

EXECUTIVE ORDER AND THE DOCTRINE OF EXECUTIVE SUPREMACY: THE NIGERIAN EXPERIENCE

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ABSTRACT

Presidents in presidential democracies typically possess executive powers that allow them to exercise political leadership. The dynamics of Nigeria's history has imposed on it a succession of leaders who ruled in such a manner that sharply showed the supremacy of the executive. Doctrine of executive supremacy posits that the executive power is vested in a single person, that powers and duties of the executive branch dominate other organs, it places the President in a position in which he has the right in law and conscience, to do as he can, and which only his capacity will set the limit. This paper identifies the nature and definition of executive powers, the question of use, legality and forms of presidential powers. The paper also appraises the law on modifying and challenging presidential powers. Power theory was adopted to serve as a theoretical base for the article. The methodology adopted in arriving at the findings is doctrinal mainly relying on decided cases and existing literature on the subject or related subjects. Recommendations are made for transparency and accountability in the use of executive orders.

Keywords: Presidential powers, constitution, legislature, supremacy

Introduction

In democratic governance in Nigeria, the rule of law finds better expression in participatory democratic governance. The involvement of citizens not only in the choice of their leaders but also in the direction of governmental policies ensures the sustenance of the rule of law in our body polity. Federalism is a constitutional political system that creates separate executive, legislative, and judicial branches of government at the national and sub-national levels.

The 1999 Nigerian constitution makes the president the chief Executive and commander in chief of the armed forces, the constitution also vested all the Executive powers of the federation in the person of the president which can be exercised directly by him (Olamide, 2020).

The Doctrine of executive supremacy confirm that the executive power is vested in a single person, that powers and duties of the executive branch dominated other organs, it places the President in a position in which he has the right in law and conscience, to do as he can, and which only his capacity will set the limit. Presidents in presidential democracies typically possess, in addition to executive powers strictly defined, certain legislative initiative and agenda-setting powers that allow them to exercise political leadership, for example, enabling them to propose legislation and control the legislative agenda. However, the excessive concentration of powers in the presidency may result in a hyper-presidential regime, in which the president is subject to few effective constraints, undermining both democracy and good government (IDEA, 2021).

Proactive legislative powers allow presidents to unilaterally establish or attempt to establish a new status quo while reactive powers allow them to defend the status quo from any changes attempted by the legislature. Under the Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution), executive power is vested in the President. In carrying out his executive functions, the President may issue orders to agents and agencies of the executive branch. These orders may set out government policies, issue directives

or command action relating to functions of the executive arm. An order issued by the President becomes rather controversial when it purports to make law. This is because law-making is ordinarily within the remit of the legislature while the President is empowered to execute laws made by the legislature. Moreover, the 1999 Constitution does not set out to make the Presidency a law-making body working in competition against the Legislature (Okebukola, 2012).

In view of the dearth of academic commentary on Presidential executive powers in Nigeria, this paper gives a general appraisal of the subject; the paper identifies the nature and definition of presidential powers, it also considers the questions of use, legality and form of presidential powers.

Conceptualizing Executive Orders

The working definition of executive order is a command directly given by the president to an executive agency, class of persons or body under the executive arm of government. Such a command is in furtherance of government policy or Act of the Legislature. The executive 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 within the contemplation of section 37 of the Interpretation Act.

Furthermore, executive orders do not give room for the choice to obey or not. They are therefore not normally directed at individuals in situations where the individual can lawfully exercise a choice of refusal. Thus, an exercise of conferred power to appoint persons into Boards, Governing Councils etc does not amount to use of executive order. They may nonetheless be directed at a class of individuals, for example, a class designated under sections 7 and 18 Code of Conduct Bureau and Tribunal Act. This is not to say that an individual cannot be subject of an executive order. Such an individual would however be a member of a target group or class, for example, heroes under Nigeria National Heroes Register Act (Kana, 2012).

Moreover, executive orders as used in this article are limited to those issued by the President of the Federal Republic of Nigeria. Nevertheless, the generality of analyses and issues, for the most part, may be applicable to States of the Federation. It is therefore important to point out that there is a debate in the United States concerning the legal possibility of gubernatorial executive orders. This debate revolves around State Constitutions and is well beyond the scope of this paper. By the way, it suffices to note that the federating units of Nigeria do not have individual State Constitutions.

Methods

This article adopted the secondary type of data collection approach through which textbooks, journals, and other materials were consulted to review scholarly works on Presidential and Executive Order while using same to explain the scenario in the Nigerian context and how it affects Nigerian constitutional democracy.

Review of Related Literature

This paper utilizes thematic style of literature review whereby the author places the items base on the themes they occupied in the paper to enable the work provides adequate knowledge on the research topic.

Executive Orders and the Rule of Law

Before President Buhari came to power on May 2015, no civilian president issued an Executive Order (Amadi, 2018). Executive Orders as rules issued by the President that have legal effect, raises issues about the nature of Executive Orders. Executive Orders have the force of law. This raises problem for the rule of law in a polity. The rule of law, both from a constitutional law and administrative law conceptions, implies the separation of power. As Montesquieu rightly observed centuries ago, the only way to guarantee the liberty and freedom of the people is to ensure that power is not concentrated in one person or organ. If the entire power of government is concentrated in one person or organ, then, there is strong possibility of abuse and

tyranny. Recently, all constitutional democracies have settled on separation of power as a fundamental cornerstone of the rule of law. The Nigerian Constitution gives an elaborate expression to this fundamental idea by separating the legislative, executive and judicial powers and vesting each on three different organs whose personnel should not be comingled. Of course, this strict separation is moderated by checks and balances that allow different branches of government to support one another for effective administration (Olamide, 2020)

But fundamentally, the law-making function is clearly defined as the responsibility of the legislature. Section 58 of the Constitution states clearly the law-making process in Nigeria. It is the National Assembly that has the powers to make law. This power must be exercised by concurrent votes of both houses and signed by the President. Where this process is not strictly followed, the Supreme Court has held such exercise as unconstitutional. This was the case in Attorney General of Bendel State Vs. Attorney General of the Federation & Ors (1983) ANLR 208, where the Supreme Court nullified a purported passage of Appropriation Act by a committee of the National Assembly without a concurrent vote of two-third of members of both houses. If Executive Orders have the force of law, it means that Presidents make laws by issuing Executive Orders. This circumvents the clear processes of law-making in the constitution. It vests on Presidents, additional power that tilts the delicate balance in the power dynamics of a constitutional democracy, especially one with a written constitution. This is more important in a fledgling democracy like Nigeria (some will say, a pseudo-democracy) coming out of a period of imperial presidency of military dictators (Guardian, 2022).

Presidential Power and Constitutional Democracy

The foundation of democracy as a form of government is the limitation of power. Unlimited power is incompatible with democracy as a form of government. Democracy has not always been the preferred form of government in human history. All forms of undemocratic regimes have held sway in the world in the past. But today, democracy is the legitimate and pervasive form of government in the world. But democracy stands for the simple idea that those who control the reins of power are exercising a delegated authority. The divine rights of Kings are forever abolished. Every human authority is exercising a delegated authority. This is now the verdict of history, written with the death of millions and the turbulence of world affairs. The heart of the social contract is the limitation of the power exercised by the government. Although Thomas Hobbes justified the monarchy during the period of the civil unrest in England, he had to fall back on the inherent rights of the people in the state of nature to justify the absolute power of Leviathan. But John Locke offered the more authoritative and influential Social Contract theory. In his view, the people in a state of nature possessed full rights and power. In order to improve their enjoyment of life, liberty and property, they constitute government with clear mandate. And when the government becomes injurious to their welfare, they disband the government (Mezey, 2013).

This notion of limited power finds expression in the supremacy of the constitution in a constitutional democracy. So, whereas the President may style himself as ‘an elected kingship’ in the language of some scholars, he remains a powerful official clothed with limited power. It is important to understand the powerful nature of the office of the President of the Republic. Many previous American presidents have been attacked for aggrandizing so much power and acting as elected monarchs. Right from the founding of the US, there have been many such presidents, who have acted in the fashion of the English kings whose tyrannous manners inspired the American Revolution. A notable example was Truman, whose confiscation of private steel mills in defense of national security was nullified by the Supreme Court. Another example was Abraham Lincoln who, during the civil war, suspended the habeas corpus writ and answered critics with a riposte, whether it is better to lose the nation and yet preserve the constitution. Recent examples of Presidents who have been accused of acting imperially include George Bush Jr., who appropriated much power, even to order the extra-judicial execution of US citizens in the war against terrorism. But despite these aberrations,

the concept of presidential power under a constitutional democracy means that power of the president as ‘elected monarch’ is highly limited and the supremacy belongs to the constitution (Skach, 2011).

Executive Orders are products of the exercise of presidential power under the constitution. So, it is important to understand presidential power under the constitution to understand the legal dimensions of these orders. The 1999 Nigerian Constitution adopts the presidential system of government rather than the parliamentary system under the 1960 and 1963 Independence and Republican Constitutions. The 1999 Constitution is like the 1979 Constitution in this regard. Speaking about the design of the 1979 Constitution, Africa’s leading constitutional law scholar, Professor Ben Nwabueze, argues that it was the exigency of rapid economic development that suggested the need for a presidential system of government with an executive president rather than the parliamentary system with a ceremonial president. Economic development was a national imperative that “calls for effective leadership, a leadership that would be able to mobilize the nation and its resources; and to provide purposeful direction for its people.” Such a leadership requires the “organization of power around a single individual in the name of the president.”

Concentration of power in the president answers to the exigency of effective mobilization and management of natural and human resources. It also answers to the exigency of effective foreign representation. But in the design of this concentrated power, the designers of the Nigerian constitutional order followed the founding fathers of the US Republic by limiting the power of the single individual President such that he or she can do all the good he or she can and none of the evil he or she could. Like I have argued elsewhere, “the unifying of the executive power in one person does not mean that the executive president created under the 1979 Constitution parallels Her Majesty, the Queen as the British Monarch. For one, the Nigerian President does not embody the sovereignty as the British Monarch does. By the Constitution, the sovereignty belongs to the Nigerian people and the Constitution is supreme” (Bello, 2004). In practical terms, the 1999 Constitution follows the US Constitution in separating the executive power from the legislative and judicial powers. Section 5 of the Constitution vests the executive power of the Nigerian federation on the President personally. This is very significant, whereas the legislative power is vested in an institution, the National Assembly (Section 4). The judicial power is vested on the Superior Courts of Record (Section 6). The Executive Power is vested on the President, who may exercise it by himself or through his Vice President or any other official.

The Uses of Executive Orders

One of the hallmarks of the administrative state is the increase in the regulatory activities of the central or federal government. David (2009) posits that public administrators are central to contemporary government, and that the nation has decided on a course of attempting to solve its problems and achieve its aims through substantial reliance on administrative action. As the challenges of managing the national economy increases, the government resorts more frequently to the use of regulatory agencies that exercise wide range of powers over domestic affairs, even impacting on private economic interests.

The President can intervene through regulatory commissions duly created by the legislature. He can also intervene directly through executive orders or presidential proclamations. One good use of the executive order is to prioritize commitment of the executive branch of government. For example, when Barack Obama became President of the United States, he needed to signal the change of government from the high-handedness of the George Bush Jr’s war against terrorism by opening the government to greater transparency. This resulted in issuing his first executive order that mandated agencies to comply with requests for disclosure of information. This order puts the onus on the agency that wants to deny the request to justify the denial rather than on the person seeking disclosure of information. When Donald Trump became President, he issued an executive order on immigration to quickly deal with the grave challenge of immigration, which formed the heart of his presidential campaign (IDEA, 2015).

In Nigeria, there has been a crying need for exercise of presidential power through issuance of executive orders. Under former president Jonathan's government, many of such instances that required an executive order have been observed. There has always been a jurisdictional conflict between the Bureau for Public Enterprises (BPE) and the Infrastructure Concession and Regulatory Commission (ICRC) about responsibility for privatization tasks. This noticeable conflict required an executive order to streamline the focus of each of these statutory agencies. Attention of the authorities on this omission was called upon but no one issued an executive order to streamline responsibilities. This is one instance in which an executive order will boost the effective exercise of executive powers (Adeumobi, 2013).

Executive Orders (EOs) Signed by President Muhammadu Buhari from 2015 TO 2023

There are instances when the President exercises executive power on matters which the legislature has not expressly permitted or prohibited. Here are the rundown of all the 14 Executive Orders signed by President Buhari's administration from 2015 to 2023 as highlighted by Kabir (2023).

Executive Order (EO) Number: 1

While Buhari was on his record-breaking 103-day medical leave in London in 2017, his Vice President, Yemi Osinbajo, signed the administration's first four Executive Orders, while he was acting President. He signed the first three Executive Orders on May 18th 2017. The Executive Order (EO) Number 1 addressed the promotion of transparency and efficiency in the Nigerian business environment. It was designed to facilitate the ease of doing business in the country.

Executive Order (EO) Number: 2

This Executive Order mandated the timely submission of annual budgetary estimates by all government agencies.

Executive Order (EO) Number: 3

This Executive Order addressed support for local content in public procurement. All Ministries, Departments and Agencies (MDAs) of the government were directed to grant preference to local manufacturers of goods and service providers.

Executive Order (EO) Number: 4

This Executive Order addressed the Federal Government's Voluntary Assets and Income Declaration Scheme (VAIDS). The government offered tax amnesty to taxpayers who had not been fulfilling their tax obligations. Defaulters were asked to regularize their tax affairs before March 2018. This is the fourth and final Executive Order signed by Osinbajo, as Acting President on June 29th 2017.

Executive Order (EO) Number: 5

This Executive Order was Buhari's debut, signed on February 6th 2018. With Executive Order 5, Buhari ordered government agencies to give preference to Nigerian companies and firms over foreigners when awarding contracts. The order also stopped the Ministry of Interior from giving visas to foreign workers whose skills are readily available in Nigeria.

Executive Order (EO) Number: 6

This Executive Order addressed the preservation of suspicious assets connected with corruption. The order allowed the government to assume control of assets linked to ongoing criminal investigations and trials. Buhari signed the order on July 5th 2018.

Executive Order (EO) Number: 7

This Executive Order enabled private sector entities to construct and refurbish roads across Nigeria in exchange for tax benefits, from the government. Buhari signed the order on January 25th 2019.

Executive Order (EO) Number: 8

This Executive Order provided a 12-month period of grace for Nigerian taxpayers to voluntarily declare and pay tax on their offshore assets through the Voluntary Offshore Assets Regularisation Scheme (VOARS). In exchange, they wouldn't be prosecuted for tax offences and offences related to offshore assets.

Executive Order (EO) Number: 9

Buhari used this Executive Order to mandate that Nigeria must become open defecation-free by 2025. The Executive Order directed that all public places including schools, fuel stations, and places of worship, market places and hospitals must have accessible toilets within their premises. Buhari signed the order on November 20th 2019.

Executive Order (EO) Number: 10

With this Executive Order, Buhari directed the financial independence of the state legislature and judiciary whose purse strings are controlled by their Governors. The President signed the order on May 22nd 2020, but the Supreme Court nullified it on February 11th 2022. The Court ruled that the order violated the principles of the separation of powers set by the constitution.

Executive Order (EO) Number: 11

This Executive Order addressed the maintenance of national public buildings. Buhari directed all Ministries, Departments and Agencies of government (MDAs) to set up maintenance departments and make them functional to preserve government assets. Buhari signed the order on April 6th 2022.

Executive Order (EO) Number: 12

This Executive Order is on improving the performance management, coordination and implementation of the presidential priorities, targeted at institutionalizing a culture of accountability and transparency, in the pursuit of good governance, in Nigeria. It was signed on 18th October, 2022

Executive Order (EO) Number: 14

This Executive Order is on the establishment of a Presidential Transition Council (PTC) to facilitate and manage the 2023 transition programme. The Executive Order will ensure the facilitation and management of the Presidential Transitions and a key feature of this Executive Order is the institutionalization of a legal framework that would enable a seamless transition of power from one Presidential Administration to another which is part of President Buhari's legacy. It was signed on February, 9 2023.

It may interest many here to know that, since 1999, none of Nigeria's three presidents before Buhari ever signed an Executive Order, but, President Muhammad Buhari has so far signed 14 Executive Orders, since 2015.

Theoretical Framework of Analysis

Power theory was adopted to serve as a theoretical base for the study. The theory was developed from the popular writings of Max Weber (weber, 1922). The theory posits that power is the ability to exercise

one's will over others. The basic assumption of the theory is that power affects more than personal relations; it shapes larger dynamics like professional organizations and government. The charismatic type of legitimate authority is the ability on one's will to be carried out despite the resistance of others

Weber (1947) identified some categories of authority. The rational legal which is when people respect power due to the acceptance of certain rules of law. The people are willing to obey because they agree with the rationality of the set of laws. For example, they may be willing to accept the authoritative power of leader of a state since they owed allegiance to the State. Charismatic authority relates when people willingly obey an authoritative figure because they admire their qualities. For example, some political leaders inspire their followers to vote for them with charismatic authority, they become popular due to their respectable personalities. A person of power can exude several types of authority at once, this often furthers their power in seat of governance.

In this respect, executive orders are product of the exercise of presidential power under the constitution. Therefore, it is important to understand presidential power under the constitution to understand the legal dimension of these orders. Concentration of power in the president answers to the exigency of effective mobilization and management of natural and human resource of the country. The President is a Chief Executive of the Federation. He has responsibility to manage and administer the federal government. As the Chief Executive, the President hires and fires, and coordinates the national economy. As Commander-in-Chief, the President has responsibility to secure the federation and marshal the Armed Forces of the Federation to protect its territorial integrity. The President as Sole Organ represents the federation in foreign relations. Exercising the functions of this office, the President negotiates with foreign entities and signs treaties that create external obligations for the country.

Discussion

Executive order will be required to fill in the gaps in legislations creating executive agencies. Because of the interest bargaining implicit in law-making, oftentimes, law creating executive agencies leave gaps that militate against effectiveness of these agencies and their ability to meet legislative mandates. Executive orders help to fill the legislative gaps by authorizing procedures that enable agencies achieve legislative mandates better. A good instance of such executive order would be Executive Order 5, issued by the President (Muhammadu Buhari) relating chiefly to promotion of Nigerian content in public procurement of goods and services in which the Nigerian Electricity Regulatory Commission (NERC), presented a regulation on national content in the electricity industry. The Executive Order 5 now reinforces the local regulation in the electricity industry. This is an important function of executive orders. They help to align broad agency mandates with presidential priority.

Presidents exercise oversight over administrative agencies by use of executive orders. The President can issue executive order that mandates some form of review process before a regulatory intervention can be issued. The President can vary the internal review mechanisms for issuance of license and permits. All these orders redefine the landscape of regulatory action to achieve strategic policy objective of the government.

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

will best comply with fair hearing requirements. Finally, no matter the exigencies of public administration, the President should not exercise executive power to issue executive orders to fill gaps which does not exist or which the legislature has spoken by law on how it should be filled.

Conclusion and Recommendations

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

There is no doubt that the President has power to issue executive orders and the courts ought to approve these orders if they are challenged. But, where the subject of these executive orders relates to matters that are contrary to the express provisions of the law, usurp the legislative functions of another branch of government or violate the guaranteed rights of citizens, the court ought to strike down such exercise of executive power.

The challenge for the legal profession and the judiciary is to understand the constitutional, political and policy contexts of the exercise of executive power. If we don't understand how exercise of executive power undermines or fosters liberty, right and property of citizens, we will muddle the debate and injure society.

For the purposes of transparency, accountability, proper records and trans-government implementation, it is important for the Presidency to adapt the use of numbered orders. Interestingly, there was a period in the history of the United States that executive orders were not numbered. However, since Abraham Lincoln issued the first numbered executive order, subsequent Presidents have followed the tradition of numbering their orders. In addition, it is important to have executive orders published and collected in publicly available volumes. Given that not all orders are required by law to be published in the Federal Gazette, it is important for the Legislature to consider the enactment of an Act enabling and requiring the periodic collection and publication of all executive orders.

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