

The Role of Law in Check-Mating Executive Lawlessness in Nigeria from 1999 – 2014

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Abstract

The existence of a virile democracy in any given polity is largely dependent on a well organised governmental structures anchored on the spirit of constitutionalism and Rule of Law. Nigeria's democratic experience over the years has not in any way been close to these ideals. Consequently, what had pervaded the polity on all grounds has been lawlessness. This paper addresses executive lawlessness and the role of law in curbing this ugly development in Nigeria, against the backdrop that executive lawlessness is one of the major problems confronting the Nigeria State as it inhibits the smooth functioning of the law and ultimately hindering sustainable development; and concludes that with every arm of government imbibing the culture of constitutionalism, complemented with a vibrant judiciary completely insulated from politics, with profound autonomy on all ground, the Nigeria State will be properly repositioned to take its rightful place in the comity of nations.

I. INTRODUCTION

The year 1999 opened a new chapter in Nigeria's quest for democracy. By virtue of the provisions of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree¹ 1999, the then Provisional Ruling Council (PRC) formally handed over power to duly elected civilian government from May 29, 1999.² From that date, May 29 of every year has been celebrated as Nigeria's "Democracy Day" and observed as public holiday. The Constitution of the Federal Republic of Nigeria, 1999 (as amended) ("1999 Constitution" or "Constitution") laid the basis for a democratic dispensation; though it is not a perfect document, just like all things created by mortals. The executive branch of government is one of the arms established by the Constitution.³ Our work, which seeks to examine the Role of Law in Check-mating Executive Lawlessness, is based on the prepositions that:

- i. there is an executive branch of government under our democratic dispensation;
- ii. the said executive branch of government has some constitutional functions and duties to perform under our democratic dispensation;
- iii. in the process of performing those functions, there may be situations when the executive branch of government oversteps its bounds and carries out- in the lawyers language- ultra-vires actions, knowingly or unknowingly; which amount to executive lawlessness;
- iv. the law will then be called upon to check the ultra-vires or lawless acts of the executive branch; and
- v. in that unique role, law itself becomes not only the regulator of executive actions, but also an instrument for intelligent social engineering for good governance.

Having dealt with the preliminary remarks and introduction in the first segment of this work, the immediate part considers the meaning and context of Executive Lawlessness. The third part of the paper discusses the Doctrine of Separation of Powers in a nutshell, taking into account the provisions of the 1999 Constitution dealing with the doctrine. A brief discourse of law as an instrument for social engineering will be considered in part four of this paper. The Role of Law in Check-mating Executive Lawlessness for Good Governance and some specific examples of acts culminating to executive lawlessness in Nigeria, which form the crux of this paper have been discussed in part five. The paper suggests that executive lawlessness can adequately be checked or put off, if various arms of government genuinely imbibe the spirit or culture of constitutionalism, in which case each arm of government functions within the realm of its constitutional competence. Our paper reveals that the greatest and most potent tool of checking executive lawlessness in Nigeria, in our view is the existence of a vibrant judiciary completely insulated from politics and with profound autonomy in all its ramifications.

II. MEANING AND CONTEXT OF EXECUTIVE LAWLESSNESS

¹No. 24, 1999.

²Constitution of the Federal Republic of Nigeria (Promulgation) Decree, (No. 24), 1999

³Section 5 Constitution of the Federal Republic of Nigeria, 1999 (as amended).

Lawless simply means “where laws do not exist or are not obeyed”.¹ It seems that there is a conclusion that there had been cases of executive lawlessness and by this section, there is a call to examine or bring up some specific examples of acts amounting to executive lawlessness undertaken by the Executive. Before delving into some acts which are likely considered to amount to lawlessness on the part of the Executive, it is worthwhile exercise to say that the Executive powers vested on the President and the Governor by our Constitution is wide and enormous, to the extent that it extends to “the execution and maintenance of this Constitution, all Laws made by the National Assembly or the House of Assembly of the State and to all matters with respect to which the National Assembly or the House of Assembly has for the time being, power to make Laws”.²

The Phrase, “Executive Lawlessness” may simply mean a situation where the Executive acts without the backing of the law. Acts which are actions or omissions of the Executives that are ultra-vires the Constitution and/or any law whatsoever. The phrase may also mean disobedient to the law. In other words, executive acts which include executive actions or omissions that are in violation of the law. In examining such acts, the word “executive” from the Constitutional provisions³ is so wide that it covers the President, Vice-President, the Ministers, the Federal Public Service, the Governor, the Deputy Governor, the Commissioner or Officers of the State Public Service.

Corollary, it may be adequate and/or correct to contend that any acts which include the actions or omissions of any of these persons, namely, the President, the Vice-President, the Ministers, or any officer of the Federal Public Service, the Governor, the Deputy Governor, the Commissioners or any Officer of the State Public Service that is lawless may be tantamount to executive lawlessness.

A call to examine some of the specific examples of acts amounting to Executive Lawlessness undertaken by the Executive in Nigeria from 1999 to 2014, is a direct and/or indirect call to examine the regimes of Chief Olusegun Obasanjo who was the first President under the 1999 Constitution and Umaru Yar’Adua – Good Luck Ebele Jonathan administrations.

It is expedient to identify how to determine acts amounting to Executive Lawlessness and in doing this recourse has to be made to the concept of the Rule of Law. Acts of the Executive that are not in line with the rule of law amount to Executive Lawlessness. The principles of Rule of Law enshrined in the Constitution include the guarantee of the fundamental human rights⁴ of the citizens, holding of popular elections of the political organs of government, separation of powers of the legislative, executive and the judicial arms,⁵ laid down procedures for law-making,⁶ independence of the judiciary,⁷ Judicial review of the legislative and executive acts, et cetera.⁸

Obviously, such executive acts that are without the backing of the law procedurally or otherwise, are deemed to be lawless acts of the executive. State and Law are closely interwoven to the extent that while States, as an organisation of power and force, can no longer be defined apart from Law, Law is created by the State and consequently it (Law) is “an instrument more or less necessary for carrying out the State’s activities and attaining its ends”.⁹ The Executive acts which must be in pursuance of the objective of the State can only be realized through an instrument of Law, and where Law is neglected or ignored by the executive in pursuance or achievement of the state’s objectives, it becomes a lawless act and same shall be null and void and of no effect whatsoever.¹⁰

III. THE PRINCIPLE OF SEPARATION OF POWERS IN A NUTSHELL

The doctrine of separation of powers which derived its origin from Aristotle, John Locke and later Montesquieu is a device against abuse of power or what he called political liberty. He posited that the functions of governments of Western States are of three kinds:¹¹ (1) The legislative or law making function is carried out by the legislature, (2) The executive function is carried out by the executive and when the legislative and executive powers are vested or united in the same person or body,

¹ A.S. Hornby, *et al*, *Oxford Advanced Learners Dictionary*, 7thedn, (London: Oxford University Press, 2000) p. 836.

² Section 5(1)(b) and (2)(b) of the Constitution of FRN, 1999.

³ 1999 Constitution, sections 5(1)(a) and (b) and 2(a) and (b) of the Constitution.

⁴ *Ibid*, Chapter 11 of the Constitution.

⁵ *Ibid*, sections 4, 5 and 6 reflecting the concept of Separation of Powers.

⁶ *Ibid*, sections 4(3), (4)(a), (b), 5.

⁷ *Ibid*, section 158.

⁸ Order 47 of the Kogi State High Court (Civil Procedure) Rules, 2006.

⁹ B. Nwabueze, *How President Obasanjo Subverted the Rule of Law and Democracy*, 1stedn, (Ibadan: Gold Press Limited, 2007) p. 4.

¹⁰ Section 1(1) and (3) of the Constitution of the FRN, 1999.

¹¹ P.A. Oluyede and D.O. Aihe, *Cases and Materials on Constitutional Law in Nigeria*, 2nd Edition (Ibadan: University of Ibadan Press Plc, 2003) p. 65; D.O. Odeleye, “The Theory and Practice of Separation of Powers in a Presidential Constitution: The Nigerian Experience”, *Frontiers of Nigeria Law Journal* (2008) P. 157; K.M. Mowe, *Constitutional Law in Nigeria*, (Lagos: Malthouse Press Ltd, 2008) p. 23; O. Abifarin, *Essays on Constitutional and Administrative Law under the 1999 Constitution*, (Kaduna: Mofolayomi Press, 2000) p. 15; A. Ojo, “Separation of Powers in a Presidential Government”. *Public Law Journal* (1981), p. 105.

there can be no liberty. (3) Again, there can be no liberty if judicial power is not separated from legislative and executive. Thus, separation of powers could be described as sharing of powers by separate bodies, but it is not a complete independence of organs of government. The various organs still have to work in cooperation although the independence is to safeguard a kind of checks and balances. Montesquieu was writing from his experience in Western States where functions of government are of three types, i.e. the legislative, the executive and judicial functions. While the first two organs are concerned with the formulation and carrying out of policies respectively the judicial function, consists of interpreting and applying the Law by the judiciary (judges in the courts). In Britain parliament makes Laws, many of which gave power to the government to do certain things. Laws are not always clear in their meanings, however, and it is then the function of the Courts to give a decision in case of dispute. Thus, this French philosopher opined in the 18th Century that the three functions of government should be kept separate. He argued that their separation would prevent one man or group of men from exerting too much power, each organ of government could act as a check on the others.¹

Inherent in the doctrine of separation of powers is the principles of checks and balances. The separation of these powers is to check one another and balance their operations without encroachment of one by the other. This doctrine has been embraced all over the civilized world, including Nigeria.

This doctrine has been entrenched in the 1999 Constitution which provides that:

“The legislative power of the Federal Republic of Nigeria shall be vested in the National Assembly which consists of a Senate and House of Representatives and shall have power to make Laws for the peace, order and good government of the Federation or any part thereof with respect to any matter in Exclusive legislative list set out in part I of second schedule to this Constitution”.

The House of Assembly of a State shall have power to make Laws for peace, order and good government of the State or any part thereof with respect to any matter in the concurrent legislative list set in part II of second schedule to the Constitution.² On this section the Court had decided under the 1979 Constitution in *Ekeocha v. Civil Revenue Commission of Imo State & Another*³ per Oputa J. (as he then was), that in all cases of interpretation, the Courts should adopt such a construction which is to put the federal legislature in such a position that it can legislate for the general interest of the whole country. This decision is a protection of legislative power of the National Assembly and was re-echoed in *A.G of Bendel v. A.G Federation*.⁴ Section 5 of the Constitution provides that:

“[T]he executive powers of the Federation shall be vested in the president and may subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice President and the Ministers of the Government of the Federation or officers in the public service and shall extend to the execution and maintenance of this Constitution, all Laws made by the National Assembly and all matters with respect to which the National Assembly has for the time being power to make Laws”.

The executive powers of a state is vested in the Governor of that State who may subject to the aforesaid and to the provision of any Law made by the House of Assembly of a State be exercised by him directly or through the Deputy Governor and Commissioners of the Government of that State or officers in the public service of the State and shall extend to the execution and maintenance of the Constitution.

Section 6(i) of the 1999 Constitution further provides that the judicial powers of the Federation is vested in the Courts to which the section relates being Courts established by Law subject as provided by the Constitution for the State. Section 6(5) declares that the section relates to Supreme Court, Court of Appeal, Federal High Court, State High Court, Sharia Court of Appeal, Customary Court of Appeal and any Court that may be established by Law.

Also worth knowing is the provision of section 6(6) that extends the judicial powers to inherent powers and sanctions of a Court of Law, all matters between persons or between government or authority and any person in Nigeria and to all actions and proceeding thereto for the determination of any questions as to civil rights and obligations of that person.

IV. LAW AS AN INSTRUMENT FOR SOCIAL CHANGE

Law must grow as the society grows. The ability of law to fit into and fix the society according to the changes constitutes one of the most important features of law. Society grows, changes and develops hence law must necessarily grow to meet the yearnings and aspirations of the society. Justice Benjamin Cardoso of the U.S. Supreme Court had aptly explained the need

¹ B.O Oluoyomade and B.U. Eka, *Cases and Materials on Administrative Law in Nigeria*, (Ife: University Press Ile-Ife, 1980) P. 5; E. Malemi, *The Nigerian Constitutional Law with Fundamental Human Rights Enforcement Procedure Rules* 2009 (Lagos: Princeton Publishing Co. 2006).

²Section 4.

³1981 1 NCLR 154 at 165.

⁴1981 10 SC 1 at 198.

for the growth in line with the growth of the society, when he said, that “[t]he Law like the traveler must be ready for the morrow. It must have a principle of growth”.¹ Roscoe Pound, while stressing the need for stability of law, observed that there must be some movement, so that law could still be stable and not standing still. In his explicit words: “Law must be stable, and yet it cannot stand still. Hence, all thinking about law has struggled to reconcile the conflicting demands of the needs of stability and of the need of change”.²

In ensuring that law continually meets the yearnings and aspirations of the society, some level of pragmatism is required or infused into the functioning of law in the society. This becomes necessary so as to properly engineer and reposition the society. Hence to the pragmatic positivism, law must be determined by social facts which means, a conception of law in ‘flux’ and of society which changes faster than the law.³

One of the major problems, which hinder development of the Nigeria State has been the twin problems of executive lawlessness and legislative laxity or carelessness. Arguably, however, as the immediate two segments will reveal, this problem has, to some extent, been addressed by some level of judicial activism.

Judicial activism is the views that the Supreme Court and other Courts can and should creatively (re) interpret the texts of the Constitution and the Laws in order to serve the judges’ own visions regarding the needs of contemporary society. Judicial activism believes that judges assume a role as independent policy-makers or independent “trustees” on behalf of society that goes beyond their traditional role as interpreters of the Constitution and laws.

Conscientious and dispassionate application of law in the society brings about sustainable development. Recently, in Nigeria, Festus Keyamo, human rights activist and constitutional lawyer had successfully challenged the legality of the appointment of the Service Chiefs by President Goodluck Ebele Jonathan done without recourse to the National Assembly. Even though the Government did not immediately comply with the order of the Court as it related to the appointments, subsequent appointments of the Service Chiefs followed the constitutional procedures.⁴ This is the kind of checks and balances, transparency and accountability required to sustain our democracy.

The judiciary has done tremendously well in many of the election cases where unlawfully or wrongfully installed Governors, Senators and other officeholders were made to vacate offices where their elections were nullified.⁵

V. SPECIFIC CASES OF CHECKMATING EXECUTIVE LAWLESSNESS

The Courts in Nigeria had made educative and illuminating pronouncements in their attempts to ensure compliance with the well elucidated principles of separation of powers in the Constitution. In the case of *Unongo v. Aper Aku*,⁶ the Supreme Court held:

The Constitution of the Federal Republic of Nigeria 1979 which is hereinafter referred to as the Constitution is very unique compared with the previous Constitution in that the executive, the legislature and the judiciary are each established as a separate organ of Government. There is what can be termed a cold calculated rigidity in this separation as shown in sections 4, 5 & 6 of the Constitution which established the legislative and the executive and the judicature respectively.

The real connecting link among these three is that they provide checks and balances on one another. But though there are these checks and balances, one cannot and must not usurp the functions of the other. The case was reaffirmed in *Attorney General of Bendel State v. Attorney General of the Federation*,⁷ where Eso JSC said:

Now it is time that the legislature, especially in a country like ours which has accepted the doctrine of separation of powers and which has got that doctrine embodied in constitution, is a master of its own household.

The exception to this sovereignty within its own household is where the powers of such legislature have been specifically restricted under the Constitution.

Having tried to show the embodiment of the doctrine of separation of powers in our Constitutions of 1979 & 1999, both statutorily and judicially it is pertinent to mention that in a military regime which has characterized this nation since 1966, the doctrine of separation of powers wears a different look entirely.

Under the past military regimes, the executive and the legislature were fused in one. The Head of State was the Chief Executive and at the same time the lawmaker. The Law-maker was the Supreme Military Council, Armed Forces Ruling

¹ Cited in D. Lloyd, *The Idea of Law*, (London: Penguin Books,) p. 14.

² Interpretation of Legal History, cited in E. Malemi, *The Nigerian Legal Method*, (Lagos: Princeton Publishing, 2010), p. 12.

³ W. Freidmann, *Legal Theory*, 5thedn., (London: 1967), p. 101.

⁴ Court declares appointment of Service Chiefs Illegal, *PointBlank-News.com/pbn/news/court/d...*

⁵ *Omehia v. Amaechi op. cit.*, *Peter Obi v. INEC*, (2007) LPELR – SC 123/2007; *Aregbesola v. INEC* ((2010) LPELCA/1/EPT/GOV/02/2010; *Kayode Fayemi v. INEC* (1999) LPELR-CCN/1/10/99; *Mimiko v. INEC* (2012) 7 NWLR (Pt. 1300) 538 and *Oshiomole v. INEC* (2011) 18 NWLR (Pt. 1279) p. 493.

⁶ 1983 2 SC NLR 332 at 361.

⁷ 1982 2 NCLR 509.

Council or Provisional Ruling Council which the Head of State was the Chairman. He carried on the duties of Law-making and Law-implementation. Thus, in *Military Governor of Ondo State v. Adewumi*,¹ the Supreme Court held that “[i]n a federation like ours, where in the constitution, the powers of such organs, that is the executive, legislative and judiciary, have been so expressly stated, recourse could only be made to preserve the federation by observance of the provisions of the constitution. There is no doubt that the legislature cum executive (now merged into one under the military) could enact laws, which could deprive the Courts of jurisdiction. For indeed, by Decree the constitutional provisions themselves could be amended thereby depriving the courts of the jurisdiction which have been given, even by the Constitution itself. This is not imaginary.

The judiciary having been empowered by section 6 of the Constitution is at the apex of this checks and balances; it has the primary duty of inquiring into the legality of acts of the executive and the legislature. Any question on whether the executive has acted *intra vires* or *ultra vires* or has complied strictly with the procedure, manner or form prescribed by law is determined by the Court. In order that the judiciary may be able to perform this function effectively, the independence of the judiciary is a pre-condition.

The fourth Declaration of the Universal Declaration of Human Rights, 1948 required the independence of the judiciary, and proper ground and procedure for removal of judges and imposes a responsibility on an organized and autonomous legal profession. This declaration was incorporated into our Constitution.² There are quite a number of cases where the judiciary had to caution the executive when the executive was acting *ultra vires* for failure to comply with the manner and form prescribed by Law in administrative or governmental action. In *Okiti Pupa Oil Palm Company Limited v. Hon. J.E Jegede and Others*,³ an issue of constitutional importance was raised as to whether an injunction of any kind can be ordered by a Court in Nigeria against the legislature as a body or against a member thereof for act purported, to have been or is being, or about to be committed in course of its operation. It was held, *inter alia*, that once a Court is properly seized with jurisdiction it will act within its inherent and constitutional power to restrain any or the said arms which in pursuit of its constitutional functions tends to over step its limited jurisdiction under the Constitution. By virtue of the constitution, it is well within the lot of judiciary in its supervisory capacity to ensure that all the three arms of Government keep within their respective area of powers, privileges and competence under the Constitution. This is in addition to the judiciary being checked through appeals and judicial review. The position was confirmed by the Supreme Court in *Governor of Lagos State v. Chief Odumegwu Ojukwu*,⁴ where it held explicitly that:

Executive lawlessness is tantamount to a deliberate violation of the constitution. When the executive is the military government which blends both executive and the legislative powers together and which permits the judiciary to coexist with it in the administration of the country, then it is more serious than imagined. The essence of rule of law is that it should never operate under the rule of force or fear, to use force to effect and act and while under the Marshall of that force, seek the courts equity is an attempt to infuse timidity into court and operate a sabotage of the cherished rule. It must never be.

Moving a step further on the supervisory role of the judiciary over the executive, the Supreme Court in *Garba v. University of Maiduguri*,⁵ said:

I would add to this admirable statement by Lord Denning that to give a blanket implementation to the decision of the executive, and without reference to the elementary rule of fairness is an abdication by the judiciary of its power to the executive especially in a country like ours where the power of each of the organs of government – Executive, legislature and the judiciary are distinct under the constitution.

The judiciary has also exercised its checks, supervision and control over the executive by inquiring into the use of presidential power by the president through his Minister in the case of *Alhaji Abdul Darman Shugaba v. Minister of Internal Affairs*.⁶ The plaintiff in that case was deported by the Minister of Internal Affairs on the order of the President made under the Immigration Act on the ground that as at the time of his election to the House of Assembly of Borno State, he was not a citizen of Nigeria by birth as provided in section 23 of 1979 (now section 25 of 1999 Constitution). The plaintiff, having proved that his father was of Chad Republic but his mother was a Nigerian of Kanuri tribe, the Court held that the deportation was illegal, null and void and unconstitutional.

¹1982 3 NWLR (Part 82) 298.

²1999 Constitution Ss. 211, 218, 229, 235, 241 & 246.

³1981 2 NCLR 459.

⁴1986 1 NWLR (Part 18) 550 at 590.

⁵*Garba v. University of Maiduguri* 1986 1 NWLR (Part 18) 550.

⁶1981 3 NCLR 47.

It has also been stated that the Court can examine whether the power conferred on the Governor to appoint Commissioners in accordance with section 173 (a) of the Constitution has been properly used or not. This was the issue in the case of Governor of Kaduna State v. House of Assembly of Kaduna State,¹ where the Governor of Kaduna State Alhaji Balarabe Musa sought an order of Mandamus from the Court to compel the members of the House of Assembly to approve his list of nominees for Office of Commissioners of Kaduna State. The Court declined to grant this application because the House of Assembly had power to approve or reject the list or any person on the list of the governor.

Distilled from the foregoing is that, nominations must be confirmed by the House of Assembly before the appointments are made. Consequently, if a Commissioner is sworn in without his appointment being confirmed, the appointment will be declared invalid. Section 173 of the Constitution has also been interpreted to mean that a Governor has a legal duty to appoint Commissioners; he does not have a choice in the matter. In Alhaji Lawal Kagoma v. Governor of Kaduna State,² it was held that since the Governor is merely a Chief Executive, there must be an Executive Council. The Constitution in section 162 (2) describes the Governor as the Chief Executive and not Sole Executive and thereby implies that there are other executives.

Another important way by which the judiciary checks the executive is by way of judicial review of administrative action. Where an administrative body or tribunal refused to follow the due process of law or the rule of natural justice, the Court has inherent power under section 6(6) (a) (b) to review any administrative action or decision that failed to comply with the rule of natural justice such as *audi Alteram par tem*, (*hear the other side*) known as fair hearing and *nemo iudex in causasua* (*you can not be a judge in your own cause*).³ That means an impartial umpire must adjudicate or arbitrate on dispute, prosecute and determine rights and obligation imposed by law.⁴

The decision of the Supreme Court in Amaechi v. Omehia,⁵ shows great hope for the future of leadership in Nigeria. The Court removed Celestine Omehia as Governor of Rivers State and ordered for the immediate swearing-in of Rotimi Amaechi in his place. Ordinarily, since Amaechi was not in fact the PDP candidate during the elections, what lawyers expected at most was ordering a fresh election with Amaechi as one of the candidates. Technically, he could not be declared a winner of an election in which he never participated. Interestingly, the Court dumped technical justice in favour of substantial justice. It reasoned that equity demanded that Amaechi should be the Governor since his party had won the election and he was wrongly disqualified as its flag bearer. By the doctrine of judicial precedent, this decision is now the law. Lower Courts are bound to apply it in appropriate subsequent cases. The Supreme Court too is bound by its decision unless there are cogent reasons for its reversal. With this, we hope to see changes in the attitude of our Lower Courts towards technical matters which often stand in the area of justice delivery.

Other decisions of the Supreme Court include those of Governor Peter Obi of Anambra State, Kogi, Kebbi, and Adamawa States Governorship elections, which witnessed judicial intervention against executive lawlessness.

In 2013, the High Court of the Federal Capital Territory in the case of The Registered Trustees of Women & Youth Empowerment Foundation v. The Minister for Federal Capital Territory & 3 Ors,⁶ held as null and void the exercise of powers of the Minister of the Federal Capital Territory in revoking the Right of Occupancy of the plaintiff over a piece of land known as plot 1347, cadastral Zone A00 measuring approximately 1.84 hectares. The facts of this case were that the plaintiff was granted a lot of land by the Minister of the FCT in 2010 for public purpose. But in 2011, the same Minister revoked the plaintiff's right of occupancy and allotted the same plot to African First Ladies Peace Centre to build a public institution. The Minister wrote to the plaintiff revoking its title, and the plaintiff went to Court. The Court nullified the letter of revocation issued by the Minister.

In 2014, the Court in the case of Sun Trust Savings & Loans Limited v. Hon. Minister, Federal Capital Territory & 3 Ors.,⁷ held that the "Park and Pay" scheme introduced by the Minister, Federal Capital Territory and Staff of his Ministry (1st and 2nd defendants in that suit and enforced by the 3rd and 4th defendants and other operators in the Federal Capital City, Abuja) was neither provided for nor envisaged under the extant FCT Road Transport Regulations 2005 or any other bye-law made pursuant to section 11(1) of the Road Traffic Act,⁸ and was consequently ultra vires, illegal, null and void and of no effect whatsoever.

At the state level executive lawlessness has been manifested in the removal of Chief Judges without following due process or without recommendation from the National Judicial Council (NJC) as stipulated in sections 153 and 292 and paragraphs 20 and 21 of the third schedule part I of the Constitution. Various State Governors have wrongly invoked section 153 to remove

¹1981 2 NCLR 529.

²1981 2 NCLR 62.

³ See s. 33 of 1979 and s. 36 of 1999 Constitution.

⁴ A.A. Borokini and M.A. Olong, *Administrative Law in Nigeria* 2nd edn., (Ilorin: Oluwole Printing Press, 2006) p. 37; J.O. Agbana, "An Appraisal of the Doctrine of Natural Justice", *Fountain Quarterly Law Journal* Vol. 3 (2006) P. 156.

⁵<http://www.thetidenewsonline.com/2014/02/10/omehia-vs-amaechi-rivers-stakeholders-hail-supreme-court-ruling/>

⁶Suit No. FCT/HC/CV/2591/2011, Per. Peter O. Affen J.

⁷Suit No: FCT/HC/CV/1116/2012, Per. Peter O. Affen J.

⁸ Cap. 548, Laws of Nigeria (Abuja) 1990.

the Chief Judges of their States but it took the intervention of the judiciary to correct this executive lawlessness¹.

In October 2004, Oyo State Government removed the Chief Judge of the State, Justice Isaiah Olakanmi based on petition by other judges of the State High Court. The Federal High Court nullified the removal as it constituted executive lawlessness by not referring the matter to NJC. In a similar development, the purported removal of Justice Olagoke as Chief Judge of Oyo State was equally nullified by the Federal High Court. In Sokoto State the attempted removal of the Chief Judge through the State House of Assembly was scuttled by the Federal High Court. The same scenario presented itself in Kwara State when the Governor of Kwara State in May 2009 sent a letter to the House of Assembly to remove the Chief Judge on various allegations. In spite of the intervention of the NJC, the Chief Judge was removed but the Court reinstated her after a protracted litigation². The Federal Government also suspended the President of the Court of Appeal, Justice Ayo Salami, and refused to recall him even after the NJC revised its decision on the case and cleared him of all allegations. This is a clear case of undue interference with the judiciary by the executive and executive lawlessness or arrogance.³ The most controversial executive arrogance is the one exhibited by Governor Amaechi of Rivers State on appointment of Chief Judge of Rivers State; the matter is also in Court now for judicial resolution.

There are also cases where the State Governors have used the State Houses of Assembly to impeach their Deputy Governors on mere misunderstanding that should have been resolved by party leadership under the doctrine of party supremacy. Such cases include; impeachment of Chief Iyiola Omisore as Deputy Governor of Osun State, impeachment of Mr. Abiodun Aluko, Deputy Governor of Ayo Fayose of Ekiti State, Deputy Governor of Jigawa State under SaminuTuraki was equally impeached, so was Enyinaya Abaribe, Deputy Governor of Governor Orji Uzor Kalu of Abia State and Chief Chris Ekpeyong Deputy Governor of Akwa-Ibom State were hastily done by the various Houses of Assembly after the Governors have allegedly induced them by constituency projects funds and they also happened when the Courts in Nigeria believed that impeachment was a legislative judicial function that the Court could not interfere with.⁴

However, it was the case of the impeachment of Governor Rashidi Ladoja of Oyo State that first got to the Supreme Court and the Court decided correctly that impeachment of any State Executive or Federal Executive must comply strictly with sections 143 and 188 of the Constitution respectively. For the reason that the procedures did not comply with section 188, the impeachment was declared null and void.

Chief Chima Nwafor, the Deputy Governor of Abia State, was impeached at the instance of the Governor by the House of Assembly. He was however, able to secure an injunction to restrain the swearing in of a new Deputy-Governor but this order was vacated a week later as the Court decided that the House of Assembly of Abia State had no power to pardon the Deputy Governor and therefore, upheld his earlier impeachment as it was a constitutional matter which could not be waived by Abia State House of Assembly. He filed an appeal against the decision but he died shortly after filing the appeal.⁵

A very disturbing aspect of executive lawlessness is the way and manner the Federal Government used Economic and Financial Crime Commission (EFCC) and the House of Assembly of Bayelsa State to impeach the Governor of Bayelsa State for alleged money laundering in London and his subsequent jumping of bail in a London Metropolitan Court. The Speaker of the House who had earlier indicated that the House was not interested in impeaching the Governor was later intimidated and hounded by the EFCC into impeaching the Governor.⁶ This impeachment was criticized by eminent Nigerians as despotic and illegal as the Governor's objection to the composition of the investigation panel members was not investigated nor considered.⁷

The same attempt had been made on Governor Joshua Dariye of Plateau State for allegedly committing similar offences of money laundering and jumping bail in a London Court.⁸ But the House of Assembly of Plateau State entered a verdict of not guilty on the Governor in spite of the harassment and intimidation of the Speaker and the Members of the House of Assembly by men of EFCC.⁹ The pertinent question is should EFCC be allowed to intimidate, harass and hound the legislature in order

¹ F.U. Uwakwe, "The Suspension of Former President of the Court of Appeal Justice Ayo Isa Salami: Threat to Independence of the Judiciary", *Confluence Journal of Jurisprudence and International Law*, Vol. 6 No. 2 (2013) P. 163.

² *Ibid*.

³ *Ibid*.

⁴ C.A. Obiora, and M.C. Eze, "Constitutionalism, Impeachment and Democracy in Nigeria (1999-2007): An Appraisal", *The Constitution*, Vol. 12, No. 1, (2012), p. 42.

⁵ EFCC Arrests Plateau Deputy Speaker, Speaker on the run Daily Independent of 8th December 2005 P. 1 Plateau Assembly to Probe Dariye *New Nigeria*, 14th December 2005 P. 1; Dariye Plateau Deputy Speaker Leads House Probe Committee. *Vanguard*, 16th December 2005 P. 11.

⁶ House Drags EFCC to Court, *Source Magazine*, 19th June 2006, P. 6; Group Tasks EFCC on Imo Council Chairman *Daily Independent*, 16th June 2006, P. 8.

⁷ Nwafor Stops Swearing in of New Deputy Governor, *Vanguard*, 20th February 2006 P. ii (40); Impeachment was not treated fairly-AbiodunAluko, *Daily Independent*, September 2005, P XII; See also Ekiti appoints new Deputy Governor, *Daily Independent*, 6th October 2006, P. 3.

⁸ 19 Oyo MPS Move to Impeach Ladoja, *New Nigeria*, 14th of December 2005, P 1; Ladoja Impeachment throws Oyo Education in disarray, *New Nigeria*, 14th December 2005, P. 30.

⁹ Ladoja, N.B.A Seeks Obasanjo's Support, Akande, Kokori and Agbakoba fault removal, *The Punch*, 17th Jan. 2006, P. 9;

to impeach a Governor of a State or Chairman of a Local Government? Is EFCC not turning itself into instrument or agent of terror? Is there a constitutional or statutory backing for EFCC in all these atrocities? In its resolve to find answers to these questions, Imo State House of Assembly had filed an action before the High Court on the propriety of EFCC to arrest Chairmen or induce the Councilors to commence an impeachment proceeding against the Chairmen of Councils in Imo State.¹

Furthermore, the invasion on the people of Odi Community by the armed men under the leadership of Chief Olusegun Obasanjo without due process of law thereby reducing the community to rubbles is an epitome of executive lawlessness. It is not in doubt that the invasion of the armed forces on the people of Odi was an ultra violation of the role of the Nigerian armed forces as set out and delimited in our Constitution.² These actions were declared illegal by the Courts and damages were awarded to the communities.

A situation where the constitutional provisions are not followed or complied with in executing or performing an executive action automatically amounts to executive lawlessness. For instance, the suspension of the elected constitutional organs of the government of Plateau State the Governor and House of Assembly from office for 7 months (May – November, 2004) and replaced by an appointed Emergency Administrator was a flagrant violation of the constitutional provision especially where the due process under the constitutional provision³ was not fully complied with.

There are occasions where the activities of the Nigeria Police Force (NPF), the State Security Services (SSS) in conjunction with the activities of the Economic and Financial Crimes Commission (EFCC) fell below expectations and standard in all ramifications as same violated the fundamental rights of individuals amounting to executive lawlessness.

The activities of these bodies to a large extent had portrayed Nigeria in the ugly image of being a state of oppression and repression at the international plane. For instance, the Chairman and Secretary of the Nigeria Labour Congress (NLC) Oyo State Chapter were arrested sometime in January, 2006 by the men of the State Security Services (SSS) for allegedly directing workers in the state to stay away from their duty post until the illegally removed Governor of the State, Senator Ladoja was reinstated to office.⁴ The Oyo State Chapter of NLC calling upon their members to stay away from the office and further calling upon the National President of the NLC and his counterpart in the Trade Union Congress to join and rise against the situation of illegal removal of the Governor and/or in defence of democracy is not an offence that would require arrest of the Chairman and Secretary of the NLC Oyo State Chapter. It was an act of executive lawlessness in ultra violation of the fundamental rights of the concerned citizens.

There are also instances where the executive arm had violated the principles and/or rules of the concept of separation of powers⁵ duly acknowledged and/or entrenched in the Constitution⁶ in the performance of its duties and responsibilities thereby exceeding the limits and extents of the provisions of such powers. This was equally demonstrated in the subversion of the Constitution by President Obasanjo when he smuggled into a bill, the Electoral Bill 2001, passed by the National Assembly and sent to him for his assent, provisions which were not in the bill when it was originally passed by the National Assembly and he (Obasanjo) proceeded to sign it into law.⁷ Meanwhile, the provisions smuggled into the bill and signed by the President became the Law even though it was not passed by the authority of the National Assembly which was vested with the constitutional power to pass such a law. Since the law was not passed by the National Assembly in accordance with the constitutional provision but became Law by the authority of the President alone, contrary to the substantive and procedural provisions of the Constitution regulating how Laws should be made, that amounted to an act of executive lawlessness.

The concept of separation of powers is the distribution of the exercise of governmental powers or functions among the three principal organs and separate departments and especially for the structure of democracy to remain successful of the legislature, the Executive and the Judiciary.⁸ The recognition of this concept is tantamount to rule of law while the violation of same is tantamount to an abuse of the rule of law.

The executive organ is traditionally vested with the responsibility of carrying out or implementing the laws made by the legislature, the policies made by quasi-legislative body or the decisions, judgment or orders rolled out by the judiciary.

Duroojaiye Ikuforifi fault Ladoja's Removal, *The Punch*, 17th Jan. 2006, P. 11; Oyo Crisis: Body of Senior Advocates wrote 14 and CJN, *The Punch*, 17th Ladoja: Labour begins strike in Oyo, *The Punch*, 17th Jan. 2006, P. 1.

¹19 Oyo MPS Move to Impeach Ladoja, *New Nigerian*, 15th December 2005, P. 1.

²Section 217(2) of the Constitution of the FRN, 1999. en.wikipedia.org/wiki/odi-massacre The Federal High Court Port Harcourt awarded N37.6billion against the Federal Government as compensation to Odi Community while another Federal High Court sitting in Abuja awarded N40billion to Zaki Biam Community. www.vanguard.ngr.com/2011/10years...

³ See for example, s. 305(3) of the 1999 Constitution.

⁴ B. Nwabueze, *op. cit.*, p. 13.

⁵ 1999 Constitution, Ss. 4, 5 and 6.

⁶*Ibid.*

⁷ B. Nwabueze, *op. cit.*, p. 134.

⁸ 1999 Constitution, Ss. 4, 5, and 6; B.F. Wright, (ed.), *The Federalist by Alexander Hamilton, James Madison, and John Jay* (Harvard University Press, 1966) pp. 491-494.

Hence, it is an established policy that upon conviction and sentence by the courts, it is the duty of the executive arm to implement and or execute the sentence. Records or researches have shown that the Nigerian executive has shown a lot of trepidation in the execution of sentence of death passed by the courts resulting in scores of prisoners being endlessly on death roll.¹ It seems that keeping these condemned prisoners endlessly on death roll without execution amounts to violation and/or contrary to the spirit and letter of the Constitution². The Civil Liberties Organization (CLO) report reveals that the Nigerian Prisons Official statistics for December, 2007 had as many as 806 persons on death roll yet to be executed while some may have spent as much as 21 years thereon.³

The inability of the executive arm of the government of Nigeria to implement the letter and/or the spirit of the constitutional provision⁴ on the economic, political and socio-cultural rights in Nigeria leaves much to be desired. It is more serious and thought provoking when it is provided to wit: "it shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of this chapter of the Constitution"⁵.

In the same vein, it has been asserted by the learned Professor⁶ commenting on "Rescuing Nigeria from the Rule of Lawlessness" of the organs of Nigerian government to wit: "they rather seem to blunt the edge of the struggle for democracy and the rule of law, as well as stultify the objective conditions of popular struggle for democracy, economic emancipation and social justice"⁷.

Furthermore, the fact of President Obasanjo declaring the Office of the Vice-President Abubakar Atiku vacant sometime in 2006 when the Vice-President Abubakar Atiku defected from the People's Democratic Party (PDP) to Action Congress (AC) was tantamount to an executive lawlessness to the extent that the Constitution⁸ did not expressly and/or explicitly confer such power on the President to so exercise. At best where the Office of the Vice-President becomes vacant for the stated reasons therein, the President can nominate a candidate of his choice and with the approval of each House of the National Assembly appoint a new Vice-President. Whether the defection of the Vice-President Abubakar Atiku to the Action Congress (AC) amounted to a resignation of his appointment and/or election as the Vice-President and whether the President was competent under the constitutional provision to declare the Office of the Vice-President vacant was a strange phenomenon that lacked certainty of constitutional coverage.⁹

Recently, the Federal High Court Abuja declared as unconstitutional, null and void the practice by which the executive arm of Government disburses budget funds to the judiciary. It violates sections 81 and 84 of the Constitution.¹⁰

VI. CONCLUDING REMARKS

The matter of executive lawlessness calls for urgent attention if our nascent democratic regime must be sustained. If it were not for the timely intervention of the judiciary invoking its constitutional powers and taking the bulls by the horns at each stage of its necessity, Nigeria would have lost its democratic process again to the unwholesome manoeuvres of some executive manipulations to have endangered and crippled the democratic process and/or regime before now.

There is a need to maintain virile and sound independence of judiciary. It is a situation where the executive would have no constitutional power apart from the appointment of the judges of the higher and superior bench, to exercise in the promotion, termination and/or retirement of the judges of the higher and superior courts; and even the funding.

Furthermore, the appointment of the judges of the superior courts must be based purely on merit and devoid of political inclinations. To this end, persons nominated or recommended for appointment unto the higher and superior courts must be people of high integrity, honesty, and purpose driven men.

The immunity guaranteed to the Chief Executives in the persons of the President, the Vice-President, the Governor, the Deputy Governor should be re-examined with intent of modifying same to limit the immunity to civil actions and lift the veil of immunity on obvious criminal matters.

The power conferred or vested upon the executive under the Constitution¹¹ seems to be too wide and enormous that it could puff the members of the executive generally and/or persons of the President, Vice-President, Governor and the Deputy Governor.

¹Tarhuule, V.V., *Corrections under Nigerian Law*, 1stedn. (Lagos: Innovative Communications, 2014) p. 211.

²*Ibid.* See also *Nemi v. A.G. Lagos State* (1996) 6 NWLR (Pt. 452) p. 42 at 54.

³Tarhuule, V.V., *op. Cit.*, p. 211.

⁴1999 Constitution, Chapter 2 which deals with "Fundamental Objectives and Directive Principles of State Policy".

⁵*Ibid.*, section 13.

⁶E.O. Esiemokhai on <http://www.fwcusnigeria.com/rescuin-nigeria.htm> (Revisited on 24/05/2014).

⁷*Ibid.*

⁸1999 Constitution, S. 146(3).

⁹See *AbubakarAtiku v. President OlusegunObasanjo*.

¹⁰S. Ejike, "Funding of Judiciary through Executive Arm Unconstitutional – Court", *Nigerian Tribune*, 27 May, 2014, p. 4; see also 1999 Constitution, *op. cit.*

¹¹1999 Constitution, S. 5(1) and (2).

From the foregoing, therefore, executive lawlessness is one of the major problems confronting the Nigeria State, as it inhibits the smooth functioning of the Law and ultimately hindering sustainable development. This work, therefore, contends that with every arm of government imbibing the culture of constitutionalism, and a vibrant judiciary completely insulated from politics with profound autonomy in all its ramifications in place, the Nigeria State will be properly repositioned to take its rightful place in the comity of nations.

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