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**THE LEGAL EFFECT AND LIMIT OF PRESIDENTIAL EXECUTIVE ORDERS
IN NIGERIA AND THE USA: A REVIEW OF EXECUTIVE ORDERS 1-6 OF
2017 - 2018 IN NIGERIA**

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Introduction

All modern national constitutions¹ explicitly state, subject to the Principle of checks and balances,² that the legislature shall make laws and the executive shall implement the laws and policies for the good governance of the country³. This is necessary because the ultimate objective of governance is to efficiently and equitably deliver public good to the citizens of a State, promote their security and welfare⁴, with a capacity for problem solving and conflict resolution, using both principal⁵ and subsidiary legislative instruments⁶ such as, Presidential Executive Orders⁷.

¹ Constitutionalism, simply put, means the constitution is the supreme law of the land and it binds every arm of government and state authority established and exercising power under the constitution, including the power to make law, rules, regulations and issue executive orders. The effect of this is that any law passed by the legislature or action of the executive or judicial arm of government shall be declared null and void to the extent of its inconsistency with any provisions of the constitution or if it violates any of constitutional limitations or obligations. See Nwabueze, B.O (1973): Constitutionalism in Emergent States, London, chapter 1; quoted in Ladan, M.T. (2010): Introduction to jurisprudence. Malthouse Press Ltd., Lagos, Nigeria, at P.225

² The Principle of 'Checks and Balances' is related to the concept of Separation of powers because each branch has its own powers (balances) and some of the capabilities that each branch has, makes sure that another arm doesn't abuse its power (checks). See Oyediran,), (2007). Nigerian Constitutional Development. Ibadan:Oyediran Consults Int., Pp. 15-17.

³ Esman,M.J. (2007) : "Good Governance and Devolution of power" in Africa Notes, May 2007, Pp.1-3

⁴ In accordance with section 14(2)(b) Constitution of Federal Republic of Nigeria 1999.

⁵ These are Acts of the National Assembly.

⁶ Such as Regulations, orders, proclamations Rules, Guidelines, largely based on delegated legislative power to the executive by the Parliament. Subject of course, to Judicial and Legislative review.

⁷ An executive order is a presidential directive, in both USA and Nigeria that requires or authorizes some action to be taken within the executive branch.

The executive arm of government, particularly the president, as Commander in-Chief, Head of State and Government in a presidential system⁸ of government, performs legislative functions necessary to meet urgent and expedient matters of national development and changing circumstances⁹ by making regulations, issuing executive/statutory orders¹⁰ proclamations and memoranda, in accordance with the specific powers granted¹¹ by the Constitution¹² or the delegated power¹³ by the legislature or by both or at times even by the inherent¹⁴ or residual executive power¹⁵ theories.¹⁶

Executive orders are a set of presidential directives¹⁷ or guidance issued to an executive branch of government for the purpose of executing or implementing the provision of any existing federal law or policy and enforcing the provisions of the Constitution. Such orders¹⁸ are usually directed towards federal administrative agencies in the USA or Federal Ministries, Departments and Agencies (MDAs) in Nigeria and their officials.¹⁹ Presidents²⁰ have used executive orders to establish

⁸ In the Presidential system of government, as it evolved first in the USA, the basis of legislative and executive relationship is the principle of Separation of powers. The President is the authoritative chief executive. He/she is neither a member of the legislature nor removable by it except by a constitutional impeachment process on the ground of gross misconduct such as bribery, treason or other high crimes. (see Lijphart, A., 1999: *Patterns of Democracy*. New Haven: Yale University Press, USA).

⁹ In addition to delegated legislative power, the executive in Nigeria performs legislative functions by recommending and initiating bills for the consideration of the legislature. Also, the power of veto over bills meant for assent is a Legislative function of the executive, most especially in the presidential system of government.

¹⁰ In both USA and Nigeria, Executive Presidents use a variety of tools to engage in “ordinance making” or “executive lawmaking” or “presidential legislation”. The major classes are executive orders, proclamations, memoranda, administrative directives and regulations. Of these, executive orders combine the highest levels of substance, discretion, and direct presidential involvement. (See Kenneth R.M. (1999): *Executive orders and Presidential Power*. The Journal of Politics, Vol;61, NO.2, May 1999, at Pp. 445-66; University of Texas Press, Austin, USA).

¹¹ The Specific Grant Power Theory holds that the executive powers of the President are specifically granted by the Constitution and laws of the Legislature.

¹² For example, section 5(1)(b) of the 1999 Nigerian Constitution as amended

¹³ For example, section 12 of the Anti-Torture Act, 2017, empowers the Attorney – General of the Federation, with the approval of the President, to make rules and regulations for the effective implementation this Act.

¹⁴ Black Law dictionary defines ‘inherent power’ as the power that necessarily derives from an office, position or status. (see 8th edn, P.610).

¹⁵ Under this theory, executive power is simply the residue of powers of the executive after legislative and judicial powers have been taken away. (See the Concise Oxford Dictionary; 7th edn, at P.508)

¹⁶ See Tribe, L.H. (1978): *American Constitutional Law*. New York: The Foundation Press Inc. P. 182.

¹⁷ See Kenneth, R.M., op. cit.

¹⁸ See Kelly, C.S (2007): “Executive Orders and the Modern Presidency: Legislating from the Oval Office by Adam L. Warber (Review); *Presidential Studies Quarterly*, Pp.169-170 at 169.

¹⁹ See Morton R (1981): *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking under Executive Order 12, 291*; in Vol. 80 *Michigan Law Review*. Pp. 193-247.

²⁰ Kelly, C.S., Op cit.

policy, reorganize executive branch agencies, alter administrative and regulatory processes, affect how legislation is interpreted and implemented, and take whatever action is permitted within the boundaries of their constitutional or statutory authority.²¹

CONTEXTUAL BACKGROUND AND STATEMENT OF THE PROBLEM

Executive orders have their origin²² in the USA. The first executive order was issued by George Washington on June 8, 1789, addressed to the heads of 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.” With the exception of William Henry Harrison, all presidents beginning with George Washington in 1789 have issued orders that in general terms can be described as executive orders. Initially they took no set form. Consequently, such orders varied as to form and substance.²³

Executive orders are official and enforceable legislative instruments as soon as the president signs them and they may be published in officially designated Register, Journal or Gazette. The USA Federal Register Act, however, specified that orders need not be published if they had “No general applicability and legal effect.”²⁴

Executive Orders have the force and effect of law, based on the authority derived from the Constitution itself or legislative enactment/statute. The ability to make such orders is also based on express or implied Acts of the legislature (National Assembly) that delegate to the president/executive some degree of discretionary power.²⁵

²¹ See Okebukola, E.O and Kana, A.A. (2012): Executive Orders in Nigeria As valid Legislative instruments and Administrative Tools. In Nnamdi Azikiwe University Journal of International Law and Jurisprudence, Vol. 3, at Pp. 59 - 68

²² Keneth, R.M., op cit.

²³ The form, substance and numbers of presidential orders has varied dramatically in the history of the USA presidency. Numbering of Executive orders, for example, began in 1907 by the Department of State, which assigned numbers to all the orders then in their files dating from 1862.

²⁴ Quoted from Gerhard Peters, The American Presidency Project, (March 20, 2018) – Executive Orders: Washington-Trump – available @www.presidency.ucsb.edu.accessed on 2 June 2018.

²⁵ See Mansfield, H.C.J (1987): ‘The Modern Doctrine of Executive Power’ in 17 Presidential Studies Quarterly, 237-252.

The problem²⁶ with presidential executive order lies first with its use, sometimes, in a controversial manner, because it allows the president to make subsidiary legislation without the consent or approval of the Legislature (US Congress or the Nigerian National Assembly). A typical recent example of executive order controversy is the use by President Obama²⁷ of order for gun control. In January 2016, President Obama took executive action to broaden the scope of who is considered to be “gun dealer” under the law, as part of an initiative to prevent criminals and mentally ill people from buying firearms. By executive order, President Obama gave funding to the bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) so that they could put more agents into the field, and instructed federal prosecutors to focus on strict enforcement of existing gun laws.²⁸ Shortly following the announcement of the Obama executive orders for stricter interpretation of, and action on, gun laws, political activist/founder of Freedom Watch and Attorney, Larry Klayman, filed a lawsuit²⁹ in the federal court, claiming that the changes made by executive order are unconstitutional, as they violate the Federal rule-making process.

In President Trump’s case, one of his first set of executive orders in office³⁰ was the signing of an executive order to weaken Obamacare by allowing federal agencies to take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the Affordable Care Act, and prepare to afford the states more flexibility and control to create a more free and open health care market.”³¹

Another problem associated with the use of executive orders lies in the criticism typically by members of the opposing party, who often characterize their use as a

²⁶ Critics of executive orders, typically members of the opposing party, often characterize their use as a circumvention of the legislative process.

²⁷ See <http://www.federalregister.gov/executiveorders/obamaEO2016>.

²⁸ Ibid. the initiative requires gun dealers to promptly report lost or stolen firearms, and sought to tear down legal barriers to disclosure of mental health issues for the purpose of background checks for gun purchases. This comes on the heels of reports that deaths caused by gun violence have reached the number of deaths caused by automobile accidents in the USA.

²⁹ This lawsuit named as defendants the President (Obama) , the USA Attorney – General and the Director of ATF. being one of the many anticipated legal challenges to Obama’s use of Executive Orders, Klayman argued in his complaint: “These actions are unconstitutional abuses of president’s and executive branch’s role in our nation’s constitutional architecture and exceed the powers of the President as set forth in the US Constitution.” Quoted in the Online Legal Dictionary: <https://legadictionary.net/executive-order/-pp.1-7> accessed on 5/30/2018.

³⁰ Executive Orders 101

³¹ *ibid*

'circumvention of the legislative processes'³². Recent history has seen American Presidents using executive orders to plow through parliamentary sluggishness and red tape to deal swiftly with important issues plaguing the people.³³ Examples of executive order use include Ronald Reagan's 1987 issuance of Executive Order No.12601, which created the President's Commission on the HIV Epidemic, and his 1988 issuance of Executive Order 12631, which sought to address the precarious financial markets of the USA. George Bush signed Executive Order No. 13470, which gave new teeth to a domestic surveillance order issued by President Reagan. This post 9/11 example of executive order use approved more aggressive surveillance by federal agencies, and limited the public's access to presidential documents.³⁴ More recently, three years into his presidency, President Obama had turned his back on Congress's posturing, especially obstinate Republican lawmakers, determining to get things done any way he could. While the use of executive orders to accomplish his goals limited the scope of Obama's actions, it enabled him to flex his presidential muscles, as he sped by the obstinate Republican members of the Congress. Obama continued to move the nation's business forward, issuing 277 executive orders³⁵ during his eight year presidency.³⁶

The above problem is compounded by a closely related problem of the absence of a regular judicial and legislative review of executive orders, largely due to all too ready acquiescence of the legislature and the indifference of the judiciary, resulting into the perception of the presidents acting like supermen with extraordinary powers and the tendency to encourage emergence of tyrants and dictators as presidents,³⁷ with the attendant negative consequence on the sustainability of constitutional democracy.

3. OBJECTIVES

³² In truth, many of the thousands of such orders issued by American presidents since George Washington have dealt with the mundane operations of the executive branch. The use of executive orders as an instrument of policy took off with Theodore Roosevelt who issued more than 1,000 during his two terms.

³³ See <http://www.federalregister.gov/executive> orders.

³⁴ Ibid.

³⁵ These executive orders covered subjects ranging from national security issues and sanctions on foreign-nations, to internet use, privacy and civil right issues.

³⁶ From 2008 to 2016.

³⁷ Udofa, I.J. (2017): Presidential Law-Making Power in Nigeria and America: Turning Presidents into Superwomen? Global Journal of Politics and Law Research, Vol. 5, NO. 3, Pp.1-16, May 2017; also see Keneth, R.M. (1999) op.cit.

It is against this contextual background that this study sets out to: examine the legal basis of the nature, scope and use of executive orders in the USA and Nigeria; explore the desirability of checks and balances using the mechanism of judicial and legislative review of executive orders; conclude with viable options for Nigeria.

4. METHODOLOGY

The methodology adopted for this study is essentially doctrinal, by reviewing existing academic literature on the subject, legal texts and case law warranting the use and review of executive orders in both Nigeria and USA

JUSTIFICATION

The justification for this study lies in the following:

- i. There is an apparent dearth of literature on the Nigerian experience,³⁸ relating to how presidents can, and have used executive orders as a way of making and implementing significant policies or policy decisions affecting citizens and overall national development.³⁹
- ii. Many Nigerians, including law and policymakers, researchers and constitutional analysts, do not appreciate the practical significance of both the concepts of separation of powers and checks and balances,⁴⁰ as well as the necessity and inevitability of the use of presidential executive orders as valid legislative instruments and administrative tools for effective implementation of significant policy decisions.⁴¹
- iii. Evidence abound in Nigeria of the infrequent use of executive orders by Executive Presidents, since the adoption in the Second Republic of the American model of Constitutional Presidentialism.⁴² This sharply contrasts with the notorious and controversial use of such orders by

³⁸ Except for Okebukola and kana(2012) op.cit

³⁹ President Buhari and Osinbajo (in his Acting President capacity) issued Presidential Executive Orders 1-6 of 2017-2018, signifying a new dawn in legal backing for presidential law making in Nigeria. These orders aimed at Easing the Way of Doing Business; timely submission of annual budget estimates by Ministries, Departments and Agencies (MDAs); promotion of local content in public procurement; tax amnesty regime and promotion of Nigerian content in contracts and science, Engineering and Technology as well as seizing assets of corrupt persons and institutions in Nigeria

⁴⁰ See Ladan, M.T. (2018) Legislative-Executive Relations. Being a course lecture PPA-706, developed for the NILDS – UNIBEN Distance Learning Postgraduate Diploma in Legislative Drafting, Pp.1-51

⁴¹ Ibid.

⁴² See Okebukola and kana, op.cit and udofia, op. cit

- practically all American Presidents, from George Washington to Donald Trump.⁴³ This infrequent use accounts for lack of regular collection, registration, chronological numbering and publication of executive orders in publicly available and accessible journals, Registers or official government Gazette for public information, use and analysis as well as for the sake of transparency and accountability in governance.⁴⁴
- iv. The frequency of unnumbered executive orders breeds disorderliness and irregularity to the processing and documentation of executive orders, such that the actual total is unknown even in the USA.⁴⁵ The consequence is undue reliance on estimates, which does not augur well for this necessary but controversial form of law making in both Nigeria and USA.
 - v. Hence the need to provide a clear understanding of the rationale behind, and validity in, the recent use of presidential executive orders in Nigeria. The ultimate goal is to enlighten legislators, policy makers, researchers and the general public on this subject, by providing an easy reference material and by encouraging further research and analysis by scholars in the interest of the public and sustenance of democracy in Nigeria.

6. REVIEW OF LITERATURE, LEGAL TEXTS AND CASE LAW

This part of the study focuses on the review of relevant materials related to the nature of legislative functions of the executive; theories of executive powers; nature and scope of executive orders; constitutional basis, checks and balances in the use of executive orders in the USA and Nigeria.

6.1 NATURE OF LEGISLATIVE FUNCTION OF THE EXECUTIVE AND THEORIES OF EXECUTIVE POWERS

In modern democracies, the executive organ performs quite extensive functions resulting from the growing complexity of the modern political system. These functions are so broad to the extent that even the legislative and judicial functions cannot be completely separated from the formulation and implementation of policies which the executive carries out. Abonyi,⁴⁶ accounts for the factors

⁴³ See Keneth, R.M., op.cit and <http://www.federaregister.gov/executiveorders>

⁴⁴ It is argued that Executive Orders need not be published if they had no general applicability and legal effect .

⁴⁵ See <http://www.presidency.ucab.edu/data/orders.php-accessed> on 20 march 2018.

⁴⁶ Abonyi,N (2006) Intergovernmental Relations in Democratic Federations Enugu: John Jacob's classic publisher Ltd.

responsible for the increasing role of the executive. These include the growth of a disciplined party system especially in a parliamentary government; the considerable influence in a presidential system of government of the Chief executive/Head of State and Government/Commander in Chief of the Armed Forces, over the legislature; the President's control over his cabinet and his power to determine policy lines of the nation especially in national emergency situations, national security challenges, foreign relations and national development.⁴⁷

Anifowoshe,⁴⁸ however encapsulates the functions of the executive into three broad categories: administrative, legislative and judicial. More importantly, is the focus on legislative functions of the executive, particularly, the President.⁴⁹ Constitutionally, the executive performs legislative functions by recommending and initiating bills for the consideration of the legislature.⁵⁰ Under section 315, the Constitution of Nigeria empowers the President to unilaterally alter or modify any existing law made before the 1999 Constitution took effect, which he considers necessary or expedient to bring that law into conformity with the provisions of the Constitution. In Nigeria, the president is also empowered to assent to and approve bills and to veto a bill by withholding his assent. This is subject to the power of the legislature to override the presidential veto.⁵¹

The president is further empowered by section 32 to make regulations on citizenship in Nigeria.⁵² In addition, through delegated power by the legislature, the executive can make regulations, issues statutory orders,⁵³ guidelines and rules necessary to meet changing circumstances.

⁴⁷ See sections 13, 14(2)(b) and 15-20 of the Constitution of the Federal Republic of Nigeria, 1999 as amended

⁴⁸ Anifowoshe, R(2008). "Constitutions and Constitutionalism." In Anifowoshe et al (eds) Elements of Politics. Lagos: Sam Irosi Publishers, at pp. 157-170

⁴⁹ While both the Constitutions of Nigeria (Section 4) and USA (Article 1) vest legislative powers primarily in the Legislature (National Assembly of Nigeria and the US Congress), they both vest the executive powers of government in the President. However, sections 81 of the Nigerian Constitution, 1999, expressly vests in the President the power to prepare and submit the Annual Appropriation Bill to the Legislature. See also sections 58(1) and (4), and (5); section 315 and 32 of the Constitution

⁵⁰ Ibid, especially section 58(1) and (4) of the 1999 Constitution of Nigeria as amended

⁵¹ Ibid section 58 (5)

⁵² Ibid, section 32 to give effect to the provisions of chapter 3 of the constitution.

⁵³ Such as Presidential Executive orders 1-6 of 2017-2018 by President Buhari and the then Ag. President Yemi Osinbajo

Theories of executive powers ⁵⁴

The nature of executive powers is not limited to execution of the laws made by the legislature but covers the residue of powers after legislative and judicial powers have been taken away. It extends to, according to the Concise Oxford Dictionary,⁵⁵ assuming responsibilities for social and economic development of the nation.

Three striking divergent theories purport to describe the nature of executive powers namely, the Residual, the inherent and the Specific Grant Power theories.⁵⁶

- i.* **Residual Power Theory:** Under this theory, executive power is simply the residue of powers of the executive after legislative and judicial powers⁵⁷ have been taken away. An important aspect of the theory which conforms to modern government practice is that the formulation of policy and administration/enforcement of laws made by the legislature and judicial decisions are classified as executive powers.⁵⁸

- ii.* **Inherent Power Theory:** Black's Law Dictionary⁵⁹ defines 'inherent power' as the power that necessarily derives from an office, position or status. According to this theory, a Chief Executive (President) can exercise any function which is inherent in nature, though there might not be any specific legislation conferring authority on him to so act. This theory, according to Tribe⁶⁰ covers those executive activities which, because of their peculiar nature, could not realistically have been anticipated and enumerated in advance. The inherent powers of the Executive President extends to both the field of foreign relations⁶¹ and matters of domestic policy.⁶² The President's inherent powers also extends to the

⁵⁴ The term 'Executive Powers' generally means the power to execute laws made by the legislature and to implement policies of the state within its constitutional limits and in accordance with due process of law.

⁵⁵ The Concise Oxford Dictionary, 7th Edn, P.508

⁵⁶ Ladan, M.T. (2018) Legislative-Executive Relations, op. cit

⁵⁷ As provided by sections 4,5 and 6 of the 1999 Constitution of Nigeria, 1999 as amended

⁵⁸ See sections 4 and 6 of the Constitution, ibid.

⁵⁹ 8th Edn, P. 610

⁶⁰ Tribe, L.H. (1978). American Constitutional Law. New York: The Foundation Press, Inc., P. 182

⁶¹ See sections 12, 19 and Exclusive Legislative List, items 2-3, 7,9, 16-20, 24-27-29, 31, 36,41-42 and 62 of the schedule to the Constitution, 1999 as amended.

⁶² Ibid, section 14 (2)(b) read together with sections 15-20.

maintenance and securing of public order, safety, security, peace and welfare of the people.⁶³ This means that in an emergency situation, the President could use troops to re-establish order and restore peace nationwide⁶⁴ in the best interest of the public.

iii. **Specific Grant Power Theory:** This theory holds that the executive powers of the President are specifically granted by the Constitution itself and laws made by the Legislature.⁶⁵ The President must therefore be prepared to justify his actions on the basis of the Constitution or the laws of the parliament. For example, section 315 of the 1999 Nigerian Constitution empowers the President to unilaterally alter or modify any existing law made before the Constitution took effect, as he considers necessary or expedient to bring that law into conformity with the provisions of the Constitution.⁶⁶ The President is further empowered by section 32 of the 1999 Constitution to unilaterally make regulations he considers necessary for carrying into effect the provisions of chapter three of the Constitution on citizenship. He is however required to lay the regulations made by him before the National Assembly.⁶⁷

It is evident from the nature of legislative function of the executive and executive power explained above, that in terms of scope, it extends to the execution and maintenance of the constitution; execution of all laws made by the legislature; execution of all matters with respect to which the legislature has powers to make laws. This power extends to the execution of treaties entered into by the President /executive on behalf of the government and people of Nigeria.⁶⁸

6.2 NATURE, SCOPE, CONSTITUTIONAL BASIS, CHECKS AND BALANCES IN THE USE OF PRESIDENTIAL EXECUTIVE ORDERS IN THE USA AND NIGERIA

⁶³ Ibid, section 14(2)(b)

⁶⁴ Ibid, section 5(1)(b) and 5(5)

⁶⁵ Nigerian Constitution, op.cit, section 5(1)(b)

⁶⁶ Ibid, section 315(2)

⁶⁷ Ibid, section 32(2)

⁶⁸ See Ladan. M.T. (2018) op.cit

The Nature and scope of Executive Orders.

The expression 'Executive Order,' is neither defined in the Constitutions of the USA and Nigeria, nor is it interpreted in any law made by the US Congress and the Nigerian National Assembly. By nature of the Presidential System of government,⁶⁹ an Executive Order⁷⁰ is a presidential directive or guidance that implements or interprets a federal statute, a constitutional provision, or a legally binding treaty. The order may require the implementation of an action, set out parameters for carrying out specific duties, define the scope of existing legislation or be a subsidiary instrument.⁷¹

An executive order may be issued for any domestic policy issue, as long as it does not encroach on the constitutional powers of the legislature.⁷² For example, an executive order cannot be made to declare war against another country without parliamentary approval;⁷³ nor can it be issued to violate the fundamental rights of citizens guaranteed by the Constitution or a legally binding treaty.⁷⁴

Legal basis, Checks and Balances in the use of Executive Orders in the USA and Nigeria.

In both the USA and Nigeria, the legal basis for the issuance and use of executive orders by presidents is primarily the constitution followed by statutory or legislative authorization.

LEGAL BASIS, CHECKS AND BALANCES

i. The Legal Basis in the USA

Clearly, Article 1 of the US Constitution specifies that "All legislative powers herein granted shall be vested in the Congress of the United States,"

⁶⁹ Wherein the executive president acts as both Head of State and Government and the Commander-in-Chief of the Armed Forces, possessing tremendous constitutional and statutory powers to run the affairs of the state.

⁷⁰ See <https://legaldictionary.net/executive-order/definition,examples,cases> and processes-accessed on 5/30/2018.

⁷¹ A subsidiary instrument within the contemplation of section 37 of the Interpretation Act, Cap. 1.23, Laws of the Federation of Nigeria, 2004.

⁷² Under section 4 of the Nigerian Constitution, 1999 and Article 1 of the USA Constitution.

⁷³ Section 5 (4) and (5) of the 1999 Constitution of Nigeria.

⁷⁴ See the decision of ECOWAS Court of Justice in SERAP v. FRN and UBEC, ECW/CCJ/APP 08/08 and WCDA KWASU v. FRN (2017) ECW/CCJ/JUD/04/17.

underscoring the separation of powers as one of the guiding principles of the framers of the Constitution.⁷⁵ Executive Orders are authorized by the president's independent constitutional authority⁷⁶ under Article 2, sections 1, 2 and 3 of the US Constitution. Various clauses of the US Constitution have been cited to support the issuance of executive orders. Among them are the Vestiture clause which states: "The executive power shall be vested in a President of the United States of the America" Article 2, section 1, clause 1. The Take Care Clause under Article 2, section 3, states that the President "shall take care that the laws be faithfully executed;" and the Commander in-Chief Clause under Article 2, Section 2, Clause 1, states that the president "shall be the Commander-in-Chief of the Army and the Navy of the United States, and of the militia of the several states when called into the actual service of the United States."

Most executive orders in the USA are issued under specific statutory authority from the Congress and have the force and effect of law.⁷⁷ Such executive orders usually impose sanctions, determine legal rights, limit agency decisions, and require immediate compliance.⁷⁸ Federal courts consider such orders to be the equivalent of federal statutes.⁷⁹ In addition, regulations that are enacted to carry out these executive orders have the status of law as long as they are reasonably related to the statutory authority.⁸⁰ An administrative action that is carried out under a valid executive order is similar to an agency action that is carried out under a federal statute. In each case, the agency's authority to enact rules and to issue orders comes from Congress.⁸¹

Absent specific statutory authority, an executive order may have the force and effect of law if congress has acquiesced in a long-standing executive

⁷⁵ See Anderson, L.M (2002), "Executive Orders, the Very Definition of Tyranny, and the Congressional Solution, and the Separation of Powers Restoration Act." Hastings Constitutional Law Quarterly 29 (Spring): Pp.589-611.

⁷⁶ The case of *Cunningham V. Neagle* 135 U.S 1, 105 CT.658, 34 L. Ed.55 (1890).

⁷⁷ Article 2 of the U.S. Constitution.

⁷⁸ Gerhard Peters et.al (2018): Executive Orders, the American Presidency Project, op.cit.

⁷⁹ See Ostrow, S., (1987), "Enforcing Executive Orders: Judicial Review of Agency Action under the Administrative Procedure Act." George Washington Law Review, P.55

⁸⁰ Ibid

⁸¹ Ibid

practice that is well-known to it. For example, in *the case of Dames v. Regan*,⁸² *the US Supreme Court* upheld various executive orders that suspended claims of US nationals arising out of the Iranian hostage crisis, citing Congress's Acquiescence in a 180 year old practice of settling US citizens' claims against foreign governments by executive agreement. In describing the situation before it, the court stated "we freely confess that we are obviously deciding only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances."⁸³

ii. **Executive Orders having the Force and Effect of Law**

In the USA, Executive Orders are not voted on, nor approved by the people, nor by their congressional representatives. Once signed by a sitting President, the order immediately becomes law. Advisor to President Bill Clinton, Paul Begala, once boiled down the awesomeness of this presidential authority in a succinct statement: "Stroke of the Pen, Law of the Land. Kinda Cool."⁸⁴ Hence it has the force of law once signed by a sitting president.

To have the effect of law, executive orders must appear in the Federal Register, the daily publication of federal rules and regulations.⁸⁵ Executive Orders are also compiled annually and are published in the Code of Federal Regulations. Selected orders are published with related statutes in US Code Annotated and US Code Service.⁸⁶

⁸² (1981) 453 U.S 654, 101 S. CT. 2972, 69 L. Ed. 2d 918

⁸³ Ibid

⁸⁴ Quoted in Legal Dictionary: Executive Order-Definition, Examples, Cases, Processes (2018), op cit.

⁸⁵ See <https://www.Federal Register.gov/executive-orders>.

⁸⁶ Gerhard, op.cit.

The form, substance and numbers of presidential orders has varied dramatically in the history of the US Presidency. Numbering of Executive Orders began in 1907 by the Department of State, which assigned numbers to all the orders then in their files dating from 1862. Through these efforts, the frequency of unnumbered orders declined sharply. President Hoover attempted to bring further orderliness and regularity to the processing and documenting of Executive Orders.⁸⁷

But it was not until the Federal Register Act in 1936 that a more thorough contemporaneous documentation of Executive Orders began. Today, virtually all numbered executive orders are published. However, the Federal Register Act specified that such orders need not be published if they had “no general applicability and legal effect.”⁸⁸ Thus, the text of some orders is not available.⁸⁹

In addition to the numbered orders, there are many unnumbered orders. The best known compilation includes ‘over 1500’ unnumbered orders, but the editor notes that the actual total is unknown. Estimates have reportedly ranged as high as 50,000. The editor, Lord,⁹⁰ notes emphatically that “no distinction can be made between numbered and unnumbered orders on the basis of subject matter, general applicability, public interest, or legal effect.”

Executive orders often omit citing a specific constitutional provision as authority. For example, Executive Order No. 11, 246, which prohibits discrimination in federal employment, simply states, “under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

.....”⁹¹

⁸⁷ *ibid*

⁸⁸ *Ibid*

⁸⁹ See John Wooley (1998): “Vital Statistics on the Presidency: Washington to Clinton,” Rev. ed (Washington D.C., C.Q. Press.

⁹⁰ Lord, Clifford L., ed. (1943) *List and Index of Presidential Executive Orders (unnumbered Series, 1789-1941)*. New Jersey Historical Records Survey, Works Progress Administration, Newark, N.J. Also see Lord, Clifford L., ed (1944) *Presidential E.O.s, Numbered 1-8030, 1862-1938*. Prepared by the Historical Records Survey, New York City, NY, Books Inc.

⁹¹ (3C.F.R.339-1964-1965 Comp.).

Some executive orders issued pursuant to the president's independent constitutional authority have been criticized as implementing what has been called essentially executive managerial policy. Although this type of order is directed toward public officials, it also may affect private interests, through the actions of such officials.⁹² For example, Executive Order No. 11, 246, which prohibits discrimination in federal procurement and employment, affects the interests of federal contractors and their employees; Executive order No. 10, 988, which extends Collective bargaining to the federal workforce, affects federal workers; and Executive Order No. 12, 291, which imposes controls on administrative rule making, affects individuals who are subject to administrative regulations.

iii. Historic and Recent use of Executive Orders in the USA: Checks and Balances⁹³

Historically, Executive Orders are used quite often to deal with a host of routine administrative matters related to the internal operations of the federal government, such as creating or amending rules or policies for federal agencies and employees, to clarifying an agency's responsibilities in carrying out or implementing some legislative instruments.⁹⁴ Every president since George Washington has used the executive order power in various ways. Washington's first orders were for executive departments to prepare reports for his inspection. He issued a total of 8 orders at an average of one order per year.⁹⁵

Executive Orders have also been used for a broad range of issues, from taking necessary measures to deal with civil war, Great depression and World War II, to prohibiting discrimination. President Abraham Lincoln suspended the writ of habeas corpus during the civil war using executive orders in 1861.

⁹² See Anderson, L.M. (2002). "Executive Orders, The very Definition of Tyranny, and Congressional Solution, and the Separation of Powers Restoration Act." *Hastings Constitutional Law Quarterly* 29 (Spring):589-611.

⁹³ *Ibid.*

⁹⁴ Sterling, J.A. (2000). "Above the Law: Evolution of Executive Orders." *University of West Los Angeles Law Review* 31 (annual)

⁹⁵ John Woolly (1998) *op.cit.*

Lincoln cited his powers under the Constitution's Suspension Clause, which states, "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion and invasion the public safety may require it."⁹⁶

In a court decision called *Ex Parte Merryman*,⁹⁷ Supreme Court Chief Justice Roger Taney, in his role as a federal circuit Judge, ruled that President Lincoln's executive order was unconstitutional. Lincoln and the Union army ignored justice Taney's ruling and congress didn't contest President Lincoln's habeas corpus suspension order.

President Franklin Roosevelt, issued the most executive orders, totaled 3,721 between 1933 and 1945, as the country dealt with the Great Depression and World War II. He established internment camps during World War II using Executive Order 9066. Roosevelt also used an Order to create the Works Progress Administration. He issued an average of 307 executive orders per year in about twelve years of his presidency.⁹⁸

President Harry Truman issued a robust 907 executive orders in about eight years in office and mandated equal treatment of all members of the armed forces. However, Truman also saw one of his key executive orders invalidated by the Supreme Court in 1952, in a watershed moment for the court that saw it define presidential powers in relation to congress. The court ruled in the case of *Youngstown Sheet and Tube Co. v. Sawyer*⁹⁹ that an executive order putting steel mills during the Korean War under federal control during a strike was invalid. In his majority opinion, Justice Black said, "The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."¹⁰⁰ It was Justice Robert Jackson's concurring opinion that stated *a three-part-test of presidential powers that has since been used in arguments involving the executive's overreach of powers.* Jackson said the President's powers were at their height when he

⁹⁶ <http://www.presidency.ucsb.edu/ws/index.php?pid=69791>.

⁹⁷ http://www.fjc.gov/history/home.nsf/page/tu_merryman_narrative.html.

⁹⁸ <http://www.archives.gov/federal-register/executive-orders/disposition.html>.

⁹⁹ http://www.oyez.org/cases/1950-1959/1951/1951_744.

¹⁰⁰ Ibid

had the direct or implied authorization from Congress to act; at their middle ground the 'Zone of Twilight,' as he put it, when it was unsure which branch could act; and at their 'lowest ebb' when a President acted against the expressed wishes of Congress.¹⁰¹

The use of executive orders also played a key role in the Civil Rights movement. In 1957, President Dwight Eisenhower used an executive order to put the Arkansas National Guard under federal control and to enforce desegregation in Little Rock. Affirmative action and equal employment opportunity actions were also taken by Presidents Kennedy and Lyndon Johnson using executive orders. President John F. Kennedy used Executive Order No. 11,063 signed on 20 November 1962, to prohibit racial discrimination in federally funded housing. President Lyndon B. Johnson also used executive order 11,246 to prohibit discrimination in government contractors' hiring practices. The order was signed on 24 September 1969. President Richard Nixon acted through an executive order (No.11, 615) to set a 90-day freeze on all prices, rents, wages and salaries in reaction to rising inflation and unemployment.¹⁰²

The most active President in the Post-World-War II era, in terms of use of executive orders, was President Jimmy Carter, who averaged 80 orders per year during his four-year-term, totaling 320 orders. In January 1977, following the Vietnam War, Jimmy Carter directed the US. Attorney General to cease investigating and in directing Vietnam War draft evaders, using executive order 11,967.¹⁰³

Recent history has seen presidents using executive orders to plow through congressional sluggishness and red tapism to deal swiftly with important issues plaguing the American people and nation. Examples include President Ronald Reagan's 1987 issuance of Executive Order No. 12601, which created

¹⁰¹ Ibid

¹⁰² See E.O. 11063-3 C.F.R. 652 (1959-63) reprinted in 42 U.S.C.A, 1982 app. At Pp.6-8 and E.O 11246-3C.F.R.339 (1964-65), reprinted in 42 U.S.C.A, 2000e, app.at 28-31, amended by E.O. 11,375- (1966-70), superseded by Order 11, 478 (1966-70). Also see, E.O.No.11,615-3 C.F.R., 602-(1971-75), amended by E.O. 11, 617, superseded by E.O. 11, 627- (1971-75).

¹⁰³ See 42 Fed. Reg. 4,393

the President's Commission on the HIV/AIDS Epidemic, and his 1988 issuance of Executive order 12631, which sought to address the precarious financial markets of the USA. Reagan averaged 48 orders per year in his eight year term. President Bill Clinton ordered in December 1995, the US reserve armed forces into active duty to augment the active armed forces' operations in and around the former Yugoslavia (Bosnia), using Executive order 12982. Clinton averaged 46 executive orders per year in his eight year term.¹⁰⁴

Following the September 11th terrorist attack on the USA, President George W. Bush issued a number of executive orders. Following his declaration of national emergency on September 14, 2001, he called members of the armed forces' Ready Reserve to active duty by Executive Order 13223. Ten days later, he issued Executive order No. 13224 that blocked the financing of terrorist organizations. Bush also created the Homeland Security Department by executive order 12228, before congress authorized this cabinet-level Department. Bush further signed Executive order 13470, which gave new teeth to a domestic surveillance order issued by Reagan. This post 9/11 example of executive order approved more aggressive surveillance by federal agencies, and limited the public's access to presidential documents. Bush averaged 36 orders per year during his eight years term.¹⁰⁵

While President Barack Obama issued 276 executive orders during his eight year presidency, a great many of those orders addressed normal operations of the executive branch of the federal government. A few others addressed pertinent national issues affecting the American people, ranging from health care, internet use, privacy and civil rights, to national security, job creation, education, energy, gun control and foreign policy matters. Obama averaged 35 executive orders per year in eight years.¹⁰⁶

More recently, President Donald Trump has issued between January 2017 and July 19th 2018 a total number of 81 executive orders covering a range of issues from national security, economy, job creation and efficiency, environmental management, labour union and health care services, to

¹⁰⁴ Wooley, J. (1998) op. cit.

¹⁰⁵ Executive Order 13,223-66 Fed. Reg., 48201. And E.O.12,228- Bush-66 Fed. Reg. 51812.

¹⁰⁶ <http://www.federal/register.gov/executive-orders/barak-obama-EO-2009-2017>.

defence, foreign relations and reorganizing the executive branch. Trump has been making use of presidential orders to quickly align the federal government's operations with his policy goals.¹⁰⁷ For example, the Executive order Establishing the President's National Council for the American Worker issued on July 19, 2018, aims at providing a coordinated process for developing and monitoring the implementation of a national strategy to ensure that America's students and workers have access to affordable, relevant and innovative education and job training that will equip them to compete and win in the global economy.

One of Donald Trump's controversial executive orders was issued on 30 January, 2018 titled: Protecting America through Lawful Detention of Terrorists. This executive order 13823, reverses a 2009 order issued by Obama ordering the closure of detention facilities at US Naval Station in Guantanamo Bay. It authorizes the transportation of additional detainees to the facility and requires that its operations be consistent with relevant US and international law.

More controversial of Trump's orders in 2017 was Executive order No. 13769 he issued just a week after he took office on 'Protecting the Nation from Foreign Terrorists Entry into the US. The executive order imposes a 90-day travel ban on all immigrant and non-immigrant individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia and Yemen. It also caps the total number of refugees that can be admitted during the fiscal year 2017 at 50,000 and suspends all refugee admissions for 120 days while the State Department evaluates which countries pose the least risk.

This first Travel Ban under Order 13769, caused chaos at the Nation's airports and started a cascade of lawsuits and appeals. The first ban, drafted in a haste, was promptly blocked by courts around the nation. A second version of the Order No. 13780 was issued two months later by Trump, fared little better, although the US Supreme Court allowed part of it to go into effect in June 2017 when it agreed to hear the Trump administration's appeals from

¹⁰⁷ Ibid –executive-orders/Donald-trump/2017-2018.

court decisions blocking it. But the Supreme Court dismissed the appeals in October, 2017 after the second ban expired. President Trump's third executive order travel ban issued on 24th September, 2017 as a proclamation No. 9645 aimed at 'Enhancing vetting capabilities and Processes for detecting attempted Entry into the USA by Terrorists and other public safety threats'. It initially restricted travel from eight nations, six of them predominantly Muslim nations, namely, Iran, Libya, Syria, Yemen, Somalia, Chad, Venezuela and North Korea. Chad was later removed from the list.¹⁰⁸

The travel restrictions varied in details, but for the most part, citizens of the countries were forbidden from emigrating to the USA and many of them are barred from working, studying or vacationing in the USA. In December 2017, the US Supreme Court allowed the ban to go into effect while legal challenges moved forward. The State of Hawaii, several individuals and a Muslim group challenged the latest ban's limits on travel from the predominantly Muslim nations. They did not object to the portions concerning North Korea and Venezuela. They argued that the latest ban like earlier ones, was tainted by religious animus and not, adequately justified by national security concerns. The challengers prevailed before a Federal District court constituted by a panel of three judges of the U.S. Court of Appeals for the Ninth Circuit, in San Francisco. The appeals court ruled that President Trump had exceeded the authority Congress had given him over immigration and had violated a part of the immigration laws barring discrimination in the issuance of visas. In a separate decision that was not directly before the justices, the US Court of Appeals for the Fourth Circuit, in Richmond, Virginia, blocked the ban on a different ground, stating it violated the Constitution's prohibition of religious discrimination.¹⁰⁹

In January 2018, the US Supreme Court agreed to hear a challenge to President Trump's third version of the travel ban and on 26 June, 2018, it upheld Trump's order in a 5 to 4 vote,¹¹⁰, the court's conservatives endorsed

¹⁰⁸ Quoted in The New York Times-<https://www.nytimes.com/2018/06/26/us/politics/supreme-court-trump-travel-ban/html>.

¹⁰⁹ Ibid, at P.2

¹¹⁰ Ibid, at P.3

Trump's power to control the flow of immigration into America on the ground that the president's power over immigration was not undermined by his history of incendiary statements about the dangers he said Muslims pose to Americans. Writing for the majority, Chief Justice John Roberts Jr. stated that President Trump had ample statutory authority to make national security judgments in the realm of immigration. He acknowledged that Trump had made many statements concerning his desire to impose "Muslim ban." But the issue before the Supreme Court is not whether to denounce statements. Rather, it is the significance of those statements in reviewing a presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, he stated, consideration must not only be given to a particular president's statements, but also the authority of the presidency itself." He concluded that the proclamation, viewed in isolation, was neutral and justified by national security concerns. It is expressly premised on legitimate purposes preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.¹¹¹

But the minority liberal justices of the US Supreme Court decried the majority decision and held the dissenting view to the effect that by upholding the travel ban, the court merely replaces one gravely wrong decision with another. The travel ban decision in favour of Trump was no better than the 1944 decision in the case of Korematsu v. United States that endorsed the detention of Japanese – Americans during the World War II. Justice Sonia Sotomayor dismissed the majority's argument that the government made its case that the travel ban is necessary for national security, saying that no matter how much the government tried to 'launder' the president's incendiary statements, all the evidence points in one direction. She accused her colleagues in the majority decision of "unquestioning acceptance" of the president's national security claims. In concurrence, Justice Anthony Kennedy emphasized the need for religious tolerance. That the First Amendment prohibits the establishment of religion and promises the free exercise of religion.¹¹²

¹¹¹ Ibid, at P.2.

¹¹² Ibid, at P.3.

The Supreme court's majority decision, on presidential power to issue executive orders, marked the conclusion of a long-running dispute over Trump's authority to make good on his campaign promises to secure the nation's borders.

iv. **The Limit of Presidential Executive Orders :Congressional and Judicial Review**

In times of crisis, the U.S. President may issue executive orders, overriding congress, on a nearly limitless scope. Many presidents have done so, including President Lincoln's Civil War. President Woodrow Wilson issued an executive order to arm the United States in preparation for World War II; and Franklin Roosevelt's executive order created Japanese internment camps after the Japanese bombed Pearl Harbour, and the USA entered the WWII.¹¹³

While all these actions were considered valid, considering the emergency nature of the times, there are definitely limitations on what a president can do by executive orders, especially in the absence of an emergency that relates to such orders. Because of the principle of separation of powers delineated by the Constitution, a president cannot do any of the following by an executive order: Establish taxes or raise them; Borrow or spend money on behalf of the nation; create, change or interfere in marriage or divorce laws; declare war; and deprive citizens of their rights to life, liberty or property.¹¹⁴

The power to issue executive orders is not absolute.¹¹⁵ The legislative and the judicial branches of government do check and balance this presidential power.¹¹⁶ First, if a president issues an executive order in accordance with a law passed by the legislature and congress disagrees, Congress has the

¹¹³ See Southern Reporter: Cases argued and determined in the Courts of Alabama, Florida, Louisiana and Mississippi (1986) West Publishing Co., P. 723.

¹¹⁴ <https://legaldictionary.net/executive-order/definition,examples>, cases and processes, op. cit

¹¹⁵ "Federal Court halts Trump's immigration ban." The Verge, 2017-01-28.

¹¹⁶ Gaziano, T.F. (2001-02-21). "The use and Abuse of Executive Orders and other Presidential Directives." Legal Memorandum No. 2. The Heritage Foundation.

power to overturn such order by passing a legislation that invalidates it. Congress can also refuse to provide funding necessary to carry out the implementation of the order. But even then, the president can veto such a defunding decision or invalidating order law. However, the Congress may override a veto with a two-thirds majority in both the House and the Senate to end such an executive order.¹¹⁷

Also, if congress disagrees with the way the president chooses to implement or execute a law made by it, Congress can revoke, modify or amend the law in order to supersede that executive order. However, if the executive order pertains to the president's constitutional authority or responsibilities, then only court can reverse it.¹¹⁸

Second, the U.S. Supreme Court also checks the power of executive order. The Court can declare an executive order unenforceable if it decides the presidential order is unconstitutional. The Court has held in many cases that all executive orders from the President of the USA must be supported by Constitution, whether from a clause granting specific power or by Congress delegating such to the executive branch.¹¹⁹ Specifically, such order must be rooted in article II of the US Constitution or enacted by the congress in statutes. Attempts to block such orders have been successful at times when such order exceeded the authority of the president or could be better handled through legislation. In 1935, the Supreme Court overturned five of President Franklin Roosevelt's executive orders (6199, 6204, 6256,6284 and 6855).¹²⁰ In 1995, Executive Order No. 12954, issued by President Bill Clinton, attempted to prevent the federal government from contracting with organizations that had strike- breakers on the payroll. A Federal Appeals Courts subsequently ruled that the order conflicted with the National Labor

¹¹⁷ See *The Fettered Presidency: Legal constraints on the Executive Branch.* (ed. Gordon C. and Jeremy A.R.) Washington, DC: American Enterprise Institute, (1989).

¹¹⁸ Glendon, S.A. Jr. (1957). *The Presidency in the Courts.* Minneapolis, University of Minnesota Press.

¹¹⁹ See Chester J.A and William J.R. (1997). *Modern Constitutional Law: The States and the Federal Government.* West – Group, at P. 528.

¹²⁰ See Glendon (1957) *op. cit.*

Relations Act, and invalidated the order.¹²¹ On 28th January, 2017, part of President Trump's executive order on protecting the Nation from foreign Terrorist entry into the United States, which temporarily barred entry into the USA from citizens of seven Muslim-majority countries, including for permanent residents, was stayed by a federal court.¹²²

Thirdly, a subsequent president may overturn an executive order made by a previous president. President Reagan used an executive order to ban the used federal funds for abortion support but President Clinton famously reversed that order. In 2001, President Bush issued Executive Order 13233, which restricted public access to the papers of former Presidents. The order was criticized as being violative of the constitution and potentially threatens to undermine one of the very foundation of the American nation. President Obama revoked that order 13233 in January, 2009.¹²³

v. Judicial attitude towards executive orders in the USA¹²⁴: Violations and Enforcement

Lawsuits that are brought in order to force federal agencies to comply with executive orders are usually dismissed by the courts on the ground that the orders do not provide a *Cause of Action*, that is, a right to judicial relief. For example, in the case of *Acevedo v. Nassau County*,¹²⁵ low-income minority groups claims that the General Services Administration had violated Executive Order NO. 11,512 (of 1970)¹²⁶ by planning a federal office building without considering the adequacy of low-income housing in the area. The federal court of appeals refused to decide the claim because the plaintiffs lacked standing, that is a legally protectible interest. Similarly, in *Manhattan-*

¹²¹ Catherine, E., "Emergency Rule, Abuse of Power?" *Insight on the News*, August 23, 1999, P.18. see also the case of "Chamber of Commerce of the U.S., et.al, v. Reich, 74 F.3d 1322 (D.C. Cir. 1996). Public.Resource.org.

¹²² *The Verge*, (2017), op. cit

¹²³ Executive Order 13489 of January 21, 2009-Presidential Records. Federal Register Publication page and date:74 FR 4669, Jan. 26, 2009.

¹²⁴ Ostrow, S. (1987). "Enforcing Executive Orders: Judicial Review of Agency Action under the Administrative Procedure Act" *George Washington Law Review* 55. Also see peter, R.H. (1983). "Making Agencies Follow orders: Judicial Review of Agency Violations of Executive Order 12291." *Duke Law Journal*.

¹²⁵ (1974)500 F. 2d 1078-(2d Cir.1974).

¹²⁶ (1970) 35 Fed. Reg. 3979.

Bronx Postal Union v. Gronouski,¹²⁷ the court denied a claim against the postmaster general for violating Executive order No. 10, 988 (of 1959-1963),¹²⁸ because the president had not granted a right of action. In the case of Independent Meat Packers Association v. Butz¹²⁹ the appellate court stated that to infer a cause of action could create “a serious risk that a series of protracted lawsuits brought by persons with little at stake would paralyze the rulemaking functions of federal administrative agencies.”¹³⁰

Similarly, the courts generally reject claims against private defendants for violations of executive orders. For example, in Cohen v. Illinois Institute of Technology,¹³¹ the appellate court denied a professor’s claim against a university to recover damages for Sex Discrimination is violation of Executive Order No. 11,246, stating that the order could not give rise to an independent private cause of action.

vi. Legal Basis and Recent use of Executive Orders in Nigeria¹³²

Executive Orders have generally crept into Nigeria’s political lexicon since the adoption of the American Presidential Constitutionalism¹³³ in 1979, and specifically in between 2017 and 2018 following their most recent use¹³⁴ by President Buhari’s Administration to quickly align federal government’s operations with his administration’s policy goals relating to combating corruption and abuse of power,¹³⁵ economic recovery and diversification,¹³⁶ and national security.¹³⁷

¹²⁷ (1965) 350 F. 2d 451 (D.C. Cir. 1965).

¹²⁸ (1959-1963)3 C.F.R. 521.

¹²⁹ (1975)526 F. 2d, 228 (8th Cir. 1975).

¹³⁰ Ibid.

¹³¹ (1975) 524, F. 2d 818 (7th Cir. 1975), and (1976) 425 U.S. 943, 965.Ct.1683, 48 L. Ed. 2d 187.

¹³² See Ladan, M.T. (2018): DLSS Law Information Brief No. 4, July 6, 2018- “Presidential Executive Orders 1-6 of May 2017 to 6th July 2018 as Enforceable Legislative Instruments in Nigeria.” Available on NILDS-NASS, Abuja website-<http://nis.gov.ng>

¹³³ Nwabueze B.O. (1973) op. cit., and Ladan, M.T. (2010) op. cit.

¹³⁴ Refer to Ladan, M.T. (2018) DLSS Law Information Brief, op. cit.

¹³⁵ As obligated by section 15(5) of chapter 2 of the Nigerian Constitution.

¹³⁶ As articulated in the 2017-2022 Economic Recovery and Growth plan (2017) of the Buhari Administration. Federal Republic of Nigeria.

¹³⁷ As obligated by section 14(2)(b) of the Nigerian Constitution and elaborated in the National Policy and Strategy on security, 2014 and the Revised National Defence Policy, 2017.

Executive order is a recognized form of subsidiary legislation¹³⁸ following parliamentary delegation of its lawmaking power to the President and other executive bodies to fill in the details lacking in the Principal Act; to implement the provisions of the Act; to make consequential amendment or modification of an existing law in order to ensure its conformity with the constitution or in relation to matters that may not have been foreseen at the time when the enabling Act was enacted.¹³⁹ Hence the Constitutional and statutory desirability and inevitability¹⁴⁰ of this form of subsidiary instrument.¹⁴¹

Like in the USA, executive Orders in Nigeria, are authorized by the President's independent constitutional authority granted by the Constitution. Various clauses of the Constitution have been cited to support the issuance of executive orders. Chief among them are the Vestiture, Necessary, Expedient and Proper, and the Commander-in-Chief Clauses.¹⁴²

- **The Vestiture Clause**¹⁴³

By virtue of section 5(1) (a) of the Constitution, the executive powers of the Federation "shall be vested in the President and may, subject to the provisions of this Constitution and any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers of the public service of the Federation."

Having established the office of the President, the Constitution confers on the President the titles of "the Head of State, the Chief Executive of the Federation and Commander – in-Chief of the Armed Forces of the

¹³⁸ By the combined reading of sections 18(1), 19, 24, 35, 37(1) of the Interpretation Act, Cap. I.23, Laws of the Federation of Nigeria, 2004. Read also section 315 and the Interpretation Section 318 (1) of the Nigerian Constitution, 1999, as amended

¹³⁹ Ibid.

¹⁴⁰ Due to the exigencies of modern society lack of parliamentary expertise and time, and the flexibility and expediency with which subsidiary legislations like executive orders can be used to address urgent national emergency critical social, economic and infrastructural problems and challenges are the reasons used to justify the constitutional and statutory delegation of law making power to the President and other executive bodies.

¹⁴¹ As contemplated by Section 37(1) paragraph 4 of the Interpretation Act, op cit.

¹⁴² Sections 5(1) and (5), 130(1) and (2), 218(1) and (3), sections 215 (3) and 315(1) (2) (4) (a-c) of the 1999 Nigerian Constitution, as amended.

¹⁴³ Section 5 (1) (a), Ibid.

Federation.¹⁴⁴ There is no doubt that the titles conferred on the president are basically pointers to the enormous executive powers he wields under the constitution. Key among the executive powers vested in the President are: of executive and maintenance of Constitution and Laws made by the Legislature,¹⁴⁵ war powers,¹⁴⁶ of appointment and removal of political appointees as head of Ministries, Departments and Agencies (MDAs) as well as chairmen and members of constitutionally established executive commissions and councils relating to various facets of national life, ranging from national defence and security, revenue, civil service, election, census, economy, judiciary, code of conduct and federal character;¹⁴⁷ of appointment of members of the federal courts,¹⁴⁸ power over public revenue;¹⁴⁹ treaty-making powers;¹⁵⁰ of prerogative of mercy;¹⁵¹ declaration of a state of emergency.¹⁵²

The powers granted under section 5 (1) (b) of the Constitution to the President is enormous which extends “to the execution and maintenance of the Constitution and all laws made by the National Assembly (NASS) has, for the time being, power to make laws.” This power to execute and maintain the Constitution and all laws, is one which is all encompassing, the scope of which cannot be easily determined until situations arise which have to be dealt with.

The duty of “execution and maintenance” means the President is responsible for making sure that the provisions of the constitution and all laws made by the National Assembly are brought into effect or necessary actions are taken to ensure compliance by all and sundry. This is certainly an enormous duty for which the President may trigger the occasional use of force.

¹⁴⁴ Ibid, Section 130 (2)

¹⁴⁵ Ibid, Section 5 (1)(b)

¹⁴⁶ Ibid, Sections 217, 218, and 5 (4) – (5) read together.

¹⁴⁷ Sections 147 to 151 and 154 -158, 162 and 171-172 of the same Constitution

¹⁴⁸ Ibid, section 231

¹⁴⁹ Sections 162 to 168 of the Constitution

¹⁵⁰ Ibid, Section 12

¹⁵¹ Section 175 of the same Constitution

¹⁵² Ibid, Section 305

The implication of the phrase under section 5(1): “subject to the provisions of this constitution,” is that additional executive powers are vested by other sections of the constitution in the President. According to the Court of Appeal in the case of Senate of National assembly V. Tony Momoh,¹⁵³ the deliberate use of this expression means that the section to which it precedes should not be constituted in “isolation, but it must be considered with reference to other provisions of the Constitution.”¹⁵⁴

The Commander-in-Chief Clause¹⁵⁵

Section 130 (2) of the Constitution confers on the President the title of “the Commander – in – Chief of the Armed Forces of the Federation.” The President, as Commander – in – Chief of the Armed Forces, established under section 217(1) is empowered by section 218(1-3) of the Constitution to determine the operational use of the armed forces of the federation; appoint the Chief of Defence Staff; Chiefs of Army, Naval and Air force staff and heads of any other branches of the armed forces of the federation as may be established by an Act of the National Assembly. The President is further empowered, by directions in writing, to delegate his powers relating to the operational use of the Armed Forces, to any member of the armed forces, subject to such conditions as he may think fit.¹⁵⁶ Generally, the President can neither declare a war with another country without the resolution of both Houses of the NASS sitting in a joint session; nor can he deploy on combat duty outside Nigeria any member of the armed forces without prior approval of the senate. Where however, the national security of the country is endangered or imminently threatened, the President, may, in consultation with the National Defence Council deploy members of the armed forces of the federation on limited combat duty outside Nigeria. He must however within seven days seek the consent of the Senate who must give or refuse such within fourteen days.¹⁵⁷ The National Assembly however still retains the power under section 217 (4) of the Constitution to make laws for the regulation of the powers exercisable by the President as

¹⁵³ (1983) 4 NCLR 269, CA, Lagos.

¹⁵⁴ Ibid.

¹⁵⁵ Sections 130 (2) and 218 of the Nigerian Constitution, 1999.

¹⁵⁶ Ibid, Section 218 (3).

¹⁵⁷ Ibid, Section 5 (4) and (5).

Commander-in-Chief and for the appointment, promotion and disciplinary control of members of the armed forces of the federation.

The Necessary or Expedient Clause¹⁵⁸

The President, as the Chief National Security Officer of the Federation is empowered by section 215 (3) of the Constitution, to give such lawful directions to the Inspector General of Police, with respect to the maintenance and security of the public and public order as he may consider necessary, and the Inspector General of Police shall comply with those directions or cause them to be complied with.

The President, as an “appropriate authority”¹⁵⁹ is empowered by section 315 (1) (2) and (4) (a-c) to modify any existing law, at anytime by order, as he considers necessary or expedient to bring that law into conformity with the provisions of the Constitution. By such executive order, the President may make such modifications, including addition, alteration, omission or repeal”¹⁶⁰ of any law, including any rule of law or any enactment or instrument whatsoever in force before the coming into force of the Constitution on 29th May, 1999.

vii. Judicial Attitude Towards Executive Orders: Executive Order of 2002 in Focus

Underscoring the constitutionality of presidential Executive Order on the Allocation of Revenue (Federation Account) (Modification) Order, Statutory Instrument No. 9 of 2002, signed by President Olusegun Obasanjo, the Supreme Court of Nigeria in Attorney-General of Abia State and Ors. V. Attorney- General of the Federation (2003),¹⁶¹ held, dismissing unanimously the claim of the thirty-six states of the Federation on violation of the principle of Separation of Powers, that by invoking his power to modify the Allocation of Revenue (Federation Account) Act, 1990 as amended by Decree 106 of 1992, under section 315 of the Constitution, the President did not breach the principle of separation of powers in making the Allocation of Revenue (Federation Account) (Modification) Order No. 9 of 2002. The Court further held that the doctrine is to promote efficiency in governance by

¹⁵⁸ Ibid, Sections 215 (3) and 315.

¹⁵⁹ Ibid, Section 315 (4)(a).

¹⁶⁰ Ibid, Section 315 (4)(b) and (c).

¹⁶¹ (2003) 4NULR (Pt.809) P.124.

precluding the exercise of arbitrary power by all the arms of government and thus prevent friction. If viewed from this perspective, one may easily frown at what section 315 of the constitution has provided. But the Nigerian constitution is a product of the Nigerian circumstance, and the like of the section has existed all along. There were similar provisions in the 1960 and 1963 constitutions respectively. Moreover, no two democratic constitutions are the same. The 1999 constitution has its own peculiarities due to the Nigerian historical circumstance.¹⁶² The court further held that the Allocation of Revenue (Federation Account, etc) Act, Cap. 16, Laws of the Federation of Nigeria, 1990, as amended by Decree No. 16 1992 directly contradict section 162 (3) of the Constitution of Nigeria, 1999.

According to Belgore, JSC,¹⁶³ “without the provisions of section 315 of our constitution, and with this court’s judgment in AG Federation v. Attorney General of Abia State and 35 ors (No.2) of (2002), the country might easily find itself operating an unconstitutional revenue allocation statute.” The Act, Cap. 16, was rendered unconstitutional in part by the Supreme Court decision in AGF v. AG, Abia State and 35 ors (No.2) of (2002), therefore, the President’s only option was to invoke his powers under section 315 (1) of the Constitution and modify the law to bring it into conformity with the Constitution. The President did just that.

Apart from the Constitution, the Acts of National Assembly can also permit modification by the President by granting the president discretionary power to use executive orders to implement or set out the extent and scope of an Act. In the exercise of such statutory discretion power by use executive orders, the court cannot usurp it. In *Ohaji v. Umamka* (2011)¹⁶⁴ the court held that where there is a statutory provision for making an order and the making of same is reposed in the President of the Republic or Governor of a State, such function cannot be usurped by the court. The furthest a court can go is to declare as to validity or otherwise of that order; but the court has not got the jurisdiction to take over the functions of such public officer by making its own order.”¹⁶⁵

¹⁶² Ibid, at Pp.178-179

¹⁶³ Ibid

¹⁶⁴ 4 NWLR (Pt. 1236)P. 148 at 164 para- C.

¹⁶⁵ *Ajakaiye v. Idehai* (1994) 8 NWLR (Pt. 364) P. 504 at Pp. 525-526.

It is however a settled law that, the power of Judicial review of executive orders begins when it is alleged that there is non-compliance or breach of statutory or constitutional limits or has not been exercised in accordance with the letter and spirit of the Constitution or Acts of the National Assembly.¹⁶⁶

The legislature can also review presidential executive orders resulting from the delegated power to make such subsidiary instruments in order to ensure its conformity with the provisions of the Principal Act. If found to be inconsistent, invalid or ultra-vires, the legislature can amend or repeal the statutory basis of the order or even challenge such an order in a court of law.

The President need not wait for Legislative or Judicial review before correcting any unconstitutional or erroneous executive order. Such an order may be terminated or suspend by the President that makes it or overturned by subsequent presidents, as earlier exemplified by the American experience. In the case of Attorney General of Abia State v. AFG (2006),¹⁶⁷ the Supreme Court of Nigeria stated that, estoppel is an equitable defence and cannot avail a defendant in a case of breach of the Constitution

viii. **Review of Presidential Executive Orders 1-6 of 2017 to 2018 as Enforceable Legislative Instruments in Nigeria.**

S/N	Date Signed	Effective Date	Action/Subject Matter Coverage	Objectives	Legal Basis	Summary
1	5 th July, 2018	Not stated	EXECUTIVE ORDER No.6: - Preservation of Suspicious Assets connected with corruption and other relevant offences.	<ul style="list-style-type: none"> To activate existing provisions of the law on freezing of Assets such that accused persons are temporarily denied access to corruptly 	Sections 5 and 15 (5) of the CFRN, 1999 as amended, which extends to the execution and maintenance of the Constitution, all laws made by the NASS to abolish all corrupt	<ul style="list-style-type: none"> This Executive Order consists of seven sections and two schedules relating to the constitutional duty of government to restrict dealings in suspicious

¹⁶⁶ AG Anambra State v. Okafor (1992) 2 NWLR (Pt. 224) P. 396 at 419, Supreme Court.

¹⁶⁷ (2006) 16 NWLR (Pt. 1005) P. 265 at Para D.

				<p>enriched resources which they can use to frustrate investigative and Judicial processes;</p> <ul style="list-style-type: none">• To promote a more effective coordination of prosecutorial matters under the office of the Attorney General of the Federation.	<p>practices and abuse of power.</p>	<p>assets subject to corruption related investigations or inquiries in order to preserve same in accordance with the rule of law and to guarantee and safeguard fundamental human rights.</p> <ul style="list-style-type: none">• The order also targets specific politically exposed persons who are currently being tried in Courts for corruption [First Schedule].• The order further seeks to restrain, pending the conclusion of their trials, owners of assets accused of corruption and elements, who purportedly aided and abetted the laundering of public funds for politically exposed persons, from carrying out any further transaction on such assets,
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						which can otherwise be employed to thwart investigative and Judicial processes or for acts of terrorism, economic sabotage of Nigeria, financing of terrorism and ethno-religious violence.
2	2 nd February, 2018	Immediate	EXECUTIVE ORDER No. 5: - For Planning and Execution of Projects, Promotion of Nigerian Content in Contracts and Science, Engineering and Technology.	<ul style="list-style-type: none"> The harnessing of domestic talents and the development of indigenous capacity in science and engineering for the promotion of technological innovation needed to drive national competitiveness, productivity and economic activities which will invariably enhance the achievement of the nation's development goals across all sectors of the economy. 	<ul style="list-style-type: none"> Section 5 of the CFRN, 1999 as amended. Chapter 3 of CAMA cap.C20, LFN, 2004; Section 11(2) of COREN Act, cap.E11, LFN 2004; sections 5 and 11 of CIPSMN Act, cap. C53, LFN 2004; Public procurement Act No.14, 2007; NITDA Act No.28, 2007; NOTAP Act, cap. N.62, LFN 2004. 	<ul style="list-style-type: none"> The thrust of the eighteen sections Executive Order 5 is the recognition of the vital role of science, technology and innovation in national economic development, particularly in the area of promoting Made in Nigeria Goods and Services [MNGS]. As a way of ensuring successful implementation of its provisions, the E.O.5: - strategically emphasizes the importance of competence and approved codes

						<p>and standards for the indigenous professionals being encouraged by its directives; prescribes collaboration between MDAs and the Standard Organization of Nigeria [SON]; states that punishment for any violation of its provisions shall be as stipulated in the Public Service Rules and other relevant laws, including those governing Public Procurement and Professional practice in Nigeria; as well as establishes the Presidential Monitoring and Evaluation Council with the President and his Vice as Alternate Chairman to monitor progress of the implementation of the Executive Order.</p>
3	29 th June, 2018	1 st July, 2017	EXECUTIVE ORDER No.4: - On the Voluntary	<ul style="list-style-type: none"> To increase the level of Tax awareness and 	<ul style="list-style-type: none"> Sections 5 and 24 [f] of the 	<ul style="list-style-type: none"> E.O.4 consists of thirteen sections. It offers amnesty

			<p>Assets and Income Declaration Scheme [VAIDS]</p>	<p>compliance, widen the tax net, and reduce incidence of tax evasion in the country.</p> <ul style="list-style-type: none"> To offer amnesty until March 31, 2018 [later extended to 30 June, 2018] to tax payers [individuals and corporate bodies] who have defaulted in their obligations in the past. 	<p>CFRN, 1999 as amended</p>	<p>to tax payers to regularize their tax affairs by providing a soft landing, which includes waiver of penalties and interest as well as immunity from tax audit and prosecution. It also provides protection of confidential information.</p> <ul style="list-style-type: none"> The scheme covers all Federal and State taxes, including personal income tax, tertiary education tax, petroleum profit tax, value added tax, capital gains tax, stamp duties etc. Eligible tax payers are to disclose their assets, income and gains from sources within and outside Nigeria, taxes paid, if any, and outstanding taxes for the preceding six years of assessment (i.e. 2011-2016) The scheme will be jointly
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						executed by the Federal and State Government Tax authorities.
4	18 th May, 2018	Immediate	EXECUTIVE ORDER No. 3: - Timely Submission of annual budgetary estimates by all statutory and non-statutory agencies, including companies owned by the Federal Government.	<ul style="list-style-type: none"> The mischief the order aims to cure is the delay in the passage and assent of National Budget occasioned by the late preparation and transmission of budget estimates by MDAs, with the 2016 and 2017 budgets as perfect reference points. 	<ul style="list-style-type: none"> Sections 5(1) (b) and 81 of the CFRN, 1999 as amended. 	<ul style="list-style-type: none"> The Executive Order consists of eight sections. It directs all MDAs to, on or before the end of May every year, prepare and submit their schedule of revenue and expenditure estimates for the next three financial years. These are to be submitted to the Ministers of Finance and Budget/National Planning. The Order further stipulates that MDAs shall on/or before the end of July every year, prepare and submit to the Ministers of Finance and Budget/National Planning their annual budget estimates, which shall be derived from the estimates of revenue and expenditure as projected in the

						<p>three-year schedule earlier mentioned.</p> <ul style="list-style-type: none">• Upon submission of the said schedule, the Ministers of Finance and Budget are to review the estimates and ensure their conformity with the national plan before they are approved and transmitted to the NASS for consideration.• The Order provides also that for erring MDAs, no payment shall be made in respect of any capital or recurrent liability, other than payment for salaries and allowances.• The Order prescribes that Heads of MDAs and CEOs of Government owned companies shall take personal responsibility and be subject to appropriate sanctions for any
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						failure to comply with this order.
5	18 th May, 2018	Immediate	<ul style="list-style-type: none"> • EXECUTIVE ORDER No. 2: - Promotion of local content in public procurement by the Federal Government. 	<ul style="list-style-type: none"> • To grant preference to local manufacturers of goods and service providers in their procurement of goods and services. 	<ul style="list-style-type: none"> • Section 5 (1) (b) CFRN 1999, as amended. • Public Procurement Act, 2007. 	<ul style="list-style-type: none"> • This Order consists of eight sections. It directs all MDAs at the Federal level to provide support for local content in public procurement and that any invitation for tenders shall specify the eligibility criteria for local manufacturers and the preference to be granted such manufacturers, in the procurement process. • The Order stipulates that the Heads of MDAs at federal level shall, within 90 days of the date of this order propose policies to ensure that the Federal Government's procurement of goods and services maximizes the use of goods manufactured in Nigeria and services provided

						<p>by Nigerian citizens doing business as sole proprietors, firms, or companies held wholly by them or in the majority.</p> <ul style="list-style-type: none"> • Under this Order, there are many provisions for Made-in-Nigeria products and services to be given preference, up to 40% in any procurement exercise to be carried out by federal MDAs. • This is in a bid to reduce over-reliance on foreign goods that are also produced locally and to encourage local production and entrepreneurship in Nigeria.
6	18 th May, 2017	Immediate	<ul style="list-style-type: none"> • EXECUTIVE ORDER NO.1 : - on the Promotion of Transparency and Efficiency in the Business Environment 	<ul style="list-style-type: none"> • To facilitate the ease of doing business in Nigeria through the promotion of transparency and efficiency in the business environment. 	<ul style="list-style-type: none"> • Section 5 (1) (b) CFRN, 1999 as amended. 	<ul style="list-style-type: none"> • The order provides for very sweeping innovations across board in MDAs mostly involved in revenue generation for the Government. More than 105

						<p>MDAs are affected by this order. Among them are the Corporate Affairs Commission and the Nigerian Immigration Service.</p> <ul style="list-style-type: none"> • Federal MDAs were ordered to publish a complete list of requirements including fees on their websites and to ensure that the list is verified and updated at all times in order to guide and ease application process for both local and foreign investors/businesses.
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It is evident from the table above, that Executive Order 6, whose first schedule targets the interim denial of access to assets of a total of one hundred and fifty five politically exposed persons, businessmen, top civil servants, individuals and private businesses or companies that were used to launder public funds illegally acquired, including by corrupt enrichment and abuse of office, pending the conclusion of their trials, is a big stick against corruption. The objectives of this order are in tandem with the renewed global and African Union regional campaign against corruption and the treaty obligations of Nigeria and 39 other African States that

have ratified the regional Convention on Preventing and Combating Corruption in Africa.¹⁶⁸

Available records have shown¹⁶⁹ that the aggregate value of the targeted assets allegedly stolen on which prosecution is being conducted, is 595,409n billion naira, exceeding the total amount of 500 billion naira appropriated for the Social Investment Programme and higher than the highest appropriation of 344 billion naira in the 2018 Budget for the Ministry of Works for the construction and rehabilitation of several roads across the country. This translates to about 57% of the monies recovered from the on-going high-profile corruption cases, to which the accused persons have unrestricted access before this order.

Despite the laudable objectives of this order, it is obvious that, unlike the previous five orders issued by the Buhari administration, there was a glaring omission to indicate its effective date of commencement, either specific future date or with immediate effect.¹⁷⁰

The table above reveals also that Executive Order 5 of 2018 which took effect immediately following its signing, makes specific directives which include:

All Ministries, Departments and Agencies (MDAs) of the government are to engage indigenous professionals in the planning, design and execution of national security projects, and to maximize domestic capacity in all contracts and transactions with science, engineering and technology components, consistent with the Public Procurement Act, 2007. Where qualifications and competence of Nigerians are either unavailable or unascertainable, the Ministry of Interior must ensure that any Expatriate Quota (EQ) for projects, contracts or programmes are granted in line with the provisions of the Immigration Act and other relevant laws and may create special immigration classifications to encourage foreign expatriates (particularly

¹⁶⁸ Adopted in Maputo, Mozambique on 11th July 2003, Entered into Force on 5th August 2006, having being signed by 49 out 55 AU Member States and verified by 40 Member States as at 30th May 2018. Nigeria ratified on 26 -09-2006 and signed earlier on 16-12-2003.

¹⁶⁹ Garba Shehu (2018): 'Executive Order 6: Buhari acquires a big stick against corruption,' in Daily Trust Newspaper, Abuja, Friday, July 6, 2018, at P. 51.

¹⁷⁰ Presidential Executive Order 6 dated 5th July, 2018- section 6 is silent and reads: "This Executive Order shall take effect on day of 2018." Which day?

from African Countries) to reside and work in Nigeria for the purpose of sharing knowledge with Nigerian Professionals.¹⁷¹

Undoubtedly, the laudable objectives of EO5 are to harness domestic talents and develop indigenous capacity in science and engineering for the promotion of technological innovation needed to drive national competitiveness, productivity and economic activities, which will ultimately enhance the achievement of the nation's development goals across all sectors of the economy. Executive Order 5 borrows essentially from the jurisprudential underpinning of the Nigerian Oil and Gas Industry content Development Act (the Local Content Act).¹⁷² But while the Local Content Act applies only to the oil and gas industry, EO5 covers all science, engineering, technology and innovation-based works and projects.¹⁷³

However, under order 5, companies that intend to employ foreign nationals on long-term assignments and require the grant of expatriate quotas will undergo additional rigorous scrutiny.¹⁷⁴

Such companies will be required to employ Nigerians to understudy their foreign experts to enable Nigerians acquire the requisite skills for the eventual takeover of the expatriate positions. Although this has always been the case, with the Executive Orders 5 having the force of law, there will be higher scrutiny regarding the implementation of this requirement.

It is noteworthy from the above table, that Order 4 on VAIDS,¹⁷⁵ was issued against the following alarming tax avoidance and evasion data:

According to the Federal Inland Revenue Service (FIRS),¹⁷⁶ the total number of tax payers in Nigeria stood at fourteen million, as at May 2017. Of this number, 96% have their taxes deducted at source from their salaries under the Pay as You Earn System (PAYE), while just 4% comply under the Direct Assessment System. That's only 214 Nigerians pay taxes of twenty million naira or more each year; and that

¹⁷¹ Section 8 of E.O. dated 2-2- 2018.

¹⁷² Of 2010; and Ibid, Section 1.

¹⁷³ Section 3 of E.O.5, op. cit.

¹⁷⁴ Ibid, Section 8-9.

¹⁷⁵ VAIDS-Voluntary Assets and Income Declaration Scheme – was signed on 29th June, 2017.

¹⁷⁶ Quoted in the Press release, Office of the Acting President, Yemi Osinbajo, dated 30th June, 2017: "How Tax-paying Nigerians can curb corruption, make governments Responsible." Speech Delivered at the Banquet Hall, State House, Abuja, on Thursday, June 29, 2017, at pp. 1-9.

those who pay over ten million naira each year were about seven hundred bringing their total to 914 persons.¹⁷⁷ This data is at variance with the structure of the Nigerian economy where there are about seventy million economically active Nigerians. This means that just 20% of people engaged in one form of business or the other are registered and paying taxes.¹⁷⁸ Hence placing Nigeria as the lowest performer in tax to GDP in the world.¹⁷⁹

The original VAIDS deadline of 31 March 2018 in the Order 4 was found to be less ambitious and counter-productive in achieving the core objectives of the Order. Based on the appeals by professional tax bodies and individual tax payers, as well as the conviction of the Federal Ministry of Finance that the overall objective to increase compliance rate will be attained and additional revenue will accrue, the President approved the extension of the deadline to June 30, 2018, for previous tax defaulters to regularize their tax positions under the scheme.¹⁸⁰

The Executive Order 4 scheme is beyond financial gain attraction but, rather its potential of expanding the tax net and in reducing the incidence of illicit financial flows, aggressive tax avoidance and outright tax evasion. By the end of the extended deadline,¹⁸¹ the FIRS reported, that the tax amnesty scheme provided under Order 4 since effective date of July 1st 2017, has had an impact in the following areas: promoting voluntary compliance that is unquantifiable. The outcome of the Scheme is the growth of the national tax payer database from under fourteen million people pre-2016 number to over nineteen million in June 2018. This is likely to translate into a positive growth in the country's tax revenue to GDP ratio for 2017/2018 official percentage.¹⁸²

The Scheme under Order 4, has also raked in about three hundred billion (300 billion) naira from previous tax defaulters- both individual and corporate entities. FIRS collected 90% of the amount, while the States collected the balance of 10%.¹⁸³

The table above further reveals the mischief that Executive Order 3 seeks to cure, but the Order fails to specifically mention what "appropriate disciplinary

¹⁷⁷ Ibid, at P. 4

¹⁷⁸ Ibid, P. 5

¹⁷⁹ Ibid

¹⁸⁰ Source: Daily Trust Newspaper, Abuja (2018): Business, Thursday, April 12, 2018 at P.17

¹⁸¹ June 30, 2018.

¹⁸² Ibid, Thursday, June 7, 2018, at P.17.

¹⁸³ Ibid, FIRS Chairman reported.

proceedings¹⁸⁴ mean with regards to the personal responsibility of the Heads of erring Ministries, Departments and Agencies. This should be corrected. In like manner, simply withholding the capital and recurrent expenditure of erring expenditure MDAs without more, but paying salaries and allowances of such MDAs is not enough to curb this menace and get our National Budget Cycle running for the national financial year. For effective realization of the objective of Order 3, a clear sanction of withholding and reducing pro-rata basis, the salaries of the relevant personnel in the MDAs who are involved in preparing budget estimates, for every additional day that exceeds the deadline given. This will not only enhance effectiveness in the performance of the stipulated duty, it will also prevent undue delays occasioned in the preparation of budget and its passage, in the long run.

As revealed by the table above, the provisions of Executive Order 2 on the promotion of local content in public procurement are highly commendable.¹⁸⁵ However, to address potential abuse and misuse of power, an independent implementation and monitoring committee comprising of persons of integrity and honesty drawn from outside the MDAs be established to vet and monitor the bidding and award process.

Finally, the above table highlighted the sweeping innovations¹⁸⁶ introduced by Executive Order one of 2017. In compliance, the Corporate Affairs Commission (CAC) has not only cancelled manual registration and incorporation, but updated its portal to ease the tedious procedures involved in the pre-incorporation and post-incorporation of companies and other business entities in Nigeria. In the published list, the relevant agency will state the stipulated time in getting an approval. The implication is a reduction in the arbitrary cost of getting these simple things done. In addition, the days of overcrowded queues at the CAC are over.¹⁸⁷

CONCLUSION AND RECOMMENDATIONS

¹⁸⁴ Executive Order 3, Sections 9 and 13.

¹⁸⁵ Paragraphs 2-8

¹⁸⁶ Such as Transparency in MDAs, Default approvals, One Government Directive, Entry Experience of Visitors and Travelers, Port Operations and Registration of Businesses, under Paragraphs 1-26 of the Order.

¹⁸⁷ Odusanmi, A.A. (2017): 'Appraisal of the Executive Orders issues by the Acting President', <https://countryhillattorneys.com.ng>.

It is evident from the above analysis, that presidential executive orders in both Nigeria and the USA are legitimate enforceable subsidiary legislative instruments and are valid administrative tools for enhancing good governance. Such orders, if made within the constitutional and statutory limits, do not necessarily derogate from principles of separation of powers and checks and balance.

The major pointers from review of executive orders in both Nigeria and USA are:

First, unlike in the USA, where landmark achievements have been recorded in both the historic and recent use of executive orders, there appears to be a lack of proper record of the frequency in the use; orderly and systematic collection, numbering, registration and publication of executive orders in Nigeria.¹⁸⁸

Second, is the absence of strategic implementation guidelines for each of the executive orders that will guarantee the progressive realization of the laudable objectives and innovative programmes, projects, schemes and mechanisms introduced by the orders.¹⁸⁹

Third, public participation and feedback is vital to the implementation of the executive orders. Hence the public should be properly enlightened on their role in exploring the remedial mechanisms contained in the respective orders whenever a specific timeline or duty imposed by the order is not met by an official of the MDA concerned or by the MDA itself.

Fourth, rather than lawmakers reactively summoning the executive to explain the legality of any order or call for its suspension,¹⁹⁰ it is rather more strategic for the National Assembly to explore the regular use of the power of legislative and judicial review of presidential executive orders in the context of the principles of separation of powers and checks and balances.

¹⁸⁸ This author, e.g., could not find the continued numbering of executive orders in Nigeria post the 2002 statutory instrument No. 9 signed by President Obasanjo. 15 years later, under Buhari Administration, fresh numbering of its executive orders commenced from numbers 1-6.

¹⁸⁹ For example, six months after the immediate coming into force of Order 5 of 2018, the guidelines for its full implementation, assigned to the Presidential Monitoring and Evaluation Council, is yet to be out. Quoted from the This Day, Friday, July 6, 2018, at P. 52.

¹⁹⁰ For example, on Wednesday, July 11, 2018, The "Senate Summons Malami over Buhari's Executive Orders;" and the same day, the House of Representatives passed a motion, "calling on President Buhari to suspend and discontinue the application of all executive orders, which the lawmakers said were replica of military decrees." Quoted from Daily Trust, Thursday, July 12, 2018, at P.3.

Fifth, are the lessons for Nigeria from the USA experience, namely:

- Ensuring orderliness and systematic numbering, registration and publication of presidential executive orders can be very tedious but necessary for ease of reference and appreciation of their use as valid enforceable legislative instruments and administrative tools for good governance;
- Sustained public education about the necessity for presidential lawmaking through executive orders will encourage effective monitoring by all stakeholders, of compliance with the orders, by the affected officials and their MDAs;
- Regular or periodic triggering of the powers of legislative and judicial review of presidential executive orders will enhance the practical application of the principles of checks and balances in the best interest of national development, democratic governance and prevent dictatorial tendencies or tyranny of the executive.
- There is a need for further research on the historic uses, frequency and impact of executive orders issued by executive presidents in Nigeria since 1979.
- Finally, the Office of the Attorney General of the Federation and Minister of Justice, should designate a Desk Officer in the Legal Drafting Department of the Federal Ministry of Justice, to commence the collation, collection, serial numbering, registration and publication of all executive orders in a designated Federal Register or Official Journal or Gazette for ease of reference by the public and periodic review by the Nigerian Law Reform Commission.
- The office of the Attorney-General of the Federation and the Law Reform Commission need to ensure public accessibility to regular publication and dissemination of executive orders to all relevant stakeholders, especially, the law and policy makers as well as the judiciary.