

## EXECUTIVE ORDERS IN NIGERIA AS VALID LEGISLATIVE INSTRUMENTS AND ADMINISTRATIVE TOOLS\*

### Abstract

*In carrying out the function of the office, the President in a presidential system such as Nigeria and the United States 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. Particularly, when Executive Orders are gazetted and made enforceable with the force of law. An order issued by the President becomes rather controversial when it purports to make law. This paper identifies the nature and definition of executive orders, the questions of use, legality and form of executive orders. The paper also appraises the law on modifying and challenging executive orders. It then ends with a conclusion that executive orders may be law-making in disguise and also serves as administrative tools. This dual nature demonstrates that in Nigeria, there is both separation and sharing of powers. Finally, recommendations are made for transparency and accountability in the use of executive orders. The methodology adopted in arriving at the findings is doctrinal mainly relying on decided cases and existing literature on the subject or related subjects.*

**Key words:** *Legislature, executive orders, constitution, administrative*

### 1. Introduction

Federalism is a “constitutional political system that creates separate executive, legislative, and judicial branches of government”<sup>1</sup> at the national and sub-national levels. The concept of separation of powers is at the fore in the interaction of these three branches of government. Under the Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution), federal legislative power is vested in the National Assembly (the Legislature), while executive power is vested in the President and the judiciary have the power to interpret laws. 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.<sup>2</sup> Moreover, the 1999 Constitution does not set out to make the Presidency a law-making body working in competition against the Legislature.<sup>3</sup> Some legal scholars therefore view executive orders as straddling presidential unilateralism and executive imperialism.<sup>4</sup> Indeed many “commentators see executive orders as subverting the vitality of the Constitution.”<sup>5</sup>

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<sup>1</sup> M A Cameron and T G Falleti 'Federalism and the Subnational Separation of Powers' (2005) 35 *Publius* 245-271 at 246.

<sup>2</sup> Cf. H C J Mansfield 'The Modern Doctrine of Executive Power' (1987) 17 *Presidential Studies Quarterly* 237-252 at 238 where it is noted that the power of the President to veto legislation is not executive in the sense that it is not implementing any law rather it is preventing the existence of a law.

<sup>3</sup> R Morton 'Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking under Executive Order 12,291' (1981) 80 *Michigan Law Review* 193-247 where it is observed that the framers of the Constitution of the USA did not intend the presidency to be an institutional competitor to the Congress.

<sup>4</sup> C S Kelley 'Executive Orders and the Modern Presidency: Legislating from the Oval Office by Adam L. Warber (Review)' (2007) 37 *Presidential Studies Quarterly* 169-170 at 169.

<sup>5</sup> J L Fleishman and A H Aufes 'Law and Orders: The Problem of Presidential Legislation' (1976) 40 *Law & Contemp. Probs.* at p. 5

In view of the dearth of academic commentary on Presidential executive orders in Nigeria, this paper gives a general appraisal of the subject. In this regard, the paper identifies the nature and definition of executive orders. Next, it considers the questions of use, legality and form of executive orders. Afterwards, it appraises the law on modifying and challenging executive orders. It then ends with a conclusion that executive orders may be law-making in disguise and also serves as administrative tools. This dual nature demonstrates that in Nigeria, there is both separation and sharing of powers. Finally, recommendations are made for transparency and accountability in the use of executive orders.

## 2. Definition and Nature of Executive Orders

The expression, executive order, is neither defined in the 1999 Constitution nor is it interpreted in any legislation of the National Assembly or House of Assembly of any State.<sup>6</sup> Indeed, the very few Acts of the Legislature that contain the expression ‘executive order’ do not define or interpret it.<sup>7</sup> The Interpretation Act also does not contain any definition of the expression.<sup>8</sup> It is therefore important to start this paper with a working definition of executive order. For this purpose, it is instructive to turn to the United States of America (USA) which has a long history of presidential use of executive orders.

Notwithstanding its age-old use in the USA, there has been no statutory or constitutional definition of executive orders. “The only statute on the subject, the Federal Register Act,<sup>9</sup> calls for the publication of all executive orders, but fails to define them.”<sup>10</sup> In addition to an absence of a statutory definition, none of the tens of thousands of executive orders that have been issued in the USA defines the terminology. Undeniably, several executive orders have provided instructions for the publication of orders and proclamations,<sup>11</sup> but none endeavours to give a definition.<sup>12</sup>

Interestingly, *Marbury v Madison* which is the first case in modern USA constitutional law resulted from an executive order.<sup>13</sup> Despite this early contact with the judiciary, there is no express judicial definition of executive orders. In situations like this where there is no executive, legislative or judicial definition, the enquirer has to turn to the academia for an unofficial but weighty clarification. Although executive orders have received much popular and scholarly attention<sup>14</sup> in the USA, they have till now received no scholarly attention at all in Nigeria. The American author, Mayer, defines an executive order as “a presidential directive that requires or authorizes some action within the executive branch.”<sup>15</sup> To Raven-Hansen, “executive orders are presidential policy directives to the federal bureaucracy.”<sup>16</sup> Despite the

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<sup>6</sup> In this paper, “Acts of the Legislature” refer to laws either made by the National Assembly or deemed to be existing law under section ... of the 1999 Constitution. “Laws of the Legislature” refers to laws made by a State House of Assembly.

<sup>7</sup> See for example Section 5, Appropriation Act No 4 2006 and Section 5 Appropriation Act No 3 2007 which expressly mentions “Executive Order”, but do not contain any interpretation or explanatory provisions as to the meaning of the word.

<sup>8</sup> Interpretation Act CAP I23 LFN 2004.

<sup>9</sup> Federal Register Act of 1935, 49 Stat. 501 (1935), 44 U.S.C. 1505 (1970).

<sup>10</sup> Fleishman and Aufes op.cit. at p. 6.

<sup>11</sup> See for example Exec. Order No. 11030, 3 C.F.R. 610 (1959-1963 compilation).

<sup>12</sup> Fleishman and Aufes op.cit. at p. 6.

<sup>13</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>14</sup> Fleishman and Aufes op.cit. at p. 6.

<sup>15</sup> K R Mayer 'Executive Orders and Presidential Power' (1999) 61 *The Journal of Politics* 445-466, at p. 445.

<sup>16</sup> P Raven-Hansen 'Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291' (1983) 1983 *Duke Law Journal* 285-353 at 286.

scholarly attention in the USA, they also do not have a precise definition of executive orders.<sup>17</sup> The first definition above is assailable by the observation that not all presidential directives are executive orders. For instance, a directive terminating an individual's employment is not strictly a matter of constitutional law. Such a directive would not amount to an executive order.<sup>18</sup> The second definition can also be challenged with the remark that policy sometimes dictate directives," therefore not all executive orders are presidential policy.

For the purpose of deriving a working definition, this paper will conflate the abovementioned positions of Mayer and Raven-Hansen. The conflation is done in the foreground of the observation that numerous Acts of the Legislature, some of which are analysed later in this paper, contain provisions empowering the President of the Federal Republic of Nigeria to make legally binding orders. In this sense, 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.<sup>19</sup>

Characteristically, 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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

On the whole, executive orders treated in this paper are limited to those issued by the President. Nevertheless, the generality of issues and analyses, for the most part, may be applicable to States of the Federation. It is relevant to point out that there is a debate in the USA concerning the legal possibility of gubernatorial executive orders.<sup>23</sup> 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. Although it goes beyond the scope of this paper to examine proclamations, it may be noted by the way that "executive

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<sup>17</sup> Fleishman and Aufes op.cit. at p. 6.

<sup>18</sup> An example of such power to terminate employment is contained in section 2(4) of the Agriculture and Rural Management Training Institute Act CAP A10 LFN 2004. See also section 5(2), Citizenship and Leadership Training Centre Act CAP C12 LFN 2004.

<sup>19</sup> Interpretation Act CAP I23 LFN 2004.

<sup>20</sup> See for example section 2(1) Agricultural Research Council of Nigeria Act CAP A12 LFN 2004; section 2(1)(a) Community Health Practitioners Registration Board Act CAP C19 LFN 2004; section 2(a) Companies and Allied Matters Act, CAP C20 LFN 2004.

<sup>21</sup> This section of the Code of Conduct Bureau and Tribunal Act CAP C15 LFN 2004 is directed at public officers. Similar legislation include sections 4, 5, 6 Customs Duties (Dumping and Subsidised Goods) Act CAP C48 LFN 2004 (directed at importers) and section 53(2) Police Act CAP P19 LFN 2004 (directed at class of persons to be determined by the President).

<sup>22</sup> Section 6(3) Nigeria National Heroes Register Act, CAP N121 LFN 2004.

<sup>23</sup> See for example E L Bernick and C W Wiggins 'The Governor's Executive Order: An Unknown Power' (1984) 16 *State & Local Government Review* 3-10.

orders are aimed at those inside government while proclamations are aimed at those outside government.”<sup>24</sup>

### 3 Legality, Use and Form of Executive Orders

Scholars have observed that the expression of presidential authority through the use of executive orders necessarily occurs in a political and institutional context.<sup>25</sup> Thus, in framing and issuing executive orders, the President considers the reaction of opponents, its implementability and costs or benefits of relying on alternative tools of command such as legislation or court orders.<sup>26</sup> Notwithstanding the political and policy issues the President takes into consideration, “executive orders have legal force only when they are based on the President’s constitutional or statutory authority.”<sup>27</sup> They are valid only where Presidents act “within the boundaries of their constitutional or statutory authority.”<sup>28</sup>

Functionally, the enabling legislative or constitutional authority may empower the President to use executive orders to perform strictly defined roles. For example, pursuant to section 2(2) Advisory Council on Religious Affairs Act,<sup>29</sup> the President may vary, increase or reduce the membership of the Council by an order published in the Federal Gazette. The power conferred on the President by this Act is strictly spelled out. As discussed later in this paper, where the enabling law sets limits to the President’s powers, any executive order outside the express instructions of the Legislature will be adjudged invalid. Where the Legislature stipulates that the President may issue a specific order, then it is left to the absolute discretion of the President to issue the order or not. However, there are instances where the Legislature makes it mandatory for the President to make an order.<sup>30</sup> In this event, the President must make the order as required by law.

Alternatively, the Legislature or Constitution may confer wide discretionary power on the President to issue orders in certain matters. This is amply demonstrated by the 1999 Constitution which allows the President and other appropriate authorities to “make such modifications in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of this Constitution.”<sup>31</sup> In essence, the President is granted the discretion to first determine that some aspects of an Act that predates the 1999 Constitution are inconsistent with the Constitution.<sup>32</sup> Thereafter, he has further discretion to amend the text of the law in such a manner that will align the Act with the Constitution.<sup>33</sup> In *A.-G. Abia v A.-G., Federation*,<sup>34</sup> the Supreme Court stated that the two tests

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<sup>24</sup> R Brandon and M Jason ‘The Power of Decree: Presidential Use of Executive Proclamations, 1977-2005’ (2007) 60 *Political Research Quarterly* 338-343 at 339.

<sup>25</sup> G King and L Ragsdale, *The Elusive Executive: Discovering Statistical Patterns in the Presidency* (Washington, DC: Congressional Quarterly Press, 1988) pp. 121-124.

<sup>26</sup> Mayer op. cit. at p. 448.

<sup>27</sup> Ibid at p. 448.

<sup>28</sup> Ibid at p. 445.

<sup>29</sup> Advisory Council on Religious Affairs Act CAP A8 LFN 2004.

<sup>30</sup> For example, see section 5(2) of the International Financial Organisation Act CAP I21 LFGN 2004.

<sup>31</sup> Section 315(2) of the 1999 Constitution. In addition to the President, the other appropriate authorities are the Governor of a State and any person appointed by any law to revise or rewrite the laws of the Federation or of a State.

<sup>32</sup> Act in this sense include unrepealed military era decrees. See section 315(1)(a) 1999 Constitution.

<sup>33</sup> Apart from this provision of the Constitution, there are several other Acts that permit modification by the executive. For example, section 1(5) Armed Forces Act CAP A20 LFN 2004, section 134 (3) Customs and Excise Management Act; section 33 Firearms Act CAP F28 LFN 2004; section 44(2) NDLEA Act CAP N30 LFN 2004; section 44 Ahmadu Bello University (Transitional Provisions) Act CAP A14 LFN 2004.

<sup>34</sup> *A.-G., Abia v A.-G., Federation* [2003] 4 NWLR (PT 809) p. 124 at 177 para. F.

for determining constitutionality of modification to an existing law are: whether the modification order brings the relevant Act into conformity with the provisions of the Constitution; and whether there has been an infraction of the Constitution by the order.<sup>35</sup>

In addition to the power to modify, the President may be granted the discretion to use executive orders to implement or set out the extent and scope of an Act.<sup>36</sup> In exercising the discretionary power conferred by an enabling legislation, the principles of law relevant to the exercise of discretion become applicable. In this sense, the executive order must be fair, just and made in good faith. In *Owoyemi v Adekoya*,<sup>37</sup> the Supreme Court had to consider the validity of the action of the Governor of Ogun State who ordered the setting aside of the selection done by Kingmakers on the ground that it was in the interest of peace to set aside the selection. The Governor acted pursuant to section 20(3) of the Chiefs Law, Cap 20 Laws of Ogun State which empowered the executive council approve or set aside the appointment of a chief "... if it is satisfied that it is in the interest of peace, order and good government to do so." The Governor had been informed that some qualified candidates had been unlawfully excluded from the selection exercise. It turned out that the Governor had been misinformed about the purported exclusion of candidates in the selection process. The Supreme Court held that although the Governor had the discretion to order the setting aside of the selection of the Chief, "it must be recognised that an exercise of discretion based on misinformation or suppression of facts cannot be considered a proper or just exercise."<sup>38</sup>

The question now arises as to whether executive orders can be issued pursuant to inherent powers other than those expressly conferred by the Constitution or the Legislature. In viewing this question, it is instructive that the President does not have the British style Crown Prerogative. Indeed, Nigeria's presidential federal system is akin to that of the USA and "the very idea of Crown Prerogative was anathema to the American people after the Revolutionary War."<sup>39</sup> On the one hand, it would seem that the President can only issue executive orders where expressly empowered to do so by the Legislature or the Constitution.

On the other hand, it is generally accepted in law that person(s) conferred with a function or duty may also take steps that are incidental to or consequential upon the performance of such a function. This is more particularly so when the function or duty is imposed by International Law. A striking example is the duty imposed on the President under the command responsibility provisions of the Rome Statute of the International Criminal Court (ICC Statute).<sup>40</sup> As Commander-in-Chief, the ICC Statute requires him to ensure that members of armed forces who are alleged to have committed breaches of International Criminal Law are investigated and tried if the investigations reveal a *prima facie* case.<sup>41</sup>

Basically, the concept is that an organised and disciplined armed force does not engage in uncontrolled violence.<sup>42</sup> Therefore, if the President does not fulfil this duty to ensure

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<sup>35</sup> Ibid p. 220 paras. B-C.

<sup>36</sup> For example, section 1(1) and (2) Visiting Forces Act CAP V4 LFN 2004; section 1(3) Transfer of Convicted Offenders (Enactment and Enforcement) Act T16 LFN 2004.

<sup>37</sup> *Owoyemi v Adekoya* [2003] 18 NWLR (Pt 852) p 307 at p 336 paras D-H.

<sup>38</sup> Ibid at p. 336, para. G.

<sup>39</sup> R M Pious 'Inherent War and Executive Powers and Prerogative Politics' (2007) 37 *Presidential Studies Quarterly* at 67.

<sup>40</sup> Available at <http://www.icc-cpi.int>. (7/7/12)

<sup>41</sup> Article 28, Rome Statute of the International Criminal Court.

<sup>42</sup> *Re Aird and Others; Ex Parte Alpert* (2004), 220 CLR 308 at 323 where J. McHugh stated that "it is central to a disciplined defence force that its members are not persons who engage in uncontrolled violence."

investigation or trial, he is deemed to “have conceived of, planned, ordered, instigated, encouraged or tolerated the commission of these crimes.”<sup>43</sup> It is presumed that everyone in the armed forces and everything they do is under the President’s control. To fulfil this investigatory and prosecutorial duty, it is not enough for the President to issue or order Rules of Engagement. Rather, s/he must go ahead to ensure that alleged violators face investigation or trial as aforesaid.<sup>44</sup> However, since the President himself is not on the field, it would suffice, as a formal step, if s/he issues an executive order to the operational heads of the armed forces directing that violations are unacceptable and demanding prompt investigation or trial of alleged violators. In such an event, the President would have issued an executive order which is not expressly provided for in an Act of the Legislature or the Constitution but is consequential upon duties imposed by International Law including the domesticated Geneva Conventions Act.<sup>45</sup>

The form executive orders take is sometimes dictated by the enabling law. The Legislature may require that a required order must be published in the Federal Gazette.<sup>46</sup> Where the Legislature stipulates the manner in which an order is to be carried out the President cannot deviate from the stipulated form. However, where there is no such stipulation, the order may take any reasonable form.<sup>47</sup> In the case of *Abubakar v AGF*,<sup>48</sup> the Supreme Court relied on and quoted with approval its earlier decision in *Co-operative Commerce Bank Nig Ltd v Anambra State* where it was held that “it is the law that where a statute provides for a particular method of performing a duty ... that method, and no other must have to be adopted”<sup>49</sup>

#### **4 Modifying and Challenging Executive Orders**

Alongside the executive order, the President may use other tools, for example, presidential memoranda,<sup>50</sup> to communicate his command and instructions to the bodies and agencies of the executive arm of government. Unlike Acts of the Legislature which cannot be modified save by legislative amendment,<sup>51</sup> extra-order tools including memoranda and even public press releases may be used to clarify or modify executive orders where there is no requirement for the executive order to be in any particular form. This flexibility is demonstrated by the USA example of Executive Order 12807 which was modified by press release.<sup>52</sup> Executive Order 12807 was issued in May 1992 by President Bush. It sought to make the Coast Guard return Haitian immigrants trying to enter the USA. The text of the order did not mention Haitian refugees. The Supreme Court found that “although the Executive Order itself does not mention

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<sup>43</sup> B I Bonafe 'Finding a Proper Role for Command Responsibility' (2007) 5 *J Int Criminal Justice* 599-618 at 600.

<sup>44</sup> See generally K Ambos 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 *J Int Criminal Justice* 159-183.

<sup>45</sup> Section 4 Geneva Conventions Act CAP G3 LFN 2004.

<sup>46</sup> See for example section 24 Commodity Boards Act CAP C 17 LFN 2004; section 13(3) Customs Excise Tariff Etc (Consolidation) Act CAP C49 LFN 2004; section 2(2) Federal Capital Territory Act CAP F6 LFN 2004; section 3(2) Federal Government Staff Housing Board CAP F11 LFN 2004; Marriage Act CAP M6 LFB 2004; section 5 Mutual Assistance in Criminal Matters Within the Commonwealth (Enactment and Enforcement) Act CAP M24 LFN 2004.

<sup>47</sup> For example, section 11(4) 20(2) Company Income Tax Act CAP C21 LFN 2004; sections 12(1), 24, 42(2), 48, 66 Customs and Excise Management Act Cap C45 LFN 2004.

<sup>48</sup> *Abubakar v AGF* [2007] 3 NWLR (Pt1022) p. 601 at 643 H.

<sup>49</sup> *Co-operative Commerce Bank Nig. Ltd v Anambra State* (1992) 8 NWLR (Pt 261) 528, 556.

<sup>50</sup> V Gordon "'The Law': Unilaterally Shaping U.S. National Security Policy: The Role of National Security Directives' (2007) 37 *Presidential Studies Quarterly* 349-367 at 366.

<sup>51</sup> It may be noted that some provisions of an Act may be adjudged invalid by the judiciary without nullifying the entire Act. This is a form of judicial modification of the Act.

<sup>52</sup> P J Cooper "'The Law': Presidential Memoranda and Executive Orders: Of Patchwork Quilts, Trump Cards, and Shell Games' (2001) 31 *Presidential Studies Quarterly* 126-141 at 139.

Haiti, the press release issued contemporaneously explained: 'President Bush has issued an executive order which will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti,'<sup>53</sup> thereby, the Court acknowledged the press release as clarifying the order.<sup>54</sup>

As demonstrated in the USA by Executive Order 9066, it is possible for these orders to have far reaching effects. Executive Order 9066 was signed by President Franklin Roosevelt on February 19, 1942. It authorized the secretary of war to "designate military areas from which any or all persons may be excluded."<sup>55</sup> This allowed the removal of both citizens and aliens of Japanese descent.<sup>56</sup> In 1982, the U.S. Commission on Wartime Relocation and Internment of Civilians found that the relocation authorized by Executive Order 9066 was "not justified by military necessity" and recommended that redress payments be made to all Japanese Americans who had been relocated.<sup>57</sup> Following the Commission's findings and a federal court decision invalidating convictions of Japanese Americans who refused to be relocated, Congress in 1988 ordered that compensation be made to Japanese Americans who had been wrongfully removed.<sup>58</sup>

Usually, the courts are the main source of redress against an executive order which is perceived to be unlawful. Both private citizens and the Legislature can approach the courts to challenge executive orders. The courts will however not lightly invalidate executive orders and the legislature cannot impose a general prohibition on the use of executive orders. As noted by the Supreme Court in *AGF v Abubakar*,<sup>59</sup> the principle of separation of powers has the effect that the legislative organ cannot take away from the President or confer on others functions of a strictly executive nature.

One of the most important cases on Presidential executive orders is that of *A.-G., Abia v A.-G., Federation*.<sup>60</sup> In that case the Supreme Court considered the validity of the promulgation of the Revenue Allocation (Federal Account, Etc) (Modification) Order (Statutory Instrument No. 9 of 2002) and held that the President acted pursuant to section 315 of the 1999 Constitution. Thus, the promulgated order was held to be consistent with the Constitution and therefore valid. The order in issue came into force retrospectively with effect from 29<sup>th</sup> May, 1999.

Traditionally, the courts allow presidents wide latitude in the use of executive orders and cannot act for the President.<sup>61</sup> In *Ohaji v Umamka*,<sup>62</sup> the Court quoted with approval *Ajakaiye v Idehai* where the SC 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

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<sup>53</sup> Salev. Haitian Centers Council, 509 U.S. 155,164 ([1993].

<sup>54</sup> Cooper , op.cit. at 139.

<sup>55</sup> R D Scherini 'Executive Order 9066 and Italian Americans: The San Francisco Story' (1991) 70 *California History* 366-377 at 367.

<sup>56</sup> Ibid at 367.

<sup>57</sup> Ibid at 367.

<sup>58</sup> Ibid at 367.

<sup>59</sup> *AGF v Abubakar* [2007] 10 NWLR (Pt 1041) p. 1 at 85 para. D.

<sup>60</sup> *A.-G., Abia v A.-G., Federation*, note 34 above.

<sup>61</sup> See for example, G A Schubert, *The Presidency in the Courts* (Minneapolis: University of Minnesota Press, 1957) where it is observed that for the 167 year period between 1789 and 1956, state and federal courts overturned only 16 executive orders.

<sup>62</sup> In *Ohaji v Umamka* [2011] 4 NWLR (Pt 1236) p. 148 at 164 para. C.

or otherwise of that order ... but the court has not got the jurisdiction to take over the functions ... by making its own order".<sup>63</sup>

The courts, however, do not hesitate to invalidate unlawful or unconstitutional executive orders. As pointed out by the Supreme Court in *INEC v Musa*, "all powers, legislative, executive and judicial must ultimately be traced to the Constitution."<sup>64</sup> In *Youngstown Sheet and Tube v Sawyer*,<sup>65</sup> a notorious American case of judicial supervision of executive orders,<sup>66</sup> the court overturned President Truman's seizure of the nation's steel mills. In *Chamber of Commerce v. Reich*,<sup>67</sup> the federal courts overturned a 1995 executive order issued by President Clinton which barred federal contractors from hiring permanent replacements for striking workers.

Similarly, the Legislature does not frequently challenge executive orders. In the USA for example, "between 1973 and 1997, Congress challenged only 36 of more than 1,000 executive orders issued."<sup>68</sup> And only two of these 36 challenges led to overturning the President's executive order.<sup>69</sup>

Notwithstanding the reluctance of the other arms of government to interfere, executives are one of the main causes of tension between the branches of government.<sup>70</sup> Tension may arise where the legislative arm alleges that an executive order is inconsistent with an existing act of the national assembly.<sup>71</sup> Ordinarily, such an inconsistent order will be adjudged void to the extent of the inconsistency. Invalidity of such an order is however not so clear-cut where the President claims to be acting pursuant to the Constitution and that the Act in issue "has sought to limit the [constitutional] provision invoked as authority."<sup>72</sup> In such case, the President bears the onus of proving "either that the statute does not cover the order or, if it does, that it is unconstitutional."<sup>73</sup>

There are situations where an executive order will be manifestly invalid. For example, one that demands the commission of a crime will be illegal and criminal sanctions may attach to the President after the end of the term of presidency. Apart from illegal orders, any that brazenly seeks to countermand an Act of the Legislature will be adjudged invalid. Thus, if the President of the Federal Republic passes an order similar to President George Bush's Executive Order 13,233, such an order will be contrary to the Freedom of Information Act 2011 and will be adjudged invalid by the Judiciary. The aforesaid Executive Order 13,233 "allows a current or former president to block public access to the federal records created during his administration."<sup>74</sup>

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<sup>63</sup> *Ajakaiye v Idehai* (1994) 8 NWLR (Pt. 364) 504 at 525-526.

<sup>64</sup> *INEC v Musa* [2003] 3 NWLR (Pt 806) p 72 at 157 para E

<sup>65</sup> *Youngstown Sheet and Tube v Sawyer* (343 U.S. 579, 1951)

<sup>66</sup> Mayer op.cit. at 448

<sup>67</sup> *Chamber of Commerce v. Reich* (74 F 3d 1322, 1996).

<sup>68</sup> G A Krause and J E Cohen 'Opportunity, Constraints, and the Development of the Institutional Presidency: The Issuance of Executive Orders, 1939-96' (2000) 62 *The Journal of Politics* 88-114 at 95.

<sup>69</sup> *Ibid* at 95.

<sup>70</sup> Fleishman and Aufes op.cit. at p. 6.

<sup>71</sup> G L Bliley 'Government by Executive Order' (1934) 82 *University of Pennsylvania Law Review and American Law Register* 739-747 at 741.

<sup>72</sup> *Ibid*

<sup>73</sup> *Ibid*

<sup>74</sup> M L Karin 'Out of Sight, but Not out of Mind: How Executive Order 13,233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records' (2002) 55 *Stanford Law Review* 529-570 at 530.



The courts may, however, not rule in favour of the Legislature where the contention is one of foreign policy and not of law. In 1793, President George Washington issued an executive order to declare American neutrality in the war between France and England. “Washington's use of an executive order was a strategic choice, as he believed that Congress was unlikely to embrace his position.”<sup>75</sup> Since foreign policy is squarely within the remit of the President the courts will be unlikely to interfere unless the Presidential order contains elements that contravene statutory or constitutional provisions.

In principle, sovereignty in Nigeria’s constitutional democracy resides in the people. As noted in *Fawehinmi v Babangida*,<sup>76</sup> the supremacy of the constitution is the hallmark of constitutional democratic governance because it is a reflection of the powers granted by the people to meet their aspirations. In *Buhari v Obasanjo*,<sup>77</sup> the Court stated that the Constitution is a general statement of how Nigerians wish to be governed. Thus, where an executive order will affect the rights of citizens, the order will be invalid if unconstitutional, whimsical or capricious.<sup>78</sup> Despite the idea that sovereignty lies in the people, a citizen in his private capacity can seek judicial review of an executive order only if s/he has the requisite standing to maintain the action. It would seem from *Adesanya v The President*<sup>79</sup> that citizens, residents and persons subject to Nigerian law may challenge executive orders. In that case, the Supreme Court per Fatai-Williams CJN held that “any person whether he is a citizen of Nigeria or not who is resident in Nigeria or who is subject to the law in force in Nigeria has an obligation to see to it that he is governed by a law which is consistent with the provisions of the Nigerian Constitution. Indeed, it is his civil right to see that this is so.”<sup>80</sup> In practice, however, the litigant has to demonstrate how s/he is directly affected by the executive order. In *SPDCN v Nwaka*, the Supreme Court noted that whether or not there is standing may differ where there is an infringement of individual right and where there is none.<sup>81</sup>

The President does not have to wait for judicial intervention before correcting an erroneous order. An executive order may be terminated or suspended by the President that makes it or overturned by subsequent Presidents. For example, upon assumption of office in 2001, George W Bush overturned several key Clinton-era orders.<sup>82</sup> The President cannot defend an unconstitutional order on the ground that it was made and followed before s/he came to office. In *AG Abia v AGF*, the Supreme Court stated that estoppel is an equitable defence and cannot avail a defendant in a case of breach of the Constitution.<sup>83</sup>

## 5. Conclusion

The 1999 Constitution does not set out to make the Presidency a law-making body working in competition with the Legislature.<sup>84</sup> Indeed, the Constitution clearly vests the legislative powers of the Federal Republic of Nigeria in the National Assembly. The Constitution further vests the

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<sup>75</sup> C J Deering and F Maltzman 'The Politics of Executive Orders: Legislative Constraints on Presidential Power' (1999) 52 *Political Research Quarterly* 767-783 at 767.

<sup>76</sup> *Fawehinmi v Babangida* [2003] 3 NWLR (PT 808) p. 604 at 651 paras. F-G.

<sup>77</sup> *Buhari v Obasanjo* [2003] 17 NWLR (Pt 850) p. 587 at 635 para G.

<sup>78</sup> *Hart v Military Governor of Rivers Tate* (1976) 11 SC 211 at 240.

<sup>79</sup> *Adesanya v The President* (1981) 12 NSCC 146, 159-160.

<sup>80</sup> *Ibid.*

<sup>81</sup> *SPDCN v Nwaka* [2003] 6 NWLR (pt 815) p. 184 at 205 to 207 particularly at 206 para. D.

<sup>82</sup> K R Mayer and K Price 'Unilateral Presidential Powers: Significant Executive Orders, 1949-99' (2002) 32 *Presidential Studies Quarterly* 367-386 at 369.

<sup>83</sup> *AG Abia v AGF* [2006] 16 NWLR (Pt 1005) p. 265 at 379 para. D.

<sup>84</sup> For an American perspective see, Morton *op.cit.* where it is observed that the framers of the Constitution of the USA did not intend the presidency to be an institutional competitor to the Congress.

executive powers in the President. This demarcation of powers reflects the traditional idea that each arm of government is separate and co-equal.

Where executive orders create rules, modify Acts or set out the parameters for their implementation, the President carries out manifestly legislative functions. This is perfectly legitimate as long as any executive order in issue is consistent with its enabling constitutional or statutory authority. In addition to their law-making properties, executive orders can also serve as administrative tools where the enabling authority so requires. In essence, executive orders being legislative instruments and administrative tools demonstrate that separation of powers does not mean that the powers may not be shared.<sup>85</sup> There can be harmonious application of the idea of shared powers and the doctrine of separated powers as long as no arm of government usurps powers not given to it or abdicates its functions.<sup>86</sup> Thus, in issuing executive orders, the President should act as an agent under the authority of the law and constitution rather than as a principal of the people.

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 USA that executive orders were not numbered. However, since Abraham Lincoln issued the first numbered executive order,<sup>87</sup> 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.<sup>88</sup> 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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<sup>85</sup> Fleishman and Aufes op.cit. at p. 2.

<sup>86</sup> Ibid at p. 6.

<sup>87</sup> Deering and Maltzman op.cit. at 767.

<sup>88</sup> This has been the case in the USA, since the enactment of the Federal Register Act, see note 9 above.