

EXECUTIVE ORDERS AND PRESIDENTIAL POWER IN NIGERIA: COMPARATIVE LESSONS FROM THE UNITED STATES OF AMERICA

Sam Amadi*

Abstract

Since his assumption of office, President Muhammadu Buhari has adopted the practice of issuing formalized Executive Orders. This is a new form of exercise of presidential power in Nigeria, which has generated controversy amongst legal and other scholars. However, there seems to be no authoritative judicial reasoning on the validity of Executive Orders in Nigeria. The paper explores the tension between the conception of the President, as a Chief Executive; and Presidential Power, as a derivative of express legal authorization in the Constitution or legislation. The paper argues that the proper lens to consider the validity of Executive Orders in Nigeria is to assess whether it alters the delicate constitutional balance between the legislature and the executive. Building on the insight of the US Supreme Court's decision in the Youngstown case, the paper argues that Executive Orders not derived from the express authorization of the law are an invalid exercise of presidential power under the 1999 Constitution.

Keywords: *Presidential Power; Executive Order; Rule of Law; Due Process; Separation of Powers.*

INTRODUCTION

Since the coming of President Muhammadu Buhari's administration in 2015, Nigerian constitutional jurisprudence has witnessed transformation. We now deal with Executive Orders¹. Before President Buhari came to power, no civilian president issued an Executive Order. As at the last count, the Buhari presidency has issued six of such orders. The Vice President, acting as President, signed a couple of those orders. The closest we came to Executive Orders before the Buhari administration was the so-called 'General Circulars' issued by the Secretary to the Government of the Federation (SGF) to guide the public service of the Federation.² The fundamental difference between the

*. SJD (Harvard), BL Senior Lecturer, Baze University, Abuja, Nigeria. Email: samad29@yahoo.com.

¹. At the last count, we have seven executive orders. Namely, Executive Orders No. 1, 2, 3, 4, 5,6 covering diverse subject matters such as anti-corruption, ease of doing business; corporate registration, taxation and project management. For these orders see <<https://howng.com/here-is-the-list-of-executive-orders-newly-issued-by-the-buhari-administration/>> accessed 22 October 2019.

². The general circular is issued by the Office of the Secretary to the Government of the Federation to address issues of governance in the entire public service.

Executive Orders and these service-wide circulars is that the latter do not derive from the executive power of the President provided under Section 5 of the Constitution.³ Again, these circulars are signed by the SGF and not the President. These circulars have doubtful legal effect and are not readily enforceable by the courts. Executive Orders can be described as “a rule or order issued by the President to the executive branch of government and having the force of law”.⁴ It has been defined as 'an order issued by a government's executive based on authority specifically granted (as per the US Constitution or a congressional act)'.⁵ They have full legal effect in the United States, but only after they have been published in the Federal Register. The first of such executive orders were reportedly issued by George Washington on June 8, 1789. The order was addressed to the heads of the federal departments, instructing them “to impress me with a full, precise, and distinct general idea of the affairs of the United States” in their fields.⁶ Ever since all but one US presidents (William Henry Harrison) have issued executive orders on one aspect of the US administration.⁷

Recently, the Nigerian presidency issued an executive order, Presidential Order No. 6 of 2018, affecting assets connected with corruption and other related offences.⁸ This is the 6th of such orders. Previous orders have focused on the administration of public procurement,⁹ especially as it deals with the

³. Reference to the Constitution in this paper, unless otherwise stated, is to the Constitution of the Federal Republic of Nigeria, (CFRN) 1999.

⁴. See <<https://www.merriam-webster.com/dictionary/executive%20order>> accessed 22 October 2019.

⁵. See <<https://www.merriam-webster.com/dictionary/executive%20order>> accessed 22 October 2019.

⁶. *Thomas v DiBacco*, ‘George Washington had a pen, but no phone, for executive orders’, *The Washington Times*, August 14, 2014, <<https://web.archive.org/web/20160514023700/http://www.washingtontimes.com/news/2014/aug/14/dibacco-the-first-president-had-a-pen-but-no-phone>> accessed 19 November 2019.

⁷. <https://en.m.wikipedia.org/wiki/Executive_order> accessed 15 November 2019.

⁸. The full title of the order is “The Preservation of Suspicious Assets Connected with Corruption and Related Offences Order signed on July 4, 2018”. The order is downloadable from <<https://www.proshareng.com/news/Doing-Business-in-Nigeria/Executive-Order-No.-6-On-Preservation-Of/40687>> accessed 24 October 2019

⁹. Executive Order No. 0001 dealing with transparency in procurement and business efficiency <<http://admin.theiguides.org/Media/Documents/EXECUTIVE-ORDER-ON-EASE-OF-DOING-BUSINESS-2017.pdf>> accessed 15 November 2019.

purchase of Nigerian goods and services, registration of businesses, taxes and other aspects of ease of doing business in Nigeria.¹⁰ Executive Order 6 authorizes the Attorney General and such other officers of the state to take hold of assets suspected of being proceeds of crime without necessarily securing an order of the court. The main opposition party, the Peoples Democratic Party (PDP) and several human rights advocates criticized this order as violating constitutional due process. They allege that the order is targeted against political opponents. These critics consider the order a presidential overreach and even a deliberate attempt at undermining the exercise of legislative and judicial powers under the constitution.¹¹ The presidency, of course, denies such imputation. It believes that these orders conform to the functions and practice of the high office of the President of the Republic of Nigeria and in accordance with the practice of constitutional democracy.¹²

Determining the legality of these orders and their constitutional application is difficult in the context of lack of judicial engagement with the exercise of executive power via issuance of executive orders and the underdevelopment of constitutional law theory in Nigeria regarding the exercise of presidential power. The problem is that we don't have a practice of issuing executive orders. Therefore, our courts have not directly pronounced on them. So, to understand the criticisms and the rebuttals, it is necessary to put these orders in the proper contexts defined by how the constitution structures the relationship between the President as Chief Executive and other branches of Government. It is important to also analyze the constitutionality and legality of these Executive Orders within the context of the tension between a commitment to promoting efficiency in government and a commitment to the protection of rights of citizens, whether denoted in terms of constitutional rights or human rights.

¹⁰. Executive Order No. 7 <<https://pwcnigeria.typepad.com/files/executive-order.-no.-007-of-2019.pdf>> accessed 15 November 2019.

¹¹. <<https://dailypost.ng/2018/10/13/executive-order-6-pdp-reacts-buharis-ban-50-high-profile-nigerians-reveals-targeted/>> accessed 15 November 2019.

¹². <<https://guardian.ng/news/executive-order-6-fg-goes-all-out-on-corruption/>> accessed 15 November 2019.

This paper is an exploration of the concept of executive orders as an expression of executive power and how it intersects with the concept of rule of law and separation of power which are critical pillars in the constitutional design of freedom and effective governance in Nigeria. In this exploration, the paper will rely on insights from US constitutional theories and the perspectives of political philosophy and administrative law. The main argument is that the judiciary will be remission determining issues that may arise in respect of issuance of executive orders in Nigerian democratic governance except it adopts a jurisprudence that is oriented in first determination the constitutional design of democratic under the Nigerian constitution and proceeding therefrom to strike a balance between commitment to effective governance measured in the capacity of the state to intervene and solve problems and protection of freedom measured in the quality of restraints imposed on exercise of presidential power.

Executive Orders and Separation of Powers

The definition of Executive Orders as rules issued by the President that have legal effect raises about the nature of Executive Orders. The fact that Executive Orders have the force of law raises a problem for the rule of law in a polity. The rule of law, from both constitutional law and administrative law conceptions, implies the separation of powers. As Montesquieu rightly observed centuries ago, the only way to guarantee the liberty and freedom of the people is to ensure that power is not concentrated in one person or organ. If the entire power of government is concentrated in one person or organ, then there is a strong possibility of abuse and tyranny.¹³ As Ben Nwabueze rightly noted, “concentration of government powers in the hands of one individual is the very definition of dictatorship, and absolute power is by its very nature arbitrary, capricious and despotic”.¹⁴ Today, constitutional democracies have settled on the separation of powers as a fundamental cornerstone of the rule of law. The Nigerian Constitution gives an elaborate expression to this fundamental idea by separating the legislative, executive and judicial powers and vesting each on each of the three different organs whose personnel should not be comingled. Section 4 of the Constitution vests ‘the legislative powers of the Federal Republic of Nigeria’ on “a National Assembly for the Federation”. Section 5 vests the executive powers on the president while Section 6 vests the

¹³. Baron de Montesquieu, *The Spirit of the Law* Book XI, Chapter 6(1748).

¹⁴. Ben Nwabueze, *The Presidential Constitution of Nigeria*, (Palgrave Macmillan, 1981) 32

judicial powers on courts listed in the Constitution.¹⁵ Of course, this strict separation is moderated by checks and balances that allow different branches of government to support one another for effective administration.¹⁶

However, fundamentally, the law-making function is clearly defined as the responsibility of the legislature. Section 58 of the Constitution states clearly the law-making process in Nigeria. It is the National Assembly that has the powers to make law. This power must be exercised by concurrent votes of both houses and signed by the President. Where this process is not strictly followed, the Supreme Court has held such exercise as unconstitutional. This was the case in *Attorney General of Bendel v Attorney General of the Federation & Ors*,¹⁷ where the Supreme Court nullified a purported passage of Appropriation Act by a committee of the National Assembly without a concurrent vote of two-thirds of members of both houses. This judgment relates to the nature of the legislative function. Until the National Assembly passes the bill in the manner prescribed in the constitution, the bill is not yet passed. Therefore, any national budget implemented by the executive will be unconstitutional.

The question is whether an executive order signed by the president that has a legislative effect can be a valid exercise of executive power. Does such an act not usurp the legislative function? If Executive Orders have the force of law, it means that Presidents make laws by issuing Executive Orders. This would be taken to circumvent the clear processes of law-making in the Constitution. It would vest on Presidents additional power that tilts the delicate balance in the power dynamics of constitutional democracy, especially one with a written constitution. This is more important in a fledgling democracy like Nigeria (some will say, a pseudo-democracy) coming out of a period of imperial presidency of military dictators.

¹⁵. Sections 4,5 and 6 of CFRN, 1999.

¹⁶. See Abiola Ojo, 'Separation of Power in a Presidential Government' [1981] *Public Law Journal*, 105.

¹⁷. [1983] ANLR 208; Cornelius M Kerwin and Scott R Furlong, *Rulemaking: How Government Agencies Write Law and Make Policy* (CQ Press, 2011).

However, judging by other provisions of the Nigerian constitution and its interpretation by the Supreme Court in some cases, as will be shown later, it is arguable that the President issuing executive orders is exercising a legislative function and that such but the government is also is authorized by the constitution. Sections 315 and 317 grant the President and Governor the power to amend existing law to bring it into conformity with the constitution. This section implies that the President or the Governor can in the 'guise' of altering an existing law, make the law to the extent that he or she can create a legal effect. The Supreme Court has been asked to determine the constitutionality of the 'executive legislation'. In *Abia State and Ors. v Attorney General of the Federation*, the Supreme Court accepted that the President can validly alter the law to bring it to conformity to the constitution. Reacting to the claim that such exercise violates the separation of power, the Eso JSC argues that, "It is true that "separation of powers" is essential to a healthy democracy, the power given the president and also to state governors in existing law of the state by the Constitution is not an abuse of the principle or doctrine of separation of powers, it is essential to giving meaning to an existing law so that the Constitution itself is not abused."¹⁸ In many other cases, the Supreme Court validated the power of the President or Governor of a state to amend existing law to bring into conformity with the constitution.¹⁹

Section 315 seems to pose a challenge to the doctrine of separation of powers in Nigeria's constitutional democracy. Classically, that doctrine prohibits the executive from acting in a manner that suggests that it is making law. Apart from the instance of reshaping of the doctrine of separation of power in the context of administrative law where administrative agency exercises the power of rulemaking, the notion that the president can make law is strange to the rule of law in a constitutional democracy.²⁰ Therefore, as long as executive orders create legal relations their constitutionality in the context of rule of law and separation of power is arguable.

¹⁸. Kayode Eso, JSC, [1993] NWLR (Pt.309) 58.

¹⁹. *Awoyemi v Adekoya* [2003] 18 NWLR (Pt. 852) 307; *Alhaji v Umanka* [2011] 4 NWLR (Pt 1236) p 148; *Ajakaye v Idehai* [1994] 8 NWLR (Pt. 364) 504.

²⁰. For constitutionality and legality of rulemaking, see A Ojo, 'Constitutionality of Delegated Legislation' [1970](4) *Nigeria Law Journal*, 99.

Presidential Power and Constitutional Democracy

Executive orders arise from the expression of presidential power. Therefore, a proper understanding of the legality and constitutionality of executive orders will derive from an understanding of the nature of presidential power in a constitutional democracy. The foundation of democracy as a form of government is the limitation of power.²¹ Unlimited power is incompatible with democracy as a form of government. Democracy has not always been the preferred form of government in human history. All forms of undemocratic regimes have held sway in the world in the past. Nevertheless, today, democracy is the legitimate and pervasive form of government in the world.²² Although, there are now many pseudo democracies across the world, from prebendal regimes in Africa to the totalitarian oligarchies in Turkey, China and Russia. However, most of these regimes pride themselves as democracies even if their acts and values derogate from the fundamentals of democracy.

Since the American Revolution and the US Constitution, democracy has become almost synonymous with representative democracy. Democracy now stands for the simple idea that those who control the reins of power are exercising a delegated authority.²³ The divine rights of Kings are forever abolished. Every human authority is exercising a delegated authority. This is now the verdict of history, written with the death of millions and the turbulence of world affairs. The heart of the social contract is the limitation of the power exercised by the government. Although Thomas Hobbes justified the monarchy during the period of the civil unrest in England, he had to fall back on the inherent rights of the people in the state of nature to justify the absolute power of Leviathan.²⁴ Nevertheless, John Locke offered a more authoritative and influential Social Contract theory. In his view, the people in

²¹. Michael Walzer, 'Liberalism and the Art of Separation' [1984] (12)(3), *Political Theory*, 315-330.

²². For a very good history of democracy, covering its first and second coming, see John Dunn, *Setting the People Free: The Story of Democracy* (Atlantic Books, 2005).

²³. John Locke, *Second Treatise on Government* (Jonathan Benneth, 2017) e-b copy, <<https://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf>> accessed 17 October 2019.

²⁴. Thomas Hobbes, *The Leviathan* (Penguin, 2017).

a state of nature possessed full rights and power. To improve their enjoyment of life, liberty and property they constituted government with a clear mandate. Moreover, when the government becomes injurious to their welfare, they disband the government.²⁵

This notion of limited power finds expression in the supremacy of the constitution in a constitutional democracy. Therefore, whereas the President may style himself as ‘an elected kingship’ in the language of some Scholars,²⁶ he remains a powerful official clothed with limited power. It is important to understand the powerful nature of the office of the President of the republic. Many previous American presidents have been attacked for aggrandizing so much power and acting as elected monarchs. Right from the founding of the US, there have been many such presidents who have acted in the fashion of the English kings whose tyrannous manners inspired the American Revolution. A notable example was Truman whose confiscation of private steel mills in defence of national security was nullified by the Supreme Court.²⁷ Edward S. Corwin argues "The history of the presidency is a history of aggrandizement, but the story is a discontinuous one. That is to say, what the presidency is at any particular moment depends on important measures on who is the president".²⁸ Another example was Abraham Lincoln who, during the civil war, suspended the habeas corpus writ and answered critics with a riposte whether it is better to lose the nation and yet preserve the constitution. Recent examples of US Presidents who have been accused of acting imperially include George Bush Jr. who appropriated much power, even to order the extra-judicial detention of US citizens in the war against terrorism.²⁹ Of course, the US Supreme Court rebuffed the claim of unrestrained executive power in a wide-ranging terrorism war. Similarly, in *Rasul v Bush*, the court equally rejected the argument that the President of the United States has total authority over Guantanamo Bay. As Justice Breyer argued, “It seems rather

²⁵. John Locke, *Second Treatise on Government* (Prometheus Book, 1986). For a critical review of Lockean social contract theory, see C B Macpherson, *The Political Theory of Possessive Individualism: Locke to Hobbes* (Oxford, Clarendon Press, 1962)

²⁶. Laurence Tribe and Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution* (Macmillan 2015) e-copy version; see also Sam Amadi, “Is the President a Policeman? Analyzing Presidential Power in a Criminal Investigation of Presidential Aides” 2017 *I BUAL* 1 52-71.

²⁷. *Youngstown Sheet & Tube Co v S Aawyer* 343 U S 579, 72 Ct 863 (1952).

²⁸. Edward S Corwin, *The President*, (5th ed New York University, Press, 1984) 29-30.

²⁹. See *Hamidi v Rumsfeld* 542 U S 507 (2004).

contrary to an idea of a Constitution with three branches that the executive would be free to do whatever they wanted without a check”³⁰.

However, despite these aberrations, the concept of presidential power under a constitutional democracy means that the power of the president as ‘elected monarch’ is highly limited and the supremacy belongs to the constitution. This arises from the principle of separation of power. The principle subordinates the exercise of presidential power to the control of other branches, especially the judicial branch. However, perhaps more important, this principle confines the President to particular kinds of action- executing and restrains him or her from other forms of exercise of governmental power- legislating. This comes clearly in analyzing the exercise of executive power under Nigeria’s 1999 Constitution.

The Incidences of Presidential Power under the 1999 Constitution and the US Constitution

Executive Orders are products of the exercise of presidential power under the constitution. The validity of executive orders issued by the Nigerian President relates to the nature of presidential power under the 1999 Constitution. Therefore, it is important to understand presidential power under the constitution to understand the legal dimensions of these orders. The 1999 Nigerian Constitution adopts the presidential system of government rather than the parliamentary system under the 1960 and 1963 Independence and Republican Constitutions. The 1999 Constitution is like the 1979 Constitution in this regard. Speaking about the design of the 1979 Constitution, Africa's leading constitutional law scholar, Professor Ben Nwabueze, argues that it was the exigency of rapid economic development that suggested the need for a presidential system of government with an executive president rather than the parliamentary system with a ceremonial president. Economic development was a national imperative that "calls for effective leadership, a leadership that would be able to mobilize the nation and its resources and to provide

³⁰. 542 US 466 (2004).

purposeful direction for its people". Such leadership requires the "organization of power around a single individual in the name of the president".³¹

The concentration of power in the president answers to the exigencies of effective mobilization and management of natural and human resources. It also answers to the exigency of effective foreign representation. But, in the design of this concentrated power, the designers of the Nigerian constitutional order followed the founding fathers of the US Republic by limiting the power of the single individual President such that he or she can do all the good he or she can and none of the evil he or she could. Like has been argued elsewhere, "the unifying of the executive power in one person does not mean that the executive president created under the 1979 Constitution parallels Her Majesty the Queen as the British Monarch. For one the Nigerian President does not embody the sovereignty as the British Monarch does. By the Constitution, the sovereignty belongs to the Nigerian people and the Constitution is supreme".³² In practical terms, the 1999 Constitution follows the US Constitution in separating the executive power from the legislative and judicial powers. Section 5 of the Constitution vests the executive powers of the Nigerian federation on the President personally. This is very significant. Whereas the legislative powers are vested in an institution- the National Assembly (Section 4). The judicial powers are vested in the Superior Courts of Record (Section 6). The Executive Power is vested on the President, who may exercise it by himself or through his Vice President or any other official.

It is difficult to fully comprehend the extent and scope of the presidential powers under section 5. The language of the Section places the President in a situation that enables him to act as the 'elected monarch' as well as 'a delegated representative of the people'. Nwabueze himself agrees that the "executive power is difficult of precise delineation. Its limits are obscure".³³ First, the executive power of the federation is donated to the President *singularly* and *personally* (not together with the ministers as is wrongly conveyed by the several approvals by Federal Executive Council (FEC)). This power is wide-ranging. It goes to the "execution and maintenance of the constitution, all laws made by the National Assembly and to all matters

³¹. Ben Nwabueze, *Presidential Constitution of Nigeria* (C. Hurst & Co, 1984) 29.

³². Sam Amadi, 'Is the President A Policeman? Analyzing Presidential Power in Criminal Investigation of Presidential Aides'[2017] (1) *Baze University Law Journal*, 62.

³³. Ben Nwabueze, note 31at 88.

concerning which the National Assembly has, for the time being, the power to make laws".³⁴ Section 5 of the Nigerian Constitution is like Article 2 of the US Constitution, which denotes executive power singularly and personally on the President. It also empowers the President to "take care that the law is faithfully maintained".

Constitutional law theory has extracted three offices in the constitutional language.³⁵ Analytically, we can argue that first; the President is a *Chief Executive* of the Federation. As Chief Executive, the President has the responsibility to manage and administer the federal government. As Chief Executive, the President hires and fires and coordinates the national economy. The second position is as *Commander-in-Chief*. As Commander-in-Chief, the President has the responsibility to secure the federation and marshal the Armed Forces of the Federation to protect its territorial integrity. The third office is the *Sole Organ*. The President as Sole Organ represents the federation in foreign relations. Exercising the functions of this office the President negotiates with foreign entities and signs treaties that create external obligations for the country. Each of these offices has its incidents and limitations.

The Nigerian Constitution also follows this matrix. The executive power defined in Section 5 of the Constitution is further elaborated through the Constitution. The President as Chief Executive has the power to enforce the law and manage the national economy. In this wise, Section 154 grants the President the power to appoint the members of certain executive agencies called 'Federal Executive Bodies'. These include the Code of Conduct Bureau, the National Judicial Council, the National Population Commission and the Independent National Electoral Commission (INEC). Section 170 establishes the Civil Service of the Federation and section 171 vests in the President the power to appoint and removes heads of the ministries, departments and agencies of the federal government, including ambassadors and other foreign

³⁴. Section 5, CFRN, 1999.

³⁵. A good textbook that follows this matrix in analyzing the extent and verities of presidential power is David M. O'Brien, *Constitutional Law and Politics: Struggle for Power and Governmental Accountability* (vol. 1, W W Norton, 2000).

representatives. The power of the President as the Commander-in-Chief is reflected in Section 218, which is defined as the power to appoint armed forces chiefs and “determine the operational use of the armed forces of the federation”. Again, the President has unrestrained power to conduct foreign policy which is expressed in the power to appoint diplomatic and consular officers and to enter into treaty obligations on behalf of the country (although such must be approved by the National Assembly to become domestic law).³⁶

It is important to bear in mind that even as Section 5 (2) grants the President wide power to maintain the constitution and the laws and to attend to all matters which the National Assembly has the power to make law (which is basically everything under our expansive federal jurisdiction), subsection (1) limits the exercise of this wide power. The executive power of the federation vested in the President is to be exercised subject to 'the provisions of this constitution' and 'to the provisions of any law made by the National Assembly'. The President can only exercise the awesome power of his office strictly following the provisions of the Constitution or laws made by the National Assembly. Even though he is the Chief Executive who has the responsibility to superintend the wellbeing of the federation he cannot act, even in national interests, except such action can be justified by the provisions of the constitution or any law made by the National Assembly.

This subsection is absent in the United States Constitution.³⁷ How does this restriction relate to the clear authorization to ‘protect and maintain the constitution’? The answer is that the President can take any action to protect the constitution as long as it is in line with the clear provisions of the Constitution and law validly made by the National Assembly. Well, Abraham Lincoln did not accept this restriction while fighting the civil war in the United States. Many Presidents in Nigeria may also reject this argument. However, a proper reading of the Nigerian Constitution justifies this position. Interestingly, as we shall see later in this paper, by judicial interpretation of the United States Supreme Court, this is also the position of the President under the US Constitution, although not expressly stated in its Article 2.

³⁶. Section 12 of CFRN, 1999.

³⁷. Article 11 of the United States Constitution.

The Uses of Executive Orders

Let us consider some of the benefits of executive orders before analyzing the legality of some of the executive orders issued by President Buhari. Why is executive order important to the exercise of presidential power? One of the hallmarks of the administrative state is the increase in the regulatory activities of the federal government. The administrative state will require an increased resort to executive orders. This is implicit in the definition of the administrative state. As David H Rosenbloom et al argue, the term 'administrative state' refers to "several realities of contemporary government that a lot of society's resources flow through public agencies, that public administrators are central to contemporary government, and that the nation has decided on a course of attempting to solve its problems and achieve its aims through substantial reliance on administrative action".³⁸ As the challenges of managing the national economy increase the government resorts more frequently to the use of regulatory agencies that exercise wide-ranging powers over domestic affairs, even impacting on private economic interests. The US Supreme Court in *FTC v Ruberiod* described this phenomenon as the emergence of the 4th branch of government that has deranged our conventional three branches of government.³⁹ The administrative state brings with it the need for presidential intervention in the management of the national economy. The President can intervene through regulatory commissions duly created by the legislature. He can also intervene directly through executive orders or presidential proclamations. One good use of the executive order is to prioritize the commitment of the executive branch of government. For example, when Barack Obama became President of the United States he needed to signal the change of government from the high-handedness of George Bush Jr's war against terrorism by opening the government to greater transparency.⁴⁰ This resulted in issuing his first executive order that mandated agencies to comply with requests for disclosure of information.⁴¹ As President Obama puts it, "For

³⁸. David H Rosenbloom, Robert S Kravchuk, and Richard M Clerkin, *Public Administration: Understanding Management, Politics, and Law in the Public Sector* (McGraw Hill, 2009)

³⁹. 343 U S 470 (US *Supre*, C) (1952).

⁴⁰. Executive Order 13233 of November 1, 2001.

⁴¹. Executive Order 13489 of January 20, 2009.

a long time now, there's been too much secrecy in this city. This administration stands on the side not of those who seek to withhold information but with those who seek it to be known. The mere fact that you have the legal power to keep something secret does not mean you should always use it. Transparency and the rule of law will be the touchstones of this presidency."⁴²This order puts the onus on the agency that wants to deny the request to justify the denial rather than on the person seeking disclosure of information. When Donald Trump became President, he issued an executive order on immigration to quickly deal with the grave challenge of immigration, which formed the heart of his presidential campaign.⁴³

Executive orders are issued according to the constitutional or statutory power of the President as Chief Executive, Sole Organ or Commander-in-Chief. It is exercised mainly to organize the executive branch of government, to streamline the jurisdiction of agencies under the executive branch and determine how these agencies will perform tasks already authorized by legislation. In Nigeria, the emergence of the executive order will serve an urgent and pressing need. Often executive agencies do not have demarcated mandates, leading to contestation and inefficiency. While the author served in Jonathan's government, he observed many such instances that required the issuance of the executive order. One instance was the usual jurisdictional conflict between the Bureau for Public Enterprises (BPE) and the Infrastructure Concession and Regulatory Commission (ICRC) about responsibility for privatization tasks. This noticeable conflict required an executive order to streamline the focus of each of these statutory agencies. The author called attention to this omission, but no executive order was issued to streamline boundaries of statutory mandates of the two executive agencies. This is one instance in which an executive order can boost the effective exercise of executive powers. The executive order would not bestow extra mandate on the agencies; it will merely clarify the exercise of executive function by these agencies.

In the Nigerian case, executive orders will be required to fill in the gaps in legislation creating executive agencies. Because of the interest bargaining

⁴². <<https://www.thoughtco.com/president-obamas-first-executive-order-3322189>> accessed 11 November 2019.

⁴³. Executive Order 13768 titled "Protecting the Nation from Foreign Terrorist Entry into the United States" effective January 27, 2017.

implicit in law-making, oftentimes law creating executive agencies leave gaps that undermine the effectiveness of these agencies and their ability to meet legislative mandates. Executive orders help to fill the legislative gaps by authorizing procedures that enable agencies to better achieve legislative mandates. This is more so in jurisdictions like Nigeria where there are comprehensive procedure codes like the United States' Administrative Procedure Act (APA) that define rulemaking and administrative adjudication. A good instance of such executive order would be Executive Order 5 issued by President Buhari relating chiefly to the promotion of Nigerian content in public procurement of goods and services.⁴⁴ Local content regulations are matters of political hardball as international and local economic interests line up on different sides of the divide. This may discourage agency leadership from acting. An executive order mandating local content regulation will force the hand of the agency. Notably, it took Nigeria many decades after the discovery of oil in commercial quantity and its exploration and exportation before enacting a local content law. This predicament influenced the author as Chief Executive of the Nigerian Electricity Regulatory Commission (NERC), to issue a regulation on national content in the electricity industry. Executive Order 5 now reinforces the local regulation in the electricity industry. This is an important function of executive orders. They help to align broad agency mandates with presidential priority.

US Presidents have been very busy with executive orders in shaping the regulatory activities of executive agencies. Because of how these activities affect the economy, different Presidents, aiming at different outcomes, have issued executive orders to shape and streamline regulatory actions. Agencies make rules in pursuit of their legislative mandates. The legislature vests such agencies as the Central Bank of Nigeria, the Nigerian Electricity Regulatory Commission, the National Communications Commission and the likes with rule-making powers because they are part of the executive branch of government. These agencies exercise presidential powers. As Cornelius M. Kerwin and Scot R. Furlong observe in their book, agencies are the equal of

⁴⁴. Executive Order No 5.

Congress and the President because the rules they issue ‘carry the same weight as congressional legislation, executive orders and judicial decisions’.⁴⁵

Presidents exercise oversight over administrative agencies by the use of executive orders. The President can issue an executive order that mandates some form of review process before a regulatory intervention can be issued. The President can vary the internal review mechanisms for issuance of license and permits. All these orders redefine the landscape of regulatory action to achieve the strategic policy objective of the government. President Reagan, Clinton, Bush, Obama and Trump issued such orders to improve the quality of rulemaking or constrain the power of agencies to make the rule by imposing additional review process.

This use of executive orders is very necessary for the context of regulatory contradiction and uncertainty in Nigeria. Many regulatory agencies in Nigeria do not have comprehensive business rules that guarantee regulatory certainty. There is also a worrisome absence of a comprehensive procedural law like the US Administrative Procedure Act (APA), which sets out the procedure for rulemaking. This poses two major problems for doing business in Nigeria. First, it grants so much discretion to agencies to make rules as they wish since there is no substantive administrative law that constrains their rulemaking power. This increases the propensity for capricious and highhanded rulemaking. Second, the absence of administrative procedure law imposes uncertainty as to the procedure to be adopted for rulemaking. It also imperils the constitutional requirement of fair hearing as the regulator may not be sure of which procedure will best comply with fair hearing requirements.

Executive orders have many benefits for constitutional governance if they are geared towards improving the effectiveness of presidential power and not to aggrandize power or encroach on the constitutional responsibilities of other branches of government. The Nigerian Supreme Court has held that separation of power does not just mean that one branch of government should not do the work of the other branches. It also mandates that no branch in the guise of doing its job encroach in the job of the other branch.⁴⁶ Encroachment is subtle

⁴⁵. Cornelius Kerwin & Scot R Furlong, *Rulemaking: How Government Agencies Write Law and Make Policy* (2011).

⁴⁶. *Kayode v Governor of Kwara State* [2005] 18 (NWLR) (Pt 957) 324.

and often difficult to detect. Nevertheless, it consists of the minimum, in the case of exercise of executive power, that it does not relate to rulemaking powers of the state except as delegated by the legislature. It must be said that some of earlier executive orders signed by the Vice President acting as President meet these considerations as they focused primarily on the work of administrative agencies and anchored on the powers, which the legislature has already granted them. No matter the exigencies of public administration, the President should not exercise executive power to issue executive orders to fill gaps that do not exist or which the legislature has spoken by law on how it should be filled. That should be the implication of the constraint of presidential power under Section 1(1) of the Constitution

Legal Incidents of Executive Orders

Executive orders are instruments for the management of the national economy and other domestic affairs by a President acting as Chief Executive, a Commander-in-Chief or Sole Organ. However, it could also become an instrument of self-aggrandizement by a President who wants to exercise more power than the constitution has granted her. The institutional design of constitutional democracy in Nigeria, as in most constitutional democracies, is to create a fair balance between the branches of government. No branch of government should undermine the other. We should agree with Thomas Jefferson when he said: "I said to [President Washington] that if the equilibrium of the three great bodies, Legislative, Executive and Judiciary, could be preserved if the Legislature could be kept independent, I should never fear the result of such a government; but that I could not but be uneasy when I saw that the Executive had swallowed up the Legislative branch."⁴⁷ This constitutional policing is achieved by limiting the president's plenary powers as chief executive to express provisions of the constitution and the law.

So, when will an executive order go beyond the executive power of the president? Can the President exercise presidential power through executive

⁴⁷. William J Olson, "Impact of Executive Orders on Legislative Process: Executive Law-Making", A Congressional Testimony October 22, 2009, <<https://www.cato.org/publications/congressional-testimony/impact-executive-orders-legislative-process-executive-lawmaking>> accessed November 14, 2019.

orders beyond the express authorization of the law in national emergencies or to protect important national interest? In *Youngstown Sheet & Tube Co. v. Sawyer*, the US Supreme Court opined, “The President’s power to issue the order if any, must stem from either an Act of Congress or from the constitution”.⁴⁸ In that case, President Truman, acting in time of national emergency, issued an order that adversely affected a private property without proper congressional or constitutional authorization. The court reviewed the extent of the President's power to 'maintain the constitution'. Justice Robert H. Jackson in his concurrence in the case argued forcefully that although the President is the Commander-in-Chief of the Armed Forces he is not 'the Commander-in-Chief of the country, its industries and its inhabitants'. The *Youngstown* case remained a pivotal case as it provides an intelligible framework for understanding when executive orders issued by the President in the exercise of Section 5 powers can be legally valid or invalid. The decision presents three scenarios of executive orders:

(i) ***When Executive Order is Based on Express Provision of the Law:***

In the *Youngstown* case, Justice Jackson makes the point that "When the President acts according to an express or implied authorization by the Congress, his authority is at a maximum, for it includes all that he possesses in his own right plus all that Congress can delegate". This fits into the language of Section 5, which gives the President the power to maintain the law and execute on all matters that the National Assembly can make law. Some of the earlier President Buhari’s executive orders relating to streamlining of licensing and registration procedures to achieve business competitiveness fall under the categories of exercise of executive power supported by the dictum of Justice Jackson.

(ii) ***When Executive Order is not Based on Express Provision of the Law:***

There are instances when the President exercises executive power on matters that the legislature has not expressly permitted or prohibited. This is like a grey area. How should the law view executive orders relating to subject matters which neither the Constitution nor Act of National Assembly has authorized or

⁴⁸. (343) U S 579 (1952).

prohibited? Justice Jackson again offers a guide. "When the President acts in absence of either a congressional power or denial of authority, he can only act upon his independent power, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a political matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderable rather than on abstract theories of law". In such a situation where the legislature has not spoken on the issues, the validity of presidential action through executive order will depend on contextual reading rather than a reference to statutory or logical justification.

(iii) *When Executive Action is Contrary to the Act of National Assembly or Undermines their Lawmaking Power:*

The third category is when the executive order violates express provisions of the law made by the National Assembly. Justice Jackson argues that "When the President takes measures incompatible with the expressed or implied will of Congress. His power is at its lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional power of Congress over the matter. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution for what is at stake is the equilibrium established by our constitutional system". When presidents take such measures, they are encroaching on the boundaries of power and aggrandizing more power to itself relative to the other branches. An executive order that creates a legal relationship in the guise of executing the law would amount to the aggrandizement of power that violates the second conception of separation of power in *Kayode v Governor of Kwara State*.⁴⁹

⁴⁹. Note 46.

Analyzing Executive Order 6⁵⁰ within the conceptual scheme of the Youngstown case would suggest that it falls into the third category. Some of its provisions appear like usurpation of the legislative mandate. Its preamble sources its legality in the Section 5 power of the President to execute and maintain the constitution and any law made by the National Assembly, especially to control corruption and further argues that 'it is the duty of any responsible government to restrict dealings in any suspicious asserts subject to the corruption-related investigation". However, it goes further to 'legislate' in a manner inconsistent with constitutional delineation of executive-legislative function. "Without prejudice to any law", the order prohibits any commercial or other transaction in respect of any assets which the Attorney General considers likely proceeds of crimes with or without any court order". By so doing, the order inserts the executive into a terrain that belongs to the judiciary and the legislature. In these circumstances, one can argue that the order is not a bona fide exercise of presidential power. It can disrupt the vital equilibrium of constitutional power-sharing that undergirds liberty and freedom in Nigeria's constitutional democracy.

If the President exercises Section 5 power to issue an executive order that adversely affects the rights of the citizens, then such exercise is self-aggrandizing and unconstitutional. In the Youngstown case, Justice Jackson said as much. President Truman had attempted to justify the seizure of private steel mills in the wake of a national emergency. The Justice ruled that the President could not, in the guise of exercising executive power, deprive citizens of basic rights such as the right to life, liberty or property without due process as guaranteed by the Fifth Amendment that protects against forfeiture of loss except by the due process of trial. This is like Section 36 of the Nigerian Constitution that guarantees every person the right to a fair hearing, which includes the right not to be damned in limbs or goods except after a due process trial. The obligation of this is that no invocation of Chapter 5 inherent or express power (including the power to protect and maintain the constitution) will validate an executive order that attempts to deprive citizens of their right to life, liberty or property without legislative or judicial

⁵⁰. Executive Order 6 titled "Preservation of Suspicious Assets Connected with Corruption and Other Related Offences Order, 2018.

authorization. This is the logic of such cases as *Stitch v. Attorney General of the Federation*⁵¹ and *Lakanmi v AG Western Region*.⁵²

CONCLUSION

The debate about the power of the President to issue executive orders relating to seizure of assets connected with corruption and related offences will need to be situated within the context of the architecture of presidential power within the framework of the design of constitutional governance in Nigeria. First, the debaters should note that the validity of the exercise of executive power is never assessed in abstract terms. It should be assessed in the context of separation of power and how each branch is aggrandizing power to the detriment of the other branch. The separation of power approach is critical because it (separation of power) is critical to protecting the rule of law. If power corrupts and absolute power corrupts absolutely, then we are safer in a republic if we find an effective way to restrain the power of the ‘elected monarch’. The most effective way is to police the boundaries of separation of power such that the President acts only in conformance to the express authorization of the constitution or the express provisions of an Act of National Assembly.

There is no doubt that the President has the power to issue executive orders and the courts ought to approve these orders if they are challenged. Nevertheless, where the subject of these executive orders relates to matters that are contrary to the express provisions of the law, usurp the legislative functions of another branch of government or violate the guaranteed rights of citizens, the court ought to strike down such exercise of executive power. This is what the court did in the Youngstown case. This is akin to the Nigerian Supreme Court decision in *Stitch v. AG of Federation*.

The challenge for the legal profession and the judiciary is to understand the constitutional, political and policy contexts of the exercise of executive power. If we do not understand how the exercise of executive power undermines or

⁵¹. 1986 [NWLR] Pt 46, 1007.

⁵². [1971] IUILR 201.

fosters liberty, right and property of citizens, we will muddle the debate and injure society.