary²² defines the verb ‘waive’ in legal parlance as ‘to abandon, renounce, or surrender (a claim, privilege, right etc)

²⁰ Per Uwaifo JSC in *Fawehinmi v IGP* (2002) 7 NWLR (pt 767) at 681 – 682 (SC).

²¹ *Amaechi v INEC* (2008) ALL FWLR (pt. 407) p.48 (SC); *AD v Fayose* (No. 1) (2004) 8 NWLR (pt. 876) 639 (CA).

²² Garner B.A *Black’s Law Dictionary* (9thed, Minnesota: Thompson Web Publishers, 2009). p.1717.

to give up (a right or claim) or voluntarily. The dictionary goes further to define the noun ‘waiver’ as “the voluntary relinquishment express or implied of a legal right or advantage.”²³ The term was also classified into express and implied. The former meaning a voluntary and intentional waiver while the latter means waiver evidenced by a party’s decisive and unequivocal conduct reasonably inferring intent to waive.²⁴ The concept was defined judicially thus “the concept of waiver denotes that a person or party who, under no legal disability and having full knowledge of his right or interest conferred in him by law, intentionally decides to give up all, or some of them”.²⁵ From the above definitions, waiver envisages a situation where a person is conferred with certain rights or privileges by law, he however, decides to relinquish or abandon those rights or privileges either intentionally i.e. with full knowledge or by necessary implication of law.

In law, the concept mostly comes up in the aspects of contracts and Court Proceedings. In the former, for instance, where a party to a contract as a result of breach of a contractual term is entitled by the agreement provisions or law to a particular remedy but he decides to forego that remedy. In the latter case, a party to a court action as a result of procedural irregularities committed by the other party is entitled to a remedy including cost or even the striking out of the case but he decides not to enforce the right or remedy. All these instances present the usual case of waiver. However, this paper is concerned with a waiver as it affects a constitutionally given right or privilege which rarely happens. But before then, the

²³ *Ibid.*

²⁴ *Ibid*; this is what the court held the 3rd respondent the former governor or Western Region to have done in *Colonel Olu Rotimi and ors v Mrs. F.O. Macgregor and ors.* (1974) LCN/0/348 (SC).as we shall soon see.

²⁵ *Nwadinobi v Monier Construction Co. Nig. Ltd* (2016) NWLR 615 (C.A).

Constitutional right must be distinguished from an ordinary statutory given right which was succinctly explained by the Nigerian apex Court thus:

The...enquiry is the extent to which a person could waive rights conferred upon him by law. When a right is conferred solely for the benefit of an individual there should be no problem as to the extent to which he could waive such rights. The right is for his benefit. He is *sui juris*. He is under no legal disability he should be able to forego the right or in other rights waive it either completely or partially depending on his free choice²⁶

The foregoing is reproduced to show the position with regard to waiver of a right or privilege provided by an ordinary statute. The position as it affects the waiver of a right or privilege conferred by Statutes must be distinguished from that of the constitution as the latter enjoins supremacy over and is not of the same nature with the ordinary statutory laws.

Application of Waiver on Constitutional Immunity

The Nigeria's Supreme Court (EsoJSC) in the foregoing *Ariori* case took time by going on voyage to other jurisdictions with constitution similar to ours in deciding whether the rights conferred on an individual by the constitution are waiveable as those conferred by an ordinary statute. After the painstaking voyage his lordship classified the constitutional rights into;

- (1) Those rights that are for the benefit of the individual alone.

²⁶ This was held in *A. Ariori and ors. v Muraino O. Elemo and ors.* (1983) LPER-SC 80/1981 (SC).

- (2) The rights that are for the benefit of the individual and Public or State.

The court finally concludes that the rights in (1) above can be waived by the individual since the benefits are for him alone. But those in the second category cannot be waived since it is not only the individual that will be affected by the waiver but also the State or Public at large so it will be contrary to Public Policy if he is allowed to waive them.²⁷

By the rules established by Nigerian courts, there is nothing in the constitution suggesting an answer to the question whether the immunity conferred can be waived by the affected officers. The *Col. O. Rotimi's* case,²⁸ decided by the then Supreme Court of Nigeria is the *locus classicus* on this issue and was followed by all similar cases that came later. The case bordered on claim for declaration of title to land. However, in the course of the trial before judgment at the trial court, the 1st defendant became the Governor of the then Western Region and so the trial judge in his judgment declined to make any order against the 1st defendant holding section 161 of the 1963²⁹ Constitution of the Federal Republic of Nigeria which provides the 1st defendant with immunity which involves a Public Policy that the 1st defendant could not waive by himself. On appeal to the then Supreme Court, the court held that the learned trial judge was right in the action against the 1st defendant and went further to state that 'no question of waiver arises for the section prescribed absolute prohibition to 'any court' during the period of office of the holder of any of the

²⁷ *Ibid.*

²⁸ Colonel Olu Rotimi and ors v Mrs. F.O. Macgregor and ors. (1974) LCN/0/348 (SC).

²⁹ The section was in pari materia with section 308 of the present Fourth Republic Constitution.

posts prescribed therein to entertain any claim for reliefs against such person'. This, the court holds in spite of the fact that the counsel to the 1st defendant did not file any pleading on that aspect and failed to canvass any argument on the issue which was argued by the other counsel as express waiver for not filing pleadings and canvassing argument on the issue. But the court affirms that 'the provisions of the section are peremptory and admits of no waiver'. In *Alamieyeseigha v Teiwa*,³⁰ one of the issues dealt by the Court of Appeal was whether immunity guaranteed by section 308 of the Constitution of the Federal Republic of Nigeria 1999 can be waived by the President or Governor himself. The Court per Muntaka Coomasie JCA resolved the issue thus

I hold that courts in Nigeria have no jurisdiction to try a person on criminal charges or civil matters if he is entitled to immunity under the Constitution even if for a reason that his immunity is waived. Any waiver of such immunity is ineffective. The immunity under section 308 (3) supra is over and above popular diplomatic immunity, therefore of any kind does not arise. The immunity is not that of a person of the appellant, but of the particular state which he represents during the tenure of his office as an Executive Governor of a State.³¹ In agreeing with this dictum his lordship Adamu JCA added thus: in its recent decision in *Tinubu's* case (2000) 8 NWLR (Pt. 714). This Court (Lagos Division) interpreted the provision of section 308 of the 1999 Constitution (supra) wherein it confirmed the

³⁰ D.S.P. *Alamieyeseigha v Chief Saturday Teiwa and 3 ors* (2001) 33 W.R.N (CA)

³¹ *Ibid* (pp. 162 – 163) lines 40 – 5 per Muntaka Coomasie JCA

immunity from suits or criminal prosecution conferred on the Governor of Lagos State which immunity the court held cannot even be waived by the Governor himself. There is no reason why we should depart from that decision in the present case.

In *Tinubu v IMB Securities Ltd*³² where the appellant was sued at the High Court of Lagos State on 28-11-1992 as a 3rd defendant. He by motion on notice applied for the writ to be set aside on the ground that he was served with the writ out of time. Following this development, the plaintiff in swift reaction, applied for renewal of its writ for six months and the trial judge granted same thereby deeming the service out of time on the appellant as good service. Dissatisfied with this decision the 3rd defendant appealed to the Court of Appeal. Whilst the appeal was pending the appellant got sworn in as the Executive Governor of Lagos state on 29th May, 1999 after being elected. On the 1st day of December, 1999 when the appeal came up for hearing, Respondent urged the court to adjourned the matter sine die until when the appellant vacated his office of the Governor looking at immunity he has and the court of Appeal granted this prayer rejecting the contention of the Appellant's counsel that the appeal can be heard despite the position of the appellant. Still dissatisfied with the decision of the Court of Appeal the appellant appealed to Supreme Court. The Supreme Court per Iguh JSC held thus:

in my view, the immunity granted to the incumbent of the relevant office under section 308 (1) (a) of the Constitution prescribes an absolute prohibition on the courts from entertaining any proceedings,

³² *Tinubu v IMB Securities Ltd* (2001) 16 NWLR (Pt.740) 670 (SC).

civil or criminal in respect of any claim or relief against a person to whom that section of the Constitution applies during the period he holds such office. No question of waiver of the relevant immunity by the incumbent of the offices concerned or, indeed, by the courts may therefore arise. In my view the Court of Appeal was absolutely right to have declined to entertain the appellant's appeal pending before it as to do otherwise would amount to continuing the plaintiff/respondent's suit against the defendant/appellant, a suit which under section 308 (1) (a) of the 1999 Constitution shall not be continued against the appellant while he remained the Governor of Lagos state.³³

Following all the above judicial authorities and pronouncements discussed above, it is clear that the immune persons have no authority or power whatsoever to waive their immunity as the right is not for their own sole benefit but for the protection of their office which the general public have an immense interest in, so it will be against the Public policy if they will be allowed to waive such immunity granted them by the Constitution. This inability of the immune persons to waive their immunity should however not be confused with their rights of taking court actions against anyone personally. To institute action against other individuals for their personal rights they need not waive their immunity as was held by the Courts.³⁴

³³ *Ibid.* (p. 25, paras. A-E).

³⁴ *Global Excellence and Ors. v Donald Duke* (2007) 16 NWLR (Pt 1059) 22 (SC); *Tinubu v IMB Securities Ltd* (2001) 16 NWLR (Pt.740) 670 (SC).

A recent trend in the Nigerian polity that seems to give fresh life to this issue was the threat by the incumbent Vice-President, Professor Yemi Osinbanjo, a Senior Advocate and Professor of law that he will waive his constitutional immunity to clear his name against the allegations of mismanaging the sum of ninety billion naira allegedly provided to them by the Federal Inland Revenue Services for the 2019 elections campaign. This threat attracted the attention of many legal practitioners in the country in which many asserted that considering the judicial interpretations of the immunity section, he lacks such power to waive the immunity though some few agree with him that he can waive his immunity. However, considering the current position taken by our Courts, His Excellency the Vice-President has no such power to waive his immunity. This was also the argument of a Senior Advocate of Nigeria Mr. Mike Ozekhome, who opined that the Vice-President “is like saying grant me the right to breach the Constitution”.³⁵

The only thing the Vice-President can do under such circumstance is to invite and allow the relevant security agencies to investigate him with free hand and give them all the necessary cooperation they need to carry out effective investigation. The National Assembly can also either alone or in conjunction with the security agencies launch an investigation in to the scandal and if the Vice-President is found wanting he can be impeached and that will give the prosecutorial agencies the power to prosecute him. The last and most consequential option he may have is to resign his appointment so as to submit himself to the jurisdiction of the courts of Law.

³⁵ Eniola Akinkuotu and Oladimeji Ramon ‘N90bn Poll Cash: Osinbanjo can’t waive Immunity say SANS’ *The Punch* (27 September 2019). <www.punchng.com/n90bn-poll-cash-osinbanjo-cant-drop-immunity-say-sans/> accessed 25 December, 2019.

Voluntary Submission to Investigation as an Alternative to Waiver

A voluntary submission for investigation by the official concerned is an alternative to waiver of the immunity since the courts have time without number affirmed the powers of the security agencies to carry out investigations against the incumbent of the immune offices instead of clamouring for something neither allowed by the constitution nor accepted by the courts, so it will only be an attempt and gaining cheap political popularity for one to claim that he will waive his immunity for prosecution at this time. It was reported that the former President Obasanjo had once waived his constitutional immunity to appear before the Oputa Commission of enquiry in 2001 to answer some allegations arising from his tenure as Military Head of State in 1970s.³⁶

Conclusion

From the discussions one cannot but arrive at an inescapable conclusion that the immunity provided to certain officials cannot in whatever guise be waived as the Constitution provides for nothing like that and our Courts through Judicial interpretations pronounced an absolute prohibition to such waiver. And as the things are presently, the Courts are not ready to depart from that position. So, any of the designated officials who desired waiving his immunity has the option of truthfully and wholeheartedly submitting himself for a true investigation or to in the alternative vacates the position he is occupying to enable the law takes its full course on him.

³⁶ Femi Falana, 'Official Corruption and Immunity in Nigeria' *Premium Times* (07 July 2016) <www.premiumtimesng.com> accessed 21 November 2019.

The study while focussing on the practicability of waiving constitutional immunity in Nigeria has made the following findings;

1. First, the immune official can resign his position to enable the law takes its full course.
2. Second, the immune official is not shielded by the Constitution against investigation by the relevant security agencies.
3. Third, the constitutional immunity does not negate or affect the power of the relevant legislature to launch an investigation against the concerned official with a view to impeaching him if found wanting.

Recommendations

The following recommendations are proffered:

1. The section of the constitution on immunity should be amended to give liberty to the immune officials to waive their immunity when there is need for the law to take its course.
2. The immune officer should be courageous enough to invite the appropriate security agencies to investigate him and if indicted he should then resigned.
3. He should also submit himself to the Legislatures concerned for investigation.
4. The Legislature concerned should in the public interest either on its own launched an investigation on the official concerned or liaise with security agencies for proper investigation. If the official is indicted then the Legislature should do the needful by impeaching the official.