EXAMINATION OF PRESIDENTIAL POWERS UNDER THE 1999 NIGERIAN CONSTITUTION

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DECLARATION

I hereby declare that this Dissertation titled "**An Examination of Presidential Powers under the 1999 Nigerian Constitution**" has been written by me and it is a report of my research work. It has not been presented in any previous application for LLM. All quotations are indicated and sources of information specifically acknowledged by means of references.

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CERTIFICATION

The Dissertation **"An Examination of Presidential Powers under the 1999 Nigerian Constitution"** has been read and approved as having met the requirements of the Faculty of Law, Nasarawa State University, Keffi, for the award of Master of Laws Degree (LL.M).

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This Dissertation is dedicated to Almighty Allah for his mercy, grace and to my beloved family.

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ABSTRACT

The 1999 Constitution separates the Executive powers from the Legislative and Judicial powers. Section 5 of the Constitution vest the executive powers of the Nigeria Federation on the President. However, this dissertation is carried out as a result of the identifiable problems associated with the vesting of some of the powers of the federation in the President, and the manner that some of the powers are exercised. Hence this study is aim to confirm that the power approved to the President under section 5(1)(b) to execute and maintain the constitution is exercised in strict conformity with the constitution and the laws made by the National Assembly, and for the President not to unilaterally expand the scope of that power thereby circumventing a drift into arbitrariness. Even though there is provision for delegation of powers, such delegates act only for and on behalf of the President hence such acts are acts of the President. This dissertation adopted the doctrinal method of research. This research discovered that the grant contained in section 5(1)(b) is obviously a blanket cheque to the President in exercise of his powers. However, there is no absolutism in the vesting of the executive powers in the president and that adequate mechanism are available to bring such president to order. It is hoped that this research had contributed to the knowledge and development of constitutional principles which could lead to good governance. Hence, is to bring to the fore that the operation of federalism is not working the parliamentary system would naturally reduce the power of the president. The research proffers recommendation on how to checkmate the presidential powers in Nigeria some of the ways include the necessity to redefine the second limb of section 5(1)(b), to have clear frontiers in order to check the abuse and misuse of powers by unscrupulous Presidents who may want to expand the scope of that power beyond the legislative scope of the National Assembly.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Presidential power under the Constitution of the Federal Republic of Nigeria (CFRN) 1999,[1] is the totality of Executive Powers that have been vested in the President. According to *Black's Law Dictionary*,[2] executive power is defined simply as 'the power to see that the laws are duly executed and enforced'.

The idea of executive Presidency is traceable to the pre-1979 era when it was thought that there was the need to have a President who could wield such powers as to be able to have a firm control of the government, This was obviously in response to the failure[3] of the Parliamentary model of government which was bequeathed to the country by the colonialists, upon the attainment of independence in 1960.[4] The executive powers, exercisable by the President, are admittedly enormous, hence it is more often than not, taken for granted especially by occupants of the office of the President. This is irrespective of the fact that such powers are granted with a number of safeguards by way of checks and balances.[5]

Now, does the President's exercise of executive powers embrace all functions that are neither legislative nor judicial, given the wording of section 5(1)(b) in particular?

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[1] The Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24, 1999 as amended referred to in this research simply as the Constitution

[2] Black's Law Dictionary, Eight Edition, 2004

[3] Ojo, J.D. The Executive under the Nigerian Constitutions, 1960-1995, in Federalism and Political Restructuring in Nigeria (1998) Specton Books Limited, Ibadan, p.299

[4] See also the Federal Republic of Nigeria, Proceedings of the Constituent Assembly, Official Report, Vol. I, Lagos Federal Ministry of Information, 1978, at pp. 258-259

[5] Section 5 (1)(a), The Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24, 1999, as amended

The CFRN, 1999 confers presidential powers but it is important to admit that in reality, there are other factors that combine to strengthen and weaken the way such powers are exercised by the President. Such circumstances include the poor political sophistication of the country, social and economic forces.

The 1999 Constitution[6] vests the powers of the Federal Republic in three[7]distinct organs the legislature, the Executive and the Judiciary. Consequently, the Constitution in its section 5 expressly vests the qualified executive powers of government in the president; thus:

Subject to the provisions of this Constitution, the executive powers of the federation-

a. 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 Ministers of the Government or the Federation or officers in the service of the federation and
b. shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has for the time being, power to make laws.

The powers granted under section 5(1)(a) of the CFRN,1999 are to be exercised by the President subject to the Constitution and the provisions of any law made by the National Assembly.[8] They are to be exercised by the President either directly or through the Vice President and ministers of the government of the Federation.

The examination of the constitution will reveal the Presidential Powers as follows:

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[6] Op. cit

[7] Ibid, section 4,5,6

[8] The National Assembly comprises of both the Senate (Upper Chamber) and the House of Representatives (Lower Chamber)

1. Execution and maintenance of the Constitution

Under this provision as in section 5(1)(b), the President is empowered not only to execute and maintain the Constitution as well as all laws made by the National Assembly, it would appear that the extension of his powers to act on "all matters within which the National Assembly has, for the time being, power to make laws", tends to confer on the President, the power to act, even before such issues are brought to the notice of the National Assembly, in which case it might be too late to reverse such an action if the National Assembly failed to concur. For example, the deployment of army troops to Zaria in 2016 which led to mass Shai killings. Emergency rule was imposed on Plateau State on May 20, 2004 and an Administrator, Gen Chris Ali appointed by President Olsegun Obasanjo, even before he would communicate with, seek and receive the nod of the National Assembly, Kehinde Mowoe,[9] is of the view that the only construction that can be put on this is that whenever a situation arises in relation to an issue where no legislation is in place, the President has a duty to act as he deems fit. The duty of 'execution and maintenance' of the Constitution involves vigilance on the part of the President so as to make sure that the provisions of the Constitution are adhered to by every section of the society. Therefore, whenever there is an infraction or attempted infraction of any provision of the Constitution, the President as the Chief Executive, has the duty before redressing such infraction either judicially or, if the case so demands, through the use of force. Thus, for example, whenever there is an attempt at secession from any part of the federation, which would be an offence against the nation and section 2 of the Constitution, the President can use federal armed might to quell it. For example, in the case of the Indigenous people of Biafra (IPOB) who were proscribed in 2017[10] as a terrorist organisation for the fear that the security of the country was being threatened. Furthermore, the duty of execution and

[9] Mowoe, K.M: Constitution Law in Nigeria (2008) Malthouse Press Limited, Lagos p. 137

[10] Adesomoju, A.:. http://punchng.com/court-ffirms-ipob's-proscription-designationas-terrorist-group/

maintenance of the Constitution under section 5(1)(b) means that the President is responsible for making sure that the provisions of the Constitution are brought into effect. Thus, by virtue of the provisions of section 153 of the 1999 constitution, certain federal executive bodies, commissions and councils are to be established. The President is saddled with the responsibility of executing the section in keeping with the provisions of other sections of the constitution in relation to adopting the federal character principle in the appointment of chairmen of Councils and Commission which was not adhered to. It should be noted that the commissions and councils, like the Independent National Electoral Commission (INEC), National Defence Council (NDC) and National Population Commission (NPC), to mention a few, are of such very fundamental importance to the existence and continuance of Nigeria, that their establishment must be done with utmost care.

2. Security powers

The security powers of the President are largely provided in sections 215, 216 and 218 of the constitution.[11] Admittedly, the powers usually delegated to the Police under the Police Act, are enormous and such powers are exclusively delegable by the President. In all of this, there is only one Federal Police Force. The problem here, as advanced by Oyelowo Oyewo,[12] is that maintenance of one Federal Police Force and delegation of power by the President alone, negates the principle of federalism and defeats the essence of quick response to security threat.[13]

The second aim of the security powers vested in the President is the power to direct the operational use of the Armed Forces. Apart from the deployment of troops on combat outside

[11] These sections confer the powers to appoint the Inspector General of Police, delegation of powers thereof, and the operational use of the Armed forces

[12] Oyewo, O: Reducing the Risk of Divided and failed Government (2009) NIALS, Lagos p. 171

[13] Akande, J.O: Introduction to the Constitution of the Federal Republic of Nigeria, 1999 (2000) MIJ Publishers, p. 329

Nigeria which is regulated by the National Assembly, the President has the power to deploy troops to quell internal crisis but is the justification in the excessive use of force such as was witnessed in Odi in Bayelsa State and Zaki Biam in Benue State during the regime of President Obasanjo and IPOB in South-East and Shiite group in Zaria during the regime of President Buhari.

3. Power of rule making

Whereas the Constitution[14] confers legislative power in the National Assembly, the President is vested with the power to "modify" existing laws.[15] This power is viewed as negating the intent and meaning of the separation of powers,[16] and is capable of portraying the President as being involved in legislation.[17]

Even though the power to legislate is vested in the legislature, the President nevertheless, performs legislative functions, Niki Tobi,[18] referring particularly to sections 58 and 315, was of the opinion that, although the 1999 Constitution provides for separation of powers and that the Executive is not empowered under the Constitution to make laws, the Executive is involved in certain areas of law-making. The first is section 58 which involves the assent of the President to Bills while the second is section 315 which deals with modification of existing laws. Accordingly, this provision empowers the President, acting without the National Assembly, to alter any law made before the 1999 Constitution took effect. In doing so, the President in effect, exercises an independent power to legislate without recourse to the National Assembly. It is clear that this provision limits the President to making only such changes in existing laws as are needed to bring them into conformity with the Constitution. However, the determination

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[14] Op. cit, section 4
[15] Op. cit, section 315
[16] Oyewo, O.: Reducing the Risk of Divided and failed Government (2009) NIALS, Lagos p. 172
[17] Tobi, N.: Exercise of Legislative Powers in Nigeria, (2002) NIALS, Lagos, p. 46
[18] Tobi, N., Exercise of Legislative Powers in Nigeria (2002) NIALS, Lagos, 44.

of whether an existing law is in conflict with the Constitution or not could become problematic and contentious. Though the President can assert a wide area of discretionary authority in this regard under section 315 of 1999 Nigerian Constitution, his decision could result in disagreements and conflicts, as was the case in relation to the Public Order Act, which was an existing law before the coming into force of the 1979 Nigerian Constitution. President Shagari altered the Act in 1981 by removing the power to grant permits for public assemblies and processions from State Governors and vesting the same in the States' Commissioners of Police, resulting in a conflict between the President and State

Governors. With regard to the power to modify existing laws made by the State, the Court in Mohammed v Attorney General of Kaduna State,[19] held that the power to modify existing law to bring it into conformity with the Constitution is not vested in the Governor alone; and that, where the Governor's modification is at variance with that of the State House of Assembly, whose legislative power is contained in section 4(6) of the Nigerian Constitution, the modification by the House of Assembly would override that of the Governor. Thus, only minor modifications, like names, dates and titles, which do not go to the substance of the law can be made by the Governor or President. Any modification which would affect vested rights must be left to the constitutionally ordained law-making body.[20]

The exact extent of the powers of the President to modify existing laws under section 315 of the Constitution in relation to the doctrine of separation of powers which precludes him from encroaching into the area preserved for the Legislature came up in the Supreme Court for consideration in A.G. Abia State and 35 Ors v.A.G. Federation.[21] In that case, President, Obansanjo, by statutory instrument N0 9 of 2002 made an order modifying the Allocation of Revenue (Federal Account etc) Act 1990 as amended by Allocation of Revenue (Federation

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[19] (1981) N.C.L.R. 117.
[20] Samuel Igbe v Governor, Bendel State, (1981) S.C. 53.
[21] (2003) 1 SCNJ 131

Account etc) Act, 1992. In so doing, the President relied on section 315 of the Constitution and purported to bring Decree 106 of 1992 in conformity with section 162(3) of the 1999 Constitution.

4. Emergency Powers

Emergency power, as provided in section 305 of the Constitution are those powers granted to the president to bring the state of emergence into force in the event of certain circumstances. Section 305 of the 1999 Constitution provides that subject to the provisions of the Constitution, the President may, 'by instrument published in the official gazette, declare a state of emergency for the federation or any part thereof, when certain constitutionally stated circumstances are in operation; Thus, for example, the President can so declare when the federation is at war or in imminent danger of invasion or war (i.e. in the case of IPOB)[22] when there is actual, or clear and present danger of breakdown of law and order in the federation or any part thereof, as to require special measures for restoring peace and security or to avert breakdown; when there is an occurrence or the imminence of occurrence of a disaster, natural or otherwise affecting a community or part of it; when there is a public danger which constitutes great threat to the existence of the federation; or where the President receives a request from the Governor, backed by the support of two-thirds majority of the Members of the House of Assembly in that State, asking that he declares a state of emergency in that State or any part thereof because of the existence of some of the stated constitutional circumstances.[23]

This has been tested in Plateau, Ekiti, Borno, Yobe, and Adamawa States, and discussions on the exercise of such power have shown that there is more to it than the mere exercise of the powers. In the instant cases, conditions precedent were said not to have been met while the

[22] Adesomoju, A.:. http://punchng.com/court-ffirms-ipob's-proscription-designationas-terrorist-group/
[23] Section 305(3)(a-g) CFRN

removal of the governors and the sack of the states' legislatures of Plateau and Ekiti were said to be in excess of the grant.[24]

Fusion of power exist in the parliamentary system, whereas the power are separated in presidential system. In parliamentary system only those persons that are appointed as ministers in the executive body who are the members of parliament. Parliamentary form of government represents a system of democratic governance of a country, wherein the executive branch is derived from the legislative body, i.e. the parliament. Here, the executive is divided into two parts, the Head of the state. i.e. President, who is only the nominal executive and the Head of the Government, i.e. Prime Minister, who is the real executive.

As per this system, the political party getting the maximum number of seats during federal elections, in the parliament, forms the government. The party elects a member, as a leader, who is appointed as the Prime Minister by the President. After the appointment of the Prime Minister, the cabinet is formed by him, whose members should be out of the parliament. The executive body, i.e. the cabinet is accountable to the legislative body, i.e. Japan and Canada.[25]

1.2 STATEMENT OF THE PROBLEM

This research is carried out as a result of the identifiable problems associated with the vesting of some of the powers of the Federation in the President,[26] and the manner that some of those powers are exercised in general terms.

1. The presidential constitution of Nigeria presently has given the President the power of law making which is far and above the spirit and intendment of separation of powers.

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[24] Atura, B.: Emergency Rule in Ekiti as the 1999 Constitution holds: law.global@nyu.edu October, 2006. See also Nwabueze, B.O: Obasanjo Rapes in the Constitution: USA fricanonline.com The Newspaper, Honston

[25] Surbhi, S.: Difference between Parliamentary and Presidential form of government:https://keydifferences.com

[26] Ibid, section 5

2. Security agents are largely vested in the President to the exclusion of the governors who are the chief security of their states, who ought to in a federating units, thus making non-function of the federal structure.
3. The situation whereby in his duty to execute and maintain the constitution with regards to all laws made by the National Assembly, the President at-times will not make recourse to the National Assembly before taking decision.
4. The President assumes too much powers that he commits impeachable offences and yet he enjoys the support of the National Assembly and also the protection of immunity.

1.3 RESEARCH QUESTIONS

In the light of the foregoing, this research work intends to answer the following questions:

1. How can the president powers of law-making be made to conform with the spirit and intendment of separation of powers?
2. How can the power of the president on security matters be decentralised in order to give Governors power of control of security agencies in-line with the federal constitution?
3. How can the President's powers to execute and maintain the Constitution be brought in conformity with the separation of powers as enshrined in the constitution?
4. How can the President be brought to book if he commits impeachable offence without politics been brought into the matter?

1.4 AIM AND OBJECTIVES OF THE RESEARCH

The aim of this study is to examine the presidential powers under 1999 Nigerian Constitution. Following the broad aim above, the specific objectives are to:

1. To ensure that the power approved the President under section 5(1)(b) to execute and maintain the Constitution is exercised in strict conformity with the Constitution and the

laws made by the National Assembly, and for the President not to unilaterally expand the scope of that power,[27] thereby circumventing a drift into arbitrariness.

2. To ensure the curtailment of wide discretionary power on the president to issue orders in certain matters by Section 315 of the 1999 Constitution
3. To ensure a depening of legislature-executive relations as envisage under the 1999 Nigeria constitution

1.5 SCOPE AND LIMITATION

The scope of this research is confined to the powers granted the President under section 5 as well as other enumerated powers contained in the Constitution. Such powers include the powers to execute and maintain the Constitution, Security Powers, Emergency Power and Power of Rule-making. It also traces the origin of the executive Presidency leading to the making of the 1999 Constitution.

1.6 SIGNIFICANCE OF THE STUDY

The presidential model of democratic governance has become a prominent institutional design in Nigerian Constitutions since its adoption in 1979. The relationship between the executive and the legislature in the Nigeria's presidential system has, however, been characterized by unhealthy rivalry, mutual suspicion and competition for supremacy. The Fourth Republic, did not witness any change in the often acrimonious relationship. Despite the majorly unambiguous provisions in the 1999 Constitution aimed at rectifying some of the problems identified with legislature-executive relations in the preceding republics, since 1999, inter-branch relationship in Nigeria has been characterized by gridlocks over major public policy decisions and struggles

[27] Under Section 5(1)(b), the President has the power to act on "all matters with respect to which the National Assembly has, for the time being, power to make laws".

in a climate of partisanship and distrust, with these major political institutions relating with each other as adversaries, not as responsible partners in governance.

1.7 RESEARCH METHODOLOGY

This research requires the use, mainly, of the doctrinal method to achieve the set objective. Therefore, this research applies this method whereby information, facts and law are collected and analysed, having due regard to the constitutional provisions governing the topic of this research.

1.8 CHAPTER SYNOPSIS

This research work follows a particular pattern.

Chapter One gives a background to this research work, it made a brief statement to the research and formulate questions that are intended to be answered in the research. The chapter went ahead to state the aims and objectives of the research, the significance of the research, the methodology employed by the researcher in carrying out the research. This chapter also state the scope of the research and the limitations that are likely to hamper the research work.

Chapter Two make a review of the literatures the researcher relied upon in carrying out the research and gives a general overview of the subject matter of this research.

Chapter Three which is the crux of this research, takes an examination of the presidential powers under the 1999 Constitution by giving an overview of the powers of the president under the 1999 Constitution.

Chapter Four looks into the challenges hindering the powers of the president under the constitution and proffered prospects.

Chapter Five gives the summary of findings, the observations made by the researcher, the recommendations, contribution to knowledge, suggested areas for further research and conclusion.

CHAPTER TWO

LITERATURE REVIEW

2.1 LITERATURE REVIEW

The concept of power, though nebulous, has been reduced to various levels for proper understanding and writers have been able to distinguish what it stands for, especially political power, in relation to its exercise.

Many authors have published some works bordering on the topic of this research. Similarly, newspapers, magazines and journals have had cause to comment on some of the aspects of the executive powers vested in the President. Such authors include erudite scholars as Ben Nwabueze, I.O. Smith, J. O. Akande, Itse E. Sagay, Hon' Justice Niki Tobi, JSC', Chuba Okadigbo, Kehinde Mowoe, J.D. Ojo, Oyelowo Oyewo and Olanrewanju Olamide.

Ben Nwabueze's in his book "Presidentialism in Commonwealth Africa" Position on the powers that are specifically granted and those that are inherent, is that the mere vesting of executive power in the president is sufficient for him to perform a variety of functions, provided always that such acts conform with the particular intent of the grant of power.[28]

Nwabueze,[29] for instance, writing on the nature of executive power, categorises power under three broad theories - (1) residual power, (2) inherent power and (3) specific grant.[30]

Bearing in mind that the main views on political power revolve around (1) normative, (2) post-modern and (3) pragmatic perspectives, and that legitimate power is similar to coercive power in that unacceptable behaviour is punished by sanction, Nwabueze says:

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[28] Nwabueze, B.O: Presidentialism in Commonwealth, Africa (1974). C. Hurst & Company, London, in Association with Nwamife Publishers, Enugu, 4.
[29] Ibid. 1
[30] Ibid. 4

> The widest view of executive power is that it embraces every power which, by its nature, is neither legislative nor judicial.
>
> It is not limited to execution of the laws and, provided it is not forbidden by law, action by government need not wait upon legislation expressly empowering government to do it.[31]

Nwabueze, in trying to find a mid-course between specific grant of power and the inherent power theory; believes that the doctrine of inherent power does not operate from outside the law, but an integral part thereof. He says:

> It is implicit in the constitution of every civilized community. This is so because no constitution can anticipate all the different forms of phenomena which may beset a nation. No doubt vast extensions to the powers of the executive would result from the doctrine of implied powers. The doctrine is a rule of construction according to which every grant of power is construed as including by implication, all such powers as are reasonably incidental thereto and not expressly excluded.[32]

Citing the position of specific grant in contradistinction with inherent powers as is in the United States, Nwabueze says:

> The United States Constitution, after declaring that the executive power shall be vested in the President, goes on to empower him to do specific things such as the power of Supreme Command of the Army, to reprieve offences, to take care that the laws be faithfully executed, and with the concurrence of the Senate to make treaties and appoint public servants. It is from these specific grants, and not from the general executive power clause, that the president derives whatever executive power he has under the constitution.[33]

On the need for the President to exercise the power conferred on him by section 5(1) of the 1999 CFRN with caution, and to recognize the limits of such power, Ben Nwabueze,[34] commenting specially on the declaration of a state of emergency on Plateau State,[35] writes:

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[31] Ibid. 1

[32] Ibid. 7- 8

[33] Ibid. 14

[34] Nwabueze, B.O., "Obasanjo Rapes Constitution by suspending Plateau Assembly and Governor", in US Africa, The Newspaper, Houston USA Africaonline.com accessed 16 August, 2018.

[35] Emergency rule was imposed on Plateau State on May 20, 2004 and an Administrator, Gen. Chris Ali appointed by President Olusegun Obsanjo, even before he would communicate with, seek and receive the nod of the National Assembly

Emergency powers comprise two distinct powers, viz, (i) power to declare a state of emergency; and (ii) power to make laws and to execute them with respect to matters within exclusive state competence in normal times, and to overstep, with some exceptions, the limitations on power arising from the constitutional guarantee of fundamental rights in chapter iv. Section 305 of the1999 CFRN, relied on by President Obasanjo for his action in Plateau State grants only the first power, but not the second; it only empowers the President to declare a state of emergency in situations there specified.

Ben Nwabueze, justifying his position that the President has no justification nor power to declare emergency in a state and remove a sitting Governor as well as sack the legislature, he draws analogy from the provisions of the 1960 Constitution, thus: Section 305 of the 1999 Constitution (reproducing section 265 of the 1979 Constitution) gives the Federal Government no emergency powers, legislative or executive, exercisable during a state of emergency declared under its provisions. It (i.e, section 305) omits completely the power in section 65(1) of the 1960 and section 70(1) of the 1963 Constitutions. The only provisions relevant to the points are those in section1 1 (3), (4) and (5) of the 1999 CFRN.

Specific powers that have attracted the most attention of scholars include:

1. Power to execute and maintain the Constitution under section 5;
2. Emergency powers under section 305;
3. Security powers under sections 216 and 218; and
4. Power of rule-making undersections 58 and 315 of the Constitution.

On the strategically important issue of security powers over the Police, the Armed Forces, and other security agencies, while the Constitution, in sections 216 and 218, provides the modalities for the delegation of powers to the Inspector-General of Police as well as the command and

operational use of the Armed Forces, it is the view of J. O. Akande,[36] in his book "Introduction to the Constitution of the Federal Republic of Nigeria" that before powers are delegated to the Inspector-General by the President, it is necessary for consultation to be first had with the Police Service Commission.

On the operational use of the Armed Forces, it is Akande's view that "it would seem that there are no constitutional limits on the exercise of this power other than the power of the National Assembly" but to this, the learned author did not go further to advance remedy.

On the power of the executive to make law, for instance, Hon Justice Niki Tobi,[37] JSC, in his work, "The exercise of legislative powers in Nigeria" argues that although the Constitution clearly provides for separation of powers whereby the executive is not empowered to make laws, it, in fact, is involved in the art of law making. Niki Tobi refers to sections 11, 58(1)(4), 315, to justify his position. These constitutional provisions deal separately with the President's assent to bills; existing laws and public order.

With due respect, Niki Tobi did not take a position on whether this power of the President to assent to bills under section 5B(4), is not a contradiction to the avowed principle of separation of powers where the three arms -Legislature, Executive and Judiciary are to operate within their jurisdictions, with one serving as a watch-dog on the other, collaborative exercise of powers notwithstanding.

[36]Akande, J.O: Introduction to the Constitution of the Federal Republic of Nigeria, 1999 (2000), MIJ Professional Publishers Limited, 330.

[37] Tobi N., The Exercise of Legislative Powers in Nigeria (2002). Institute of Advanced Legal Studies, Lagos, 44

Another writer, V.C.R.A.C. Crabbes[38] in his article "The Doctrine of Separation of Powers and the Persuasive Approach to Interpretation of Legislation" believes that the power of the President to veto legislation by congress is a legislative power.

I.O. Smith,[39] writing on the features of the Constitution, discusses the supremacy of the Constitution, that it is written, rigid, republican, federal, presidential, with the principles of separation of powers, with bi-cameral legislature and the rule of law, independent judiciary and fundamental rights provision.

Specifically, he restates the position of the President, vis-a-vis the discharge of the executive powers conferred on him, thus:

> The Constitution established a presidential system of government. Under this dispensation, the President is the Head of state, the Head of Government and commander-in-chief of the Armed Forces, as provided in section 130(2) of the constitution... The President shall discharge his executive functions with the assistance of ministers and special advisers.

Smith, in his book, merely restated the position of the Constitution but did not dwell on the crucial issue or elements that sustain the effective exercise of the powers of the President, such as the lure to circumvent constitutional provisions and act in excess of the powers conferred, having taken advantage of the gullibility of the elected representatives and the docility of the electorate.

Contributing to the vesting of powers in sections 5(1)(b) and 305 of the Constitution, Kehinde Mowoe,[40] emphasizing the enormity of powers exercisable by the President, holds that the only construction that can be put to this vesting clause is that the President is under an obligation to

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[38] Crabbe, V.C.R.A.C., The Doctrine of Separation of Powers and the Persuasive Approach to Interpretation of Legislation, (2000) NIALS, Lagos, 4.

[39] Smith, I.O., The Constitution of the Federal Republic of Nigeria, annotated, (1999), Ecowatch Publications (Nigeria) Limited, Lagos (intra, chapter two)

[40] Mowoe, K.M., Op. Cit. 137

deal with issues as they occur on a day-to-day basis, before they receive the attention of the National Assembly.

On emergency power, the author holds that there can be no doubt that this power to declare a state of emergency, especially in relation to a component state, "can be potent in the hands of an unscrupulous Chief Executive and a cantankerous federal legislature especially in the light of the provisions of section 1 1(3)(4) of the Constitution.[41]

In his contribution to the provisions of sections 5B and 315, Oyelowo Oyewo believes that "executive powers of rule-making and the exercise of delegated powers constitute a veritable source of over-reaching its limits and unsettling the separation of powers from the legislature or even the checks and balances in the interplay of powers and functions.[42]

This research, zeroing in on four broad areas, viz, (1) the vesting in, and (2) exercise of such enormous executive powers by the President; (3) delegation of certain of such powers thereof and the (4) power of the president to legislate, viz-a-viz modification of existing laws - examines the identifiable pitfalls therein and proffers recommendations to such areas where inadequacies exist.

2.2 KNOWLEDGE GAP

It is to be noted that the above works did not dwell on the remedies on what should amount to reducing arbitrariness on the powers granted to the president. There is no doubt that the erudite scholars mention in this work had done justice in examining the Presidential powers under the 1999 Constitution. However, as research continues in the global education setting there will always be gap that need to be filed. One of the scholars highlighted on the operational use of the armed forces which in his view it would seem that there are no constitutional limits on the

[41]Ibid. 155
[42]Ibid. 173

exercise of this power other than the power of the National Assembly. But this learned author did not go further to advance remedy. Similarly, another scholar took a position on whether the power of the president to ascend to bills under section 5B (4) is not a contradiction to the avowed principle of powers where the three arms-legislature, Executive and Judiciary are to operate within their jurisdictions, with one serving as a watch-dog on the other, collaborative exercise of the powers notwithstanding.

The research intends to examine the presidential powers under 1999 constitution and proffer recommendations that will curb the arbitrariness of the powers examined. Consequently, this makes the research different by providing the remedy of the arbitrariness to the powers of the president. The essence of this study is to ensure the curtailment of wide discretionally powers of the President.

2.3 CONCEPTUAL FOUNDATION

2.3.1 The Concept of Political Power

Power is one of the very concepts in the tradition of thought of the human societies which is about political phenomena. It is also a concept on which, in spite of its long history, there is, on analytical levels, a notable lack of agreement both about its specific definition, and about many features of the conceptual context in which it should be placed. There is however, a core complex of its meaning, having to do with the capacity of persons or collectivises, to get things done effectively, in particular, when their goals are obstructed by some kind of human resistance or opposition.

The problem of coping with resistance gives rise to the question of the role of coercive measures, including the use of physical force, and the relation of coercion to the voluntary and consequential aspects of power systems.

Therefore, power, as it is known, is a concept that is basically central to politics. There are undoubtedly varied views and definitions of power – political power – such that you have normative view of power, post-modern normative view of power and pragmatic view of power. Political power is the bundle of powers granted or bestowed on holders of political offices or organs of government, to be exercised by them in the context of governmental affairs.

Black's Law Dictionary defines political power as "The power vested in a person or body of persons exercising any function of the state; the capacity to influence the activities of the body politic"[43]. One of the early philosophers, Max Weber, in one of his works – Politics as a Vocation[44] defined power as the "ability to impose one's will, even in the face of opposition from others", while Hannah Arendt, another philosopher, posits that "political power corresponds to the human ability not just to act but to act in concert".[45] For political power in a given state to be lawful, it must derive from some authority itself, such authority being among others, the constitution, legislations, usages and conventions.

For the constitution to be effective as a supreme source of political power, it must itself derive from the sovereign – the free will of the people – hence the necessity to discuss the three basic schools of thought on power.

[43] Black's Law Dictionary, 8th Edition, 2004, 1197

[44] Weber, M., Politics as a vocation, p. 130

[45] Arendt, H.: "On Violence", (1970), Mac Millan Publishers, London, p. 32

2.3.2 Normative View of Power

The normative view of power debate has somehow coaleased into three broad dimensions, viz, decision-making, agenda-setting and preference shaping. While decision-making, as postulated by Robert Dahl[46], advocates the notion that political power is based in the formal political arena, hence measured through voting patterns and decisions made by politicians, agenda-setting, on the other hand, as postulated by Peter Bachrach and Morton Baratz[47] presupposes that power involves both the formal political arena and behind-the-scenes agenda-setting by elite groups, often with a hidden agenda that most of the public may not be aware of.

2.3.3 Post-Modern View of Power

This school of thought has debated over how to define political power.

Perhaps the best known definition is that of Michel Foucault, whose work in "Discipline and Punish"[48], conveys a view of power that is organic within society. This view holds that political power is more subtle and is part of a series of societal controls and normalizing influences through historical institutions and definitions of formal vs. abnormal, hence he characterized power as "an action over actions", and argued that power was essentially a relation between several dots, in continuous transformation. This view thus, lends credence to the view that power in human society, is part of a training process in which everyone, from a president to a homeless person, uses power in his relationships with society.

2.3.4 Pragmatic View of Power

The pragmatists, however, believe that legitimate power is similar to coercive power in that unacceptable behavior is punished by fine or other forms of penalty[49].

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[46] Dahl, R.A: Who Really Rules in Dahl's New Haven, (Yale University Press, 1961)

[47] Ibid

[48] Foucault, M.: Discipline and Punishment (1978), Strategy Formulation: Political Concepts; St. Paul, MN, West Publishing

[49] Gompers, S: Men of Labor: Be Up and Doing –American Federalist, May 1906, p. 319

2.3.5 The Crux of Political Power

The totality of the various views on political power presupposes that the gamut of state powers is comprised of three core units – (1) those who make the laws to create the powers; (2) those who exercise the powers and (3) those who enforce the exercise of the powers. These three distinct units of state powers are known in modern day governance as the legislature, executive and the judiciary. Though separate and distinct from one another, they complement each other in their symbiotic relationship. In other words, the concept of political power revolves around the need to exercise control, by a group of persons or individuals, over the affairs of men, with certain codes of conduct as a guide, to which everyone is expected to subscribe, hence the need to examine the very nature of such powers exercisable by the president.

2.4 THE NATURE OF PRESIDENTIAL POWERS

Reference to presidential powers, for the purposes of this work and in line with the provisions of section 5(1) of the Constitution of the Federal Republic of Nigeria, 1999, means executive powers. This is because all powers so vested in the executive arm of government are to be exercised by the president either directly or through his representatives.

To that extent, all actions of those persons or organs remain the acts of the president[50]. Therefore, this sub-topic discusses the theories of executive power and the extent and reality of the powers so exercised by the president.

2.4.1 Origin of Executive Presidency

The vesting of executive powers in the President is traceable to the then Constitution Drafting Committee, which believed that "no African Head of State has been known to be content with the position of a figurehead"[51]. The position of that committee easily found favour and drew

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[50] Section 5(1)(a), Constitution of the Federal Republic of Nigeria (Promulgation) Decree No.24, 1999as amended. See also Malemi, E.: The Nigerian Constitutional Law (2010) Princeton Publishing Co., Lagos. P. 35

[51] Akande, J.O.: Introduction to the Constitution of the Federal Republic of Nigeria, 1999 (2000), MIJ Professional Publishers Limited, p. iv.

inspiration from the experience of the feud between the then ceremonial President and the Prime Minister, under the 1960 Constitution – Dr. Nnamdi Azikiwe and Alhaji Abubakar Tafawa Balewa. Dr. Azikiwe had made a passionate plea in 1961 that Nigeria should become a republic so as to clothe the President with executive powers.

His plea was considered at an all-party conference in July, 1963, where it was agreed that a Republic be declared in October, 1963. Even at that, the President was still not clothed with executive powers. Thus, political crisis was to break out over inconclusive census and election rigging in the then Western Region, necessitating the military to intervene.[52]

After a period of military interregnum, in 1979, the military, headed by Gen Olusegun Obasanjo, made the 1979 Constitution, ceding executive powers to the President, and handed power to an elected Chief Executive – Alhaji Shehu Shagari.

2.4.2 The nature of executive power exercisable by the President

Executive power is one of the three powers of state, having been borne out of the doctrine of separation of powers, whereby three arms of government are created. They are the legislative, executive and judicial branches which perform different and distinct roles.

While agreeing that executive power is a term of uncertain meaning, there is however the view that the three main theories around the concept, have exhaustively discussed the topic. These are (1) the Residual Power Theory, (2) the Inherent Power Theory and (3) the Specific Grant Theory.

2.4.3 The Specific Grant Theory

Specific grant, in the context of this work, may be referred to simply as the power granted the President to carry into effect, the specific provisions of the law, be it the Constitution or other enactments. This is to say that whatever action, be it administrative or otherwise, which the

[52] See also Ojo, J.D. (1998). The Executive under the Nigerian Constitution, 1960 –1995; Spectrum Books Limited, Lagos, p. 300

President is to take, must necessarily derive from specifically enacted laws, including the law of nations, especially that the primary grant is the maintenance and preservation of the Constitution, such as the 1999 Constitution.

There are differing opinions as to what constitutes specific grant of power; its scope, limit as well as its interrelationship with the implied power theory.

There have hardly been judicial authorities in Nigeria that have tested the exercise of specific grant of power, vis-à-vis, exercise of inherent power but the old American case of **Re Neagle**[53], gives a clear picture of what a president ought to do where there are situations of necessity. In that case, there was a threatened attack on a justice of the United States while on circuit. The threat was actually carried out but not before the United States Attorney-General had detailed a marshal to protect the judge. The attacker was shot dead. The issue that arose was whether that power to protect a judge was specifically granted to the president, to which the Supreme Court, in its wisdom, held by majority decision, that "the power to execute the laws extended to all the rights, duties and obligations growing out of the constitution and to all the protection implied by the nature of the government under the Constitution", since the protection of the judge was essential to the existence of the government.

Even though this decision was criticized by a minority of two judges on the ground that no specific grant existed for the protection of judges, they nevertheless admitted that the president's executive power extended to the execution of the law of the constitution.

Ben Nwabueze, commenting on the decision of the court in the Neagle's case, admitted that the action of the Attorney-General was "necessary" in the circumstances but cautioned thus: "But the situation necessitating the invocation of the power must be grave one; it must be a

[53] 51 Conningham v. Neagle, 135 U.S.1 (1890), p.83, per Justice Lamar

situation of present and imminent danger to the existence, peace or well-being of the state or society"[54].

The reasoning of those who believe in this school of thought is that, as it is in both Nigeria and America, the constitution, after declaring that the executive power shall be vested in the president, goes on to empower him to do specific things, such as the power of supreme command of the Armed Forces, to reprieve offences, take care that the laws be faithfully executed and with the consonance of the Senate, make treaties and appoint public servants, hence it is from the general executive power clause, that the president derives his power under the constitution.

Interestingly, those opposed to the view illustrated by the decision in **Myers v. United States**[55], hold that the clause vesting executive powers in the president, simpliciter, is a grant of power and that "the vesting of the executive power in the president was essentially a grant of power to execute the laws".

2.5.4 The Residual Power Theory

While positing that the widest view of executive power is that it embraces every power which, by its nature, is neither legislative nor judicial, an erudite scholar, Ben Nwabueze[56], quoting with affirmation from Alan Glendhill[57], says that

> Executive power is what remains of the functions of government after the legislative and judicial powers have been taken away. It is not limited to the execution of the laws and, provided it is not forbidden by law, action by government need not wait upon legislation expressly empowering government to do it. The formulation of policy and the preliminary steps necessary to implement it by legislation come within the executive power.

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[54] Nwabueze, B.O., Presidentialism in Commonwealth Africa (1974) C. Hurst & Company, London, in association with Nwamife Publishers, Enugu, p. 12

[55] Myers v. United States, op. cit, at p.117; per Taft C.J.

[56] Nwabueze, BO: Presidentialism in Commonwealth Africa (1974), C. Hurst & Company, London, in Association with Nwamife Publishers, Enugu, p.1

[57] Glendhill, A.: Pakistan. The Development of its Laws and Constitution, 2nd ed. (1967) p.42

The kernel of the residual power theory on executive power is that it is not limited by the inherent implication of the word "execute", since the word suggests physical action which would therefore exclude any function which does not involve such an action. One of the advantages of this school of thought is that it recognizes nevertheless, that the thinking out of policy and the administering of laws, also constitute executive action, since the executive has the primary responsibility for government, and policy formulation is a key executive function. These, ordinarily however, do not fall within the purview of executive functions, as a distinction ought to be drawn between functions that are executive by nature and those that are not but are merely treated as such by modern governmental practice. This is the view of the United States Supreme Court[58], which held that "the vesting of executive power in the President operates unquestionably as a limitation on congress' legislative power, precluding it from using the power to divest the President of any function that properly forms part of the executive power".

However, the objection to the residual power theory is its assertion that the executive has an inherent authority, independently of an enabling law, to execute any action necessary for the government of any nation, as long as this is not out rightly prohibited by law. This was the view

followed in **Myers v. United States**[59], where Justice Mc Rendds said:

> I think it perfectly plain and manifest that although the framers of the Constitution meant to confer executive power on the President, yet they meant to define and limit that power and to confer it in the lump.

[58] Humphrey v. United States (1934), 295 U.S.602

[59] Quoted in Justice Mc Renolds' discenting judgment in Myers v. United States, 272 U.S. 52 at p. 229-30.

2.6.5 The Inherent Power Theory

The theory presupposes that executive power confers an inherent authority to execute functions which are considered inherently executive in nature. This however, excludes those functions that are not inherently executive, such as policy formulation and administrative law.

This is where it differs significantly from the residual theory even though it shares with the latter, the assertion that within its proper sphere, the executive has an inherent authority to act without prior authority conferred by legislation.

This position was commented upon by a former United States President, Theodore Roosevelt, thus:

> The most important factor in getting the right spirit of my administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the constitution or imposed by the Congress under its constitutional powers... I declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it... My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws[60].

But this position has been sharply criticized by Ben Nwabueze[61], as "both startling and dangerous", in that it means the executive can interfere with private rights at will, without legal authorization as long as what it does is not prohibited expressly. Nwabueze, however, appears here, to contradict his position as expressed with regard to the residual power theory. This position is similar to the position of Lord Atkin in **Eshugbayi Eleko v. Government of Nigeria**[62], where he said: "The Executive can only act in pursuance of the powers given to it by law. In accordance with British jurisprudence, no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice".

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[60] Roosevelt, T: Autobiography, pp. 388-9

[61] Nwabueze, B.O. op. cit, p. 5.

[62] Eshugbayi Eleko v. Government of Nigeria (1931) A. C. 662-670

Further contributing to the debate on inherent power, United States Senator Clay, quoting with affirmation from the judgment of Justice Mc Reynolds in **Myers v. United States,**[63] exclaimed! "Inherent power, where is it derived? The constitution created the office of President; it had no power prior to its existence, it can have none but those conferred upon it by the instrument which created it...".

The inherent power theory, as widely criticized as it is, enjoyed the support of one of the greatest authorities on government, John Locke, when, in his book, **Two Treatises of Government**, he wrote,

> ...where the legislative and executive powers are in distinct hands, as they are in all moderated monarchies and well-framed governments, there, the good of the society requires that several things should be left to the direction of him that has the executive power. For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws having the power in his hands, has by the common law of nature, a right to make use of it for the good of the society in many cases where the municipal law has given no direction, till the legislature can conveniently be assembled to provide for it...[64]

The crux of Locke's thesis here is to the effect that in such situations, public security becomes paramount. Ordinarily, this view, bordering on necessity, is almost universally held applicable.

But Nwabueze[65], in criticizing this concept, said:

> By attributing to the executive, power to do anything that is not prohibited by law, the inherent power theory equates the executive to a natural person. This is clearly untenable... No doubt, vast extensions to the powers of the executive would result from the doctrine of implied powers. The doctrine is a rule of construction according to wch every grant of power is construed as including by implication, all such powers as are reasonably incidental thereto and not expressly excluded.

Thus, inherent power is conceived by reference to the totality of the powers of the executive whereas implied power may be judged by reference to its being necessary for the fulfillment of specific grant of power, hence the need to consider these powers that are specifically granted.

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[63] Myers v. United States, 272, U.S. 52, op. cit at p. 237

[64] Locke, J: Two Treatises of Government (Morley, ed.), Bk.11, Ch.14, p. 159-66

[65] Nwabueze, B.O., Op. cit, p.8

2.7.6 Power and Prospect of Arbitrariness: Checks and Balances

One peculiar nature of power is that the tendency is always there that the incumbent president, with a wide-ranging latitude to exercise executive power, could become over-bearing and go beyond his bounds. This accords with Lord Acton's maxim: "Power tends to corrupt, absolute power corrupts absolutely..."[66]. This is illustrated by the famous story of Abraham Lincoln, who, while taking a voice vote with his cabinet, said: "nos, 7; ayes, 1. The ayes have it"[67]. Thus, the necessity for effective checks and balances.

Checks and balances, as a system, rests on an open recognition that particular functions belong to a given organ of government while at the same time exercising the power of oversight control by another organ so as to ensure that one does not exercise its acknowledged powers in an arbitrary and despotic manner, the ultimate purpose, being to make in one of his numerous socio-political quotes, said: "Power tends to corrupt, absolute power corrupts absolutely... And remember, where you have a concentration of power in a few hands, all too frequently men with the mentality of gangsters get control. History has proven that, All power corrupts; absolute power corrupts absolutely" separation of powers more effective as an instrument of constitutionalism.

Some of the most common means by which the legislature exercises its power of checks are by impeachment and overriding of the president's veto. In Nigeria, there has not been any case of impeachment of a president but in the United States, it has been tried twice and twice it failed[68].

As an American author[69] in his book, said: "The Power of Impeachment is not meant to give Congress a control over the president's tenure. Impeachment, it has been aptly said, 'is not an

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[66] 64 Lord John Emerich Edward Dalbergh Acton, an English historian and political scientist (1837-1869),

[67] "The Possibilities of the Presidential System in Developing Countries", in Parliament as an Export, ed. Sir Alan Burns (1969), p.195

[68] President Lindon Johnson in 1868 and President Bill Clinton over the Monica Lewinski Case

[69] Clinton Rossiter: The American Presidency, 2nd ed. (1960) pp. 52-3

inquest of office', a political process for turning out a president whom a majority of the House and two-thirds of the Senate simply cannot abide. It is certainly not, nor was it ever intended to be, an extraordinary device for resisting a vote of no confidence".

However, the Nigerian political system can hardly be said to be developed enough to understand the dividing line between violations of the provisions of the Constitution and political expediency.

2.5 GENESIS OF THE EXECUTIVE PRESIDENCY IN THE 1999 CONSTITUTION

The 1999 Constitution, largely a reproduction of the 1979 Constitution, is modelled along the American Constitution, which is executive presidency in nature, and has a chequered history. The history of the quest for executive presidency in Nigeria dates back to the early 1960s, the period shortly post-independence, which period was marred by political power struggle under the parliamentary system.

The making of the 1999 Constitution has a short history but anchored on the events leading to the making of the 1979 Constitution. In 1985, after the military had ousted the government of Alhaji Shehu Shagari in the Second Republic in 1984, the government of Gen IB Babangida embarked on a long process of transition to civilian rule, with the setting up of a Political Bureau and a Constitution Review Committee. There was also a Constituent Assembly,[70] the outcome of which was the 1989 Constitution. That constitution never became functional before Gen. Babangida was forced out of office in the aftermath of the annulment of the June 12, 1993 general elections. Then, a twist in constitutionalism ensured with yet another military head of state – Gen Sani Abacha.

He tried to fashion out a constitution in 1995. That did not see the light of day, as he was to die suddenly, in 1998. When Gen Abdulsalami Abubakar assumed power as Head of State

[70] Federal Republic of Nigeria: Proceedings of the Constituent Assembly, Official Report, Vol. 1, Lagos: Federal Ministry of Information, 1978, Vol 496-497 at pp. 258-259.

thereafter, he constituted the Constitutional Debate Co-ordinating Committee which was mandated to explore ways of fashioning out an acceptable constitution for Nigeria.

That Committee came out with a report that there was substantially nothing wrong with the 1979 Constitution, and that it merely required minor modifications. This was promptly done and that marked the being of the 1999 document, in operation to date.

2.5.1 History of the Executive Powers of the President

Admittedly, Nigeria has had its fair share of political turmoil, spanning the period of colonization, pre-independence, and post-independence to date.

The British colonialists granted independence to Nigeria on October 1, 1960 under a parliamentary system of government of the Westminster type of democracy. There was a Governor-General who was the head of state representing the Queen and a Prime Minister who was the effective head of government. There were also regional governors and regional premiers who were the heads of regional governments. By this arrangement, the Governor-General and the governors were meant to be ceremonial heads of state without executive powers. Just like the British Monarch, they had three powers, the power to be consulted, to advise and to warn, but the persons who wielded real power at the centre and the regions were the prime minister and the regional premiers.

Discontent was soon to set in as Dr. Nnamdi Azikiwe, the first indigenous head of state, in 1961, made a passionate plea that Nigeria should become a republic with the Governor-General as President with executive powers. He felt disenchanted with the weak position of the governor-general and believed that it was wrong to give all the powers to the prime minister.[71] His plea for an executive presidential system was considered at an all party conference in July 1963. At that conference, it was agreed that Nigeria should become a republic in October 1963

[71] Azikiwe, v. Governor-General: Call for a Republican State: Daily Express, Nov 18-25, 1961 at p.5

with the Governor General as constitutional president. Dr. Azikiwe was not pleased with this arrangement which did not vest executive powers in the president.

The pre-eminent role of the head of government was clearly demonstrated during the federal election of December 1964 when the head of state advised that the election be postponed from December 30,

1964 to a later more convenient date. Alhaji Abubakar Tafawa Balewa, the prime minister and head of government at the centre disagreed and ordered that the election should go on as scheduled.

The threat by the United Progressive Grand Alliance (UPGA) that if the elections were held on December 30, 1964, the party would boycott the election, did not deter the prime minister. Despite total boycott in the East and partial boycott in the West and the Midwest, the election went ahead. During the election, there were electoral malpractices and the election was massively rigged. Even though the Nigerian National Alliance (NNA) won the election through rigging, the President, Dr. Azikiwe was constitutionally bound to call on Alhaji Tafawa Balewa to form his cabinet since he won majority support in parliament.

With the census controversy in 1962 and 1963, the treasonable felony trial of 1963, and rigging of both the federal election of December 1964 and the Western regional election of October 1965, the Army had a fertile ground to seize power on Saturday, January 15, 1966, when the civilian government could not arrest the worsening political turmoil, ostensibly due to power tussle.

Between January 15, 1966 and October 1, 1979, the Army was in power in Nigeria. No serious effort to get a new Constitution for Nigeria was made until Brigadier Murtala Muhammed (as he then was) assumed office as Head of State on July 29, 1975. In his 15th independence anniversary broadcast on October 1, 1975, he announced the constitution of the Constitution Drafting Committee, to examine the possibility of introducing an executive presidential system

with the president and vice-president popularly elected; that the choice of the members of the cabinet should reflect the federal character of the country; and to establish an independent judiciary.[72]

At the end of the debates, the members recommended to the Constituent Assembly a presidential executive system of government[73] thus marking a break from the British Parliamentary system which was previously adopted in post-colonial era. General Murtala Muhammed was shortly to be assassinated, thus paving the way for General Olusegun Obasanjo to perfect the craft. This led to the inauguration of the Second Republic, headed by Alhaji Shehu Shagari, as Executive President, in 1979, under an executive presidential system, tailored along that of the United States of America.

Under section 4(1) of the 1979 Constitution, legislative power was vested in the National Assembly while section 4(6) of the Constitution vested legislative powers of a state of the federation in the House of Assembly of the state. Again section 5(1) vested executive powers of the Federation in the President while section 5(2)(a) vested executive powers of the state in the State Governor. Similarly section 6(1) vested judicial powers of the Federation in the courts established for the Federation while section 6(2) vested judicial powers of a state in the courts established for a state.

The inauguration of the Executive Presidential Constitution in 1979 was in tandem with the view of the Constitution Drafting Committee that "no African Head of State has been known to be content with the position of a mere figure-head"[74]

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[72] Federal Republic of Nigeria: Report of the Constitution Drafting Committee containing the draft Constitution, Vol. 1, Lagos: Federal Minister of Information, 1976, p. xiii.

[73] See also Ojo, J.D.: The Executive Under the Nigerian Constitution –1960 –1995, (1998), Spectrum Books Limited, Ibadan, p. 301

[74] Akande, JO: Introduction to the Constitution of the Federal Republic of Nigeria, 1999(2000), MIJ Professional Publishers Limited, p. iv

2.6 BASIC FEATURES OF THE CONSTITUTION

The Constitution has a number of features which are germane to good governance, provided the political actors play the game in accordance with the rules. The Constitution is supreme, Presidential, rigid, Republican, and has a bi-cameral legislature.

2.6.1 The Presidential Nature of the Constitution

Presidentialism implies that government is not just the function of one undifferentiated, monolithic organization, but rather, its various functions may be separated and assigned to different organs.

Under the Constitution,[75] the President is Head of State, the Chief Executive and Commander-in-Chief of the Armed Forces of the Federation. This constitutional provision says it all. That is the essence of the Constitution being Presidential. That is, all executive power is vested in the one man called the President, to exercise it in accordance with the provisions of the Constitution, as the three powers of state, by way of checks and balances, are vested in three distinct organs.

The President is not synonymous with the state, as allegiance is owed not to him, but to the people or Nigeria, to whom sovereignty belongs.

The President is subject to the provisions of the constitution and the laws and although insulated from prosecution while in office, he could be sued in his official capacity[76].

2.6.2 Supremacy of the Constitution

The 1 999 Constitution[77] in its section 1 (1),provides that: "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal

[75] See Section 130(2) CFRN
[76] Section 308(1)(a)(b)(c) CFRN
[77] Ibid

Republic of Nigeria"; and that (3) "if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency, be void".[78]

The supremacy of the Constitution is the basic anchor of a democratic government such as ours. Not only are the provisions of the Constitution binding on all authorities and persons throughout Nigeria, No person or group of persons shall take control of the government of the country nor shall the country be governed except in accordance with the provisions of the Constitution[79].

Being the basic law, i.e., the grundnorm, its provisions are Supreme over all other laws and any law inconsistent with such provisions shall be null and void, as held in *Obaba V. Governor of Kwara State,*[80]

2.6.3 Written and Rigid Nature of the Constitution

The world over, both democratic and non-democratic governments have Constitutions. They are either written or unwritten. Nigeria, like the United States of America, Russia, France and Germany, has its Constitution in a written document, unlike Great Britain, Israel and New Zealand, which perhaps, are the only countries known not to have written constitutions. This is so not merely in the sense that it is a document but essentially because it is one in which fundamental principles concerning the organization of government, the powers of its respective agencies and the rights of the subjects are encapsulated in one document. One of the consequences of the constitution being written is that it is rigid. That is, its provisions cannot be altered in the manner of the ordinary law-making process. For any provisions of the

[78]ibid
[79] Section 1(2) CFRN
[80]*Obaba V. Governor of Kwara State(1994)4NWLR (pt.29a) p.31 @39 ,para A-G,F-II*

Constitution to be amended, it has to be in strict compliance with section 9(1)(2)(3)(4), particularly its sub-section (2), which provides that:

> An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section B of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all states.

The particular provision of the foregoing subsection reinforces the essence of the rigidity of the Constitution.

2.6.4 The Republican Nature of the Constitution

A Republic is defined by Black's Law Dictionary[81] as "A system in which the people hold sovereign power and elect representatives who exercise that power. This simple definition aptly fits the Nigerian constitutional democracy. Nigeria, became a Republic in October, 1963 and since then, successive constitutions, including those that did not see the light of day, have maintained that status, as provided in section 2(1) of the Constitution which provides thus: "Nigeria' is one indivisible and indissoluble sovereign state to be known as the Federal Republic of Nigeria".

Thus, the cumulative effect of this status is that sovereignty belongs to the people of Nigeria, from whom government, via the instrumentality of the Constitution, derives its powers and authority.[82]

2.6.5 The Federal Nature of the Constitution

The 1999 Constitution,[83] provides that Nigeria shall be a Federation consisting of states and a Federal Capital Territory, and that there shall be 36 such states. The Federal structure

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[81] Black's Law Dictionary, Eighth Edition, 2004, 1330.
[82] Constitution of the Federal Republic of Nigeria, 1999 section 14(2)(a)
[83] See Section 2(2), 3(1) CFRN

recognizes three independent tiers of government, that is, the Federal, State and Local Governments and each tier has its own defined administrative structure through which the business of governance is carried out.

The federal structure is reflected in the legislative, executive and judicial arms of government,[84] and the arms of the three tiers of the federal structure are expected to function independently of the other, with of course, collaboration.

For instance, only the National Assembly has the legislative power over items in the Exclusive Legislative List, as set out in Part I of the Second Schedule to the Constitution[85]. Although the House of Assembly of a State has power to legislate concurrently with the National Assembly on matters listed in the Concurrent Legislative List, as contained in the First Column of Part II of the Second Schedule to the Constitution, where the Federal Government has validly legislated on a matter, no inconsistent state legislation shall co-exist with it on the same matter, hence such legislation shall be void, to the extent of that inconsistency.[86]

Similarly, no authority or person shall make raw on any item reserved for the Local Government Council to legislate upon as provided in the Fourth Schedule to the Constitution.[87]

Disputes between the Federal and State or between states, involving any question on which the existence or extent of a legal right depends, shall be subject to the exclusive original jurisdiction of the Supreme Court.[88]

Even though the Constitution clearly spells out the federal structure of the country - Federal, State and Local Governments - the Governor of a state, in exercising the authority vested in

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[84] See Section 4, 5 & 6 CFRN
[85] See Section 4(2)(3) CFRN
[86] Section 4(5) CFRN See also *Governor of Ondo State v. Adewunmi (1988) 3 NWLR 9 (pt. 82) p.280*
[87] Section 7(5) CFRN
[88] Section 232(1) CFRN

him, in relation to his state, shall not impede or prejudice the authority which has been lawfully vested in the President of the Federal Republic, in relation to that same state.[89]

2.6.6 Separation of Powers

The Constitution can be described as a huge river, with a collection of three streams whose waters, though flow in the same direction and cross one another, never mix. This aptly describes the term separation of powers. State powers[90] -the legislative, executive and judicial powers- are established to avoid concentration of power in one man or arm of government so that the acts of one should not be controlled by the other. This is also called checks and balances, for one arm is necessarily a check on the other, particularly, the role of the judiciary asa major check on the executive and the legislature.

Even though the doctrine of separation of powers is held very strongly, there is however, a symbiotic relationship between the three arms of government, particularly so as to ensure the smooth functioning of the machinery of government. For instance, a piece of federal legislation does not become law (Act) merely upon its passage by the National Assembly, until it has received the assent of the President, except where such assent is withheld for longer than 30 days and then overridden by the requisite two-thirds majority of the National Assembly.[91]

2.6.7 Rule of Law and Basic Rights

Executive lawlessness has been safeguarded by the provision, in Chapter 4 of the Constitution in that the power of the Executive to move against the citizen shall not be dictated by the whims and caprices of the executive but only to the extent that derogation is allowed.

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[89] Section 5(3)(a)(b)(c) CFRN
[90] Section 4,5,6 CFRN
[91] Section 58 (1)(4)(5) CFRN

To this extent, the Constitution[92]provides guarantees and protects the individual's basic rights. The rights are non-negotiable and cannot be bridged, except for any infraction pursuant to a court order or any law that is reasonably justifiable in a democratic society, in the interest of defence, public safety, public order, public morality or public health or for authority or person without prejudice to the right to damages under the law.

[92] Sections 33-46 CFRN

CHAPTER THREE

THE PRESIDENTIAL POWERS UNDER THE 1999 NIGERIAN CONSTITUTION

3.1 THE POWERS OF THE PRESIDENT UNDER THE 1999 CONSTITUTION

The Constitution,[93] in its Chapter I, Part II, vests the three powers of state in sections 4, 5, and 6 respectively, in three branches of the government.

Under this arrangement, the powers of the executive branch of the Federal Government are vested in the President in general terms by the provisions of section 5(1)(a)(b). There are however, a number of other specifically granted powers. They include (1) security powers, (2) appointments and removals, (3) emergency power, (4) the power of rulemaking and (5) prerogative of mercy.

3.2 POWER TO EXECUTE AND MAINTAIN THE CONSTITUTION

Admittedly, the most elaborate of the powers of the President are the powers granted under section 5(1)(b), the basis upon which executive powers are to be exercised by the President to execute and maintain the Constitution in all its ramifications. The duty of execution and maintenance of the constitution is one which is all encompassing, the scope of which cannot be easily determined until situations arise which have to be dealt with. There is no doubt however that fundamental duty of the President who is thereby placed in the position of the conductor of a mighty orchestra encumbered with the duty of making sure every section or part works in harmony.

The duty of execution and maintenance of the Constitution under section 5(1)(b) means that the President is responsible for making sure that the provisions of the Constitution are brought

[93]Constitution of the Federal Republic of Nigeria 1999 (as amended).

into effect. Thus, for example, by virtue of the provisions of section 153 of the 1999 constitution, certain federal executive bodies, commissions and councils are to be established. The President is saddled with the responsibility of executing the section in keeping with the provisions of other sections of the constitution in relation to it. It should be noted that the commissions and councils, like the Independent National Electoral Commission (INEC), National Defence Council (NDC) and National Population Commission (NPC), to mention a few, are of such very fundamental importance to the existence and continuance of Nigeria, that their establishment must be done with utmost care.

Also there are many other provisions of the Constitution where the National Assembly is given the power to make laws in relation to the establishment of certain bodies. It is the President's duty to ensure this, and execute the provisions of the laws after they are made, inconformity with the provisions of the Constitution.

The duty of 'execution and maintenance' of the Constitution involves vigilance on the part of the President so as to make sure that the provisions of the Constitution are adhered to by every section of the society. Therefore, whenever there is an infraction or attempted infraction of any provision of the Constitution, the President as the Chief Executive, has the duty before redressing such infraction either judicially or, if the case so demands, through the use of force. Thus, for example, whenever there is an attempt at secession from any part of the federation, which would be an offence against the nation and section 2 of the Constitution, the President can use federal armed might to quell it. More importantly, whenever there is an attempt at infraction of any constitutional provisions in such a way that it would be to the detriment of some Nigerians, or contrary to international obligations which Nigeria is a part of through ratification of treaties, observance of the Constitution can be enforced through judicial means, or force, where the former fails.

Whatever the means employed by the President, dialogue, diplomacy, judicial pronouncement, or force as the ultimate tool, there is no doubt that he has the duty of ensuring that such controversies are solved.

Similarly, there appears to be support for use of force under the United States Constitution, which in Article II section 3 grants to the President the duty of taking care "that the laws be faithfully executed". The Posse Comitatus Act of the United States provides:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United states, make it impracticable to enforce the laws of the United states in any state or territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any state, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.[94]

President Eisenhower invoked this power, when he dispatched troops to Little Rock, Arkansas in 1957 to counter resistance to Federal District Court orders pertaining to the desegregation of certain public schools in the Little Rock School District.[95] The authority to decide whether the exigency of the situation requires the use of force belongs to the President. There is no doubt that a correct interpretation of this power in our constitution would incorporate the American position in appropriate cases, The President or head of the executive in a modern state cannot in any way successfully perform his duty of execution and maintenance of the Constitution without the discretion as to such use of force.[96]

In a like manner, section 5(1)(b) imposes on the President the duty to execute and maintain all laws made by the National Assembly. This is certainly an enormous duty for which the arguments on the occasional use of force would suffice. The section goes on to provide that the President's executive powers extend to, "all matters with respect to which the National

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[94] Posse Comitatus Act of the United states, 1979, 20 statute, 152,IOU. S.C.332-333.

[95] Killian & Beik: The Constitution of the United states of America: Analysis and interpretation, p. 45.

[96] *Martin V. Mott, 12 wheat (23 U.S.) 1a (x827).* See also *cooper v. Aaron, 358 us 1,4, 18-19 (1958).*

Assembly has, for the time being, power to make laws". This is inspite of the fact that the section already confers on him the authority to execute and maintain all laws made by the National Assembly.

The construction that can be put on this is that, whenever a situation occurs, in relation to a particular matter under the legislative authority of the National Assembly, but for which a law has not yet been made, the President has the duty to deal with it in the course of his duties in the day to day running of the affairs of the nation. Thus, for example, if there is no federal law on drugs and poisons, as in List 21 on the Exclusive Legislative List and the President is faced with a situation of importation of dangerous poisons by a company, he has the authority to deal with it administratively until a law is enacted by the National Assembly.

Apart from the general powers listed under section 5 of the 1999 Constitution, the Constitution again confers other powers and duties on any other branches.[97] Under the Constitution, this power is to be regulated by the National Assembly.[98]The President, as the Commander-in-Chief, determines the operational use of the army, but he may and does delegate the power to senior members of the armed forces.[99]Generally, he cannot initiate or declare war with another country without the sanction of a resolution of both Houses of the National Assembly at a joint sitting.[100] Where however, the security of Nigeria is being threatened or endangered, the President may, upon consultation with the NDC, deploy members of the Armed Forces on limited combat duty outside Nigeria.[101] He must however within seven days, seek the consent of the Senate which must give or refuse such within fourteen days.

[97] Section 218(2) CFRN
[98] Section 218(4)(a)(b) CFRN
[99] Section 218(3) CFRN
[100] Section 5(4)(b) CFRN
[101] Section (4)(b) & 5(5) CFRN

The NDC is an executive body created by the Constitution,[102] and consists of the President and Vice President as Chairman and Deputy Chairman respectively, and the Minister of Defence, Service Chiefs, and other members that may be appointed by the President. Their duty is purely to advise the President on matters of defence, though he is not bound to take such advice. Where Nigeria is invaded or in imminent danger of invasion by the enemy, the President has the discretion to determine the appropriate reaction. The National Assembly however, retains the power to make laws for the regulation of the powers of the President as Commander-in-Chief, and for "the appointment, promotion and disciplinary control of members of the Armed Forces of the Federation.[103]

3.3 SECURITY POWERS

The security powers of the President are basically anchored on his power to give directive to the Inspector-General of Police, through the Nigeria Police Council, under section 216, as well as under section 218 of the Constitution, which empowers the President to determine the operational use of the Armed Forces.

By virtue of the provisions of section 217 of the 1999 Constitution, the armed forces of the federation consist of "an army, a navy, and an air force" and other branches that may be established by an Act of the National Assembly, which must provide for their adequate and effective maintenance and equipment from the office of the Commander-in-Chief of the Armed Forces. The President has the authority however to appoint the chiefs of defence, army, naval and air staff, and heads, of any other branches[104]. Under the Constitution, this power is to be regulated by the National Assembly.[105] The President, as the Commander-in-Chief, determines the operational use of the army, but he may and does delegate the power to senior members of

[102] Section 218(4) CFRN
[103] Section 318(4)(b) CFRN
[104] Op. cit, section 218(2)
[105] Ibid, section 218(4) (a) (b)

the armed forces.[106] Generally, he cannot initiate or declare war with another country without the sanction of a resolution of both Houses of the National Assembly at a joint sitting[107]. Where however, the security of Nigeria is being threatened or endangered, the President may, upon consultation with the National Defence Council, deploy members of the Armed Forces on limited combat duty outside Nigeria[108]. He must however within seven days, seek the consent of the Senate which must give or refuse such within fourteen days.

The National Defence Council is an executive body created by the Constitution,[109] and consists of the President and Vice President as chairman and deputy chairman respectively, and the Minister of Defence, service chiefs, and other members that may be appointed by the President. Their duty is purely to advise the President on matters of defence, though he is not bound to take such advice. Where Nigeria is invaded or in imminent danger of invasion by the enemy, the President has the discretion to determine the appropriate reaction. The National Assembly however, retains the power to make laws for the regulation of the powers of the President as Commander-in-Chief, and for "the appointment, promotion and disciplinary control of members of the Armed Forces of the Federation.[110]

3.4 POWER TO APPOINT AND REMOVE FROM OFFICE

There are basically two types of appointments which the President has powers to make under the Constitution. They are statutory appointment and direct appointment of personal aides.

3.4.1 Ministers and Special Advisers

Among the officers of the executive branch are Ministers of the Federation. The President has the power to establish as many ministerial portfolios as he deems fit. Those to be appointed as

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[106] Ibid, section 218(3)
[107] Ibid, section 5(4)(b)
[108] Ibid, section 5(5). This is a proviso to section 5(4)(b)
[109] Ibid, section 218(4)
[110] Ibid, section 318(4)(b)

Ministers must however, possess the same qualifications as members of the House of Representatives.[111] Thus, for example, they must be Nigerians, at least thirty years old; with a minimum of school certificate or its equivalent, and must not be subject to any of the grounds for disqualification. The Senate must confirm any appointment by the President.[112]Once the Senate has confirmed such appointment, neither it nor anybody except the President may in any way affect the appointment, or initiate or demand dismissal.

This position is the same under the United States Constitution. Thus, the position of the President as the head of the administration is maintained consistently by his removal powers in relation to offices of the executive department.

Appointment of Ministers by the President must reflect the principles of federal character,' and each state must, as far as possible, be represented.[113] In his appointments into the Federal Executive Council generally, it must be reflected. If the confirmation of the Senate is not forthcoming within twenty-one days, the appointment of the Minister is deemed to have been approved.[114]

It is the President who exercises his power to assign portfolios to Minister as well as the duties of the Vice President from time to time.[115] Thus, in *Tende V. Attorney General of the Federation*,[116] the court noted that the building of a port complex and the name to be given to it must be specifically delegated to the Minister of Transport by the Chief Executive before he can exercise it. The President must hold regular meetings with his Ministers for the purposes

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[111] Section 147(5) CFRN
[112] Section 14(2) CFRN
[113] Section 14(2)147(3) CFRN
[114] Section 147(6) CFRN
[115] Section 148(1) CFRN
[116] *(1988)1NWLR pt. 71, 506 at p.522.* see also Mowoe, K.M,: Constitutional Law in Nigeria (2008) Malthouse Press Limited, p.140

of coordinating their activities, determining the general direction or government policies and advising the President.

3.4.2 Power to Appoint Federal Attorney-General

Given the enormity of the powers conferred on the Attorney-General of the Federation and Minister of Justice under sections 150 and 174 of the 1999 Constitution, there is no doubt that such appointment must be well thought out. He is appointed by the President subject to confirmation of Senate, being a Minister in the executive department, though with already defined duties and powers. He must however be a person who has been qualified to practice in Nigeria for not less than ten years. His duties[117] are:

(a) To institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court martial, in respect of any offence created by or under any Act of the National Assembly.

(b) To take over and continue any such criminal proceedings that may have been instituted by any other authority or person, and

(c) To discontinue at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by him or any other authority or person.

The Attorney-General's discretion in the discharge of his duties is thus, limited by the requirement that he must take public interest and justice into consideration. Even though he is an appointee of the President and can be sacked by him, he is to maintain some measure of independence in the discharge of his fundamental functions. As was noted by the court in *State V. Ilori,*[118]

> The pre-eminent and incontestable position of the Attorney General, under the common Law, as the chief law office of the state, either generally, as a legal

[117] Sections 150(2) CFRN.

[118] *State v, Ilori (1983) 2 S.C.155,* see also *Makada v. COP (1985) HCNLR 1141 at p. 1158.*

> adviser or specially in all court proceedings to which the state is a party, has long been recognized by the courts. In regard to these powers, and subject only to ultimate control by public opinion and that of Parliament or the Legislature, the Attorney General has at common Law, been a master unto himself, and under no control whatsoever, judicial or otherwise vis-a-vis his power of instituting or discontinuing criminal proceedings.[119]

This fact notwithstanding, the President has the overall authority as Chief Executive to remove the Attorney General or any member of his Cabinet from office.[120]

There are however instances of a clash of interest and the discharge of the functions of the Attorney General and that of other law enforcement agencies such as the National Drug Law Enforcement Agency (NDLEA), Economic and Financial Crimes Commission (EFCC), which, like the Police, are involved in similar activities of investigation and prosecution of offenders. The courts have made extensive pronouncements in this regard. In *Olusemo v. Commissioner of Police,*[121] Kalgo JCA held:

> That the Attorneys General of the Federation and the states are empowered to institute and undertake any prosecution on behalf of the government. If any other authority or person does in relation to criminal proceedings, in a court within their jurisdiction, they can take over, continue or discontinue it. Where they do not, the power of those other prosecuting persons, which in this case was the police, is unlimited.

In *FRN v. Osahon & Ors,*[122] the Supreme Court approved this ruling. In dealing with the issue whether or not a police officer can institute criminal proceedings on behalf of the Federal Government without the fiat of the Attorney General, the court stated that by virtue of the provisions of section 174(1)(b) of the Constitution which empowers the Attorney General to take over and continue prosecution "that may have been instituted by any other authority or person", prosecution by the police as any other authority is envisaged. This is reinforced by the provisions of the Act of various courts, especially section 23 of the Police Act, which provides:

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[119] Ibid.

[120] *Lawal Kagoma v, Governor of Kaduna State (1981) 7 NCLR, 525*

[121] *(1988) 11 NWLR (pt. 575), 547; Nigeria Police Force v. Adekanye (No.1) (2002), 15 NWLR (pt. 790) 318.*

[122] *(2006) 5 NWLR (Pt 973) 361 SC*

Subject to the provisions of section 174 and section 221 of the Constitution of the Federal Republic of Nigeria any police officer may conduct in person all prosecutions before any court whether or not the information or complaint is laid in its name.

3.4.3 Civil Service of the Federation

Section 169 of the Constitution provides that a Civil Service of the Federation, is to be established. Section 318 defines Civil Service as "the service of the Federation in a civil capacity as staff of the Office of the President, the Vice President, a Minister or Department of the Government of the Federation assigned with the responsibility for any business of the Government of the Federation". The Constitution thereafter creates a number of offices.[123]

(a) Secretary to the Federal Government;

(b) Head of the Civil Service (who must be the permanent secretaries or persons of Federal or State service);

(c) Ambassadors, High Commissioners representatives of Nigeria abroad (whose appointments must be confirmed by Senate);

(d) Permanent Secretaries in a ministry of extra-ministerial departments of government; and

(e) Offices of the personal staff of the President.

Offices created under items (a) and (e) exist at the pleasure of the President and cease when he leaves office, but if they were appointed from the public service of the federation or state, they must be allowed to return there.[124] In making these appointments, the President must also reflect the concept of federal character. All the officers appointed under this section must conform to the code of conduct.[125] The Federal Civil Service Commission (FCSC) has the

[123] Section 171(1) CFRN
[124] Section 171(6) CFRN
[125] Section 172 CFRN

power (without prejudice to the power of the President and other commissions) to appoint, discuss and exercise disciplinary control over members of the Federal Civil Service.

The President may however order that the authority of the commission in this respect should not be exercised in relation to certain officers without consultation with the Head of the Civil Service.

3.4.4 Power Over Commissions and Councils

By virtue of the provisions of section 153 of the Constitution, 14statutory executive bodies comprising councils and commissions are established for execution of the functions in various facets of our national life; ranging from defence to police, civil service, election, census, security, economy, revenue to the judiciary. Under the 1979 Constitution, the Code of Conduct Bureau, Federal Character Commission, National Judicial Council, Nigeria Police Council and Revenue Mobilisation, Allocation and Fiscal Commission, were not included. Their powers and composition are provided for in Part One of the Third Schedule to the Constitution.

The power of the President to appoint the Chairmen and Members of the Commissions, is subject to confirmation by Senate.[126] Appointment is not necessary in the case of ex-officio members who are members of the commissions or councils by virtue of the office they hold, in relation to the appointment of members of the Council of State, National Defence Council and National Judicial Council, the confirmation of Senate is not necessary[127]. On the appointment of Chairmen and Members of the Independent National Electoral Commission, National Judicial Council, Federal Judicial Service Commission and the National Population Commission, the President must consult the Council of States.[128] The Council of State is made up of the President as Chairman, Vice President and Deputy Chairman, all former Heads of

[126] Section 154(1) CFRN
[127] Section 154(2) CFRN
[128] Section 154(3) CFRN

States and Presidents, all former Chief Justices of the Federation, President of Senate, Speaker of the House of Representatives, all, Governors and the Attorneys General of the Federation. Their function is advisory, and the President, though bound to seek their advice, is not to bound to take it.[129]

Any Chairman or Member can be removed by the President, 'acting on an address supported by two-thirds majority of the members of the Senate asking for removal for inability to discharge the functions of his office (either because of infirmity of body or mind or other causes) or for misconduct.[130]

However, section 158 of the Constitution provides that in relation to the exercise of its powers to make appointments or to exercise disciplinary control over persons", certain statutory bodies shall not be subject to the control of any other authority or person. This is because of the very crucial role they perform in society, but this independence is only in relation to the stated function. They are the Code of Conduct Bureau, National Judicial Council, Federal Civil Service Commission, Revenue Mobilisation, Allocation and Fiscal Commission, Federal Character Commission, and the Independent National Electoral Commission. The National Population Commission is also included, but in addition to the stated grounds of independence, it is also not subject to control in relation to a decision whether or not to accept the census returns of any of its officers, and the conduct and compiling of the report of the census, as provided under section 155(2).

In United States of America, the Constitution does not provide for the establishment of bodies such as these, thus making it an extra-constitutional matter. It however gives the President the power in Article II section 2 to appoint "all other officers of the United States, whose

[129]See *Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 2 NCR 1, 174, SCN,*
[130] Section 157(1) CFRN

appointments are not herein otherwise provided for, and which shall be established by law". Thus, where an Act of Congress establishes such bodies, the President would have the power to appoint them.

3.4.5 Judicial Appointments

The Chief Justice of the Federation, Justices of the Supreme Court, the President of the Court of Appeal and Justices of the Court of Appeal are appointed by the President on the recommendation of the National Judicial Council, subject to confirmation by Senate under Section 231(1) and (2) and section 238(1) and (2) of the 1999 Constitution. Although the President partakes in the appointment of the Chief Justice of the Federation, he has little or no discretion in the matter. The President can only remove the judicial officers in this category only in compliance with the provisions of section 292(1) of the Constitution.

For emphasis, Section 231 of the Constitution provides as follows:

1) The appointment of a person to the office of Chief justice of Nigeria shall be made by the President on the recommendation of the National judicial Council subject to the confirmation of such appointment by the Senate
2) The appointment of a person to the office of a justice of the Supreme Court shall be made by the President on the recommendation of the National judicial Council subject to the confirmation of such appointment by the Senate

Section 238 provides as follows:

1) The appointment of a person to the office of the President of the Court of Appeal shall be made by the President on the recommendation of the National Judicial Council subject to the confirmation of such appointment by the Senate
2) The appointment of person to the office of the Justice of the Court of Appeal shall be made by the President on the recommendation of the National Judicial Council subject to the confirmation of such appointment by the Senate

By these provisions, the President exercises his powers over the choice of persons he appoints into such offices. Though, the exercise of his power of appointment is not

absolute, but the President has the sole responsibility under the Constitution to make these appointments.

The President can also exercise his powers of removal which must be in compliance with Section 292(1) of the Constitution.

3.4.6 Power over Public Revenue

Even though the National Assembly has the sole authority to determine the manner in which revenue is to be allocated among the various levels of government, the President as the Head of Government has a crucial role to play in the collection, accumulation and declaration of such revenue in accordance with constitutional provision. He is also responsible for preparing a budget for the expenditure of the amount standing to the tune of the federation, and lays it before the legislature for its approval, as provided in section 162(1)(2).

3.5 PREROGATIVE OF MERCY

The authority and power to grant free or conditional pardon in certain circumstances, and in relation to federal laws have always been given to the Head of the Executive under the constitutions since 1960 and is one of the most basic and fundamental powers exercised. Chief Justice Marshal, in *United States v. Wilson*,[131] defined a pardon as: An act of grace, proceeding from the power entrusted with the execution of laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed".[132]

Section 175 of the 1999Constitution provides that the President may:

a) Grant any person concerned with or convicted of any offence created by an Act of the National Assembly a pardon, either free or subject to lawful conditions.
b) Grant to any person a respite, either for an indefinite or for a specific period, of the execution of any punishment imposed on that person for such in offence.

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[131] *United States V. Wilson, 7, pet, (32 U.S.) 150, 160-161 (1833).*
[132] Ibid

c) Substitute less severe form of punishment for any punishment imposed on that person for such an offence or
d) Remit the while or any part of any punishment imposed on that person for such an offence or any penalty or forfeiture otherwise due to the state on account of such an offence.

The phrase person 'concerned with or convicted used in subsection (1)(a) implies the fact that free or conditional pardon may be granted to a person who is still on trial, or who has been arrested in connection with the offence but has not yet been tried or has been convinced though punishment is not yet imposed. According to the court in *Okongwu V, State*,[133] the effect of a free pardon is such as to remove from the subject of the pardon, "all pains, penalties and punishments whatsoever that the said conviction may ensure, but not to wipe out the conviction itself". That is, it has the effect of forgiving the person of his offence by removing the penalties, even though the conviction is still in the record of the courts.

Section 175(1)(b) deals with situations in which the President may by pardon, suspend the execution of a punishment for a definite or indefinite period. Thus, for example, a death penalty or life sentence imposed on a woman found to be pregnant might be suspended for a period of time, until her child is born and weaned, or of a particular age. Also, death or life sentence on a convicted felon who is found to have contacted a terminal disease may be suspended.

In the United States, under Article II, section 2, and the First clause, the President is given the authority, to grant reprieves and pardon for offences against the United States, except in cases of impeachment. Even though the Nigerian Constitution do not make express provision for such an exception, they specifically provide that the power is to be exercised in relation to offences created by Acts of the National Assembly. This automatically excludes offences like impeachment created under the Constitution in Section 143.

[133] *(1986) 5 NWLR pt. 44, 721*

3.6 EMERGENCY POWERS

Emergency powers are those powers granted to the President to bring a state of emergency into force in the event of certain circumstances ensuring. Imposition of emergency rule in a component unit of the federation is as old as the Nigerian nation. Under section 65 of the 1969 constitution, the Parliament had the power to make emergency laws, as a result of which the Emergency Powers Act of 1961 was made. Under the various Presidential constitutions that have been operated since 1979, the power to declare a state of emergency is given the President to exercise in accordance with laid down constitutional principles.[134]

Section 305 of the 1999 Constitution provides that subject to the provisions of the Constitution, the President may, 'by instrument published in the official gazette, declare a state of emergency for the federation or any part thereof, when certain constitutionally stated circumstances are in operation; Thus, for example, the President can so declare when the federation is at war or in imminent danger of invasion or war when; there is actual, or clear and present danger of breakdown of law and order in the federation or any part thereof, as to require special measures for restoring peace and security or to avert breakdown; when there is an occurrence or the imminence of occurrence of a disaster, natural or otherwise affecting a community or part of it; when there is a public danger which constitutes great threat to the existence of the federation; or where the President receives a request from the Governor, backed by the support of two-thirds majority of the Members of the House of Assembly in that State, asking that he declares a state of emergency in that State or any part thereof because of the existence of some of the stated constitutional circumstances.[135]

[134] Emergency rule was first declared during the Western Regional crisis in 1965
[135] Section 305(3)(a-g) CFRN

The President cannot declare a state of emergency in a state except where the circumstances require it and the Governor fails to request for such a declaration within reasonable time as provided in section 305(5).

Immediately after the proclamation on any of these stated grounds, the President of the Senate and Speaker of the House of Representatives must then arrange for a meeting of each House to consider the situation and decide whether or not to approve the proclamation. The proclamation will cease to have effect if revoked by the President; or is not approved by the National Assembly within two days whilst it is in session, or ten days whilst it is not in session; or six months after which the proclamation has been in force, though the National Assembly can extend it for another six months.[136] The National Assembly can, however, revoke the proclamation of a state of emergency at any time by a simple majority of each House.

This power cannot however, be used as an authority to remove the Governor or Deputy Governor of the state. Thus, if a state of emergency declared in a state by the President, and approved by the National Assembly, depending on the circumstances, the National Assembly can take over the legislative duties of the House of Assembly.

3.7 POWER OVER EXISTING LAWS

In Nigeria, one of the most important aspects of the President's executive powers is, paradoxically, his role in the core legislative process. Although the law-making power is primarily vested in the National Assembly, the Constitution also gives a share of the power to the President. Thus, section 58 of the 1999 Nigerian Constitution provides that: "The power of the National Assembly to make laws shall be exercised by bills passed by both Houses of the National Assembly and assented to, by the President". The effect of this constitutional

[136] Section 305(2)(b) CFRN

provision is that the President must ordinarily participate in the law-making process, as a bill duly passed by the National Assembly can only become law after presidential assent.[137] While it is firmly settled that presidential assent is necessary before a legislative bill can become law, the need for a presidential assent to validate a constitutional amendment is not devoid of controversy.[138] In Nigeria, there was a sustained debate on the desirability or otherwise of presidential assent to validate the First Alteration bill seeking to amend the 1999 Constitution of Nigeria. This culminated in the case of Agbakoba v The National Assembly,[139] where the Federal High Court, per Okeke J., held that: "constitutional amendment without presidential assent is null and void".[140] Accordingly, the First, Second and Third Alteration bills in respect of amendment of the 1999 Constitution of Nigeria, were subjected respectively to presidential assent.[141]

Veto Power

The Nigerian Constitution empowers the President to veto a bill by withholding his assent, if he does not approve its content;[142] thereby preventing it from becoming law. There are no restrictions on the grounds for which the President may veto a bill passed by the Nigerian National Assembly. For example, the veto power is not only to be used in blocking legislation which the President considers unconstitutional; it may also be exercised whenever the President thinks the bill is objectionable for any reason. If the President withholds assent, the National

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[137] However, there are two categories of rules which may be enacted by the Senate and the House of Representatives which do not require presidential participation. These are the House Standing Rules and Orders, and Concurrent Resolutions taken jointly to correct errors in bills of the National Assembly yet to receive presidential assent.

[138] See Generally I.B. Lawal, "The Review of the Constitutional Amendment Procedure and Presidential Assent in Nigeria", (2015) 7(5) Journal of Law and Conflict Resolution, 26 – 30.

[139] Unreported; see The Punch, 10th November 2010 p. 1.

[140] It was argued for presidential assent that constitutional amendment being by way of an Act of the National Assembly is subject to section 58(1) of the Constitution. Thus section 9 of the Constitution is not only subject to section 58(1) but also subject to the relevant constitutional provisions on the National Assembly in relation to law-making or law amendment.

[141] However, the National Assembly is still considering further review of the constitutional Amendment Procedure to expressly exclude presidential assent.

[142] CFRN, 1999, s. 58(4).

Assembly, if it so wishes can invoke its constitutional power to override the presidential veto; by further enacting the bill into law without the President's assent. Under section 58(5) of the Constitution, this would occur when, after the President's veto, the bill is again passed by each House of the National Assembly, provided that this second passage is sanctioned by at least two-thirds majority of each House.

The President's power to veto bills constitutes an extremely important and effective part of his executive authority. Though the President rarely exercises this power, the possibility of the President's veto will always be in the minds of members of the National Assembly as they plan and formulate new legislation. The necessity of producing bills, which the President would willingly assent to, would be a constant factor in the legislative process. A President's timely suggestion that he may veto a particular bill under consideration could result in changes to the bill before its passage. Moreover, when the President exercises the veto power, his veto is usually not likely to be overridden by the National Assembly; because, as already noted, such an exercise requires at least two-thirds of the members voting to override. The President would count on the support of his party members and other supporters to prevent the National Assembly from overriding his veto. As Joye and Igweike[143] have observed, it is only in the relatively few cases that a presidential veto is overridden as the veto is normally effective in well over nine out of ten cases. Statistics would seem to indicate that passion rarely runs high enough to muster the necessary opposition to the President in the National Assembly to override his veto.[144] The President can therefore use his powers of assent to, and veto of, bills to ensure that only those laws that are consistent with his administration's philosophy, priorities and programmes are enacted and enforced.

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[143] E.M. Joye and K. Igweike, Introduction to the 1979 Nigerian Constitution (London: Macmillen, 1982) p. 227.
[144] Ibid.

There is no constitutional or statutory authorization of line – item veto in Nigeria. Thus, the President must assent to the entire bill or veto the entire bill. He is not authorized to assent to certain items in the bill and veto the others.

Section 315(4)(b) defines existing law as any law, including any rule of law or any enactment or instrument whatsoever which was in force or was made immediately before the Constitution came into force. In *Okike v. LPDC* the court declared the Legal Practitioners Act, Cap 207 Laws of the Federation of Nigeria 1990 an existing law.[145] An existing law has effect subject to such modifications as may be necessary to bring it into conformity with the provisions of the Constitution,[146] to be made by an appropriate authority, which is the President, with respect to federal law. It is deemed to be an Act of the National Assembly when it is a law with respect to a matter on which the National Assembly is empowered by the Constitution to make laws, and a law made by a House of Assembly if it is a raw with respect to any matter on which a House of Assembly is empowered by this constitution to make laws.

A court of law or tribunal established by law however has the power, to declare invalid any provision of an existing law on the ground of inconsistency with the provisions of any other existing law, a law of a House of Assembly, an Act of the National Assembly, or any provision of the Constitution.[147] Any person appointed by any law to revise or rewrite the Laws of the Federation or of a State can also make such modifications as an appropriate authority, such as in the President or the Governor, in the instant provision.[148]

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[145] *(2005) 21 WRN 1at p. 23. See also Hon Justice Mamman Kolo v. Attorney General of the Federation (2002) WRN 53, p. 75.*

[147] Section 315(3) CFRN.

[148] Section 315(4)(a)(iii) CFRN.

3.8 COMMAND AND OPERATIONAL USE OF THE ARMED FORCES

The Constitution[149] creates the office of the President and vests in him as Head of State, the Chief Executive of the Federation and Commander-in-Chief of the Armed Forces of the Federation-the power to determine the operational use of the Armed Forces of the Federation. This extends to his power to appoint Service Chiefs[150] and by directions in writing and subject to such conditions as he may think fit, delegate to any member of the Armed Forces of the Federation, his powers relating to the operational use of the Armed Forces of the Federation.

Section 218(1) of the Constitution provides thus:

> The powers of the President as the commander-in-chief of the Armed Forces of the Federation shall. include power to determine the operational-use of Armed Forces of the Federation.
>
> (2) The powers conferred on the President by subsection (1) of this section shall include power to appoint the Chief of Defence staff, the Chief of Army Staff, Chief of Naval Staff, the Chief of Air staff and heads of any other branches of the Armed Forces of the Federation as may be established by an Act of the National Assembly.
>
> (3) The President may, by directions in writing and subject to such conditions as he may think fit, delegate to any member of the Armed Forces of the Federation powers rerating to the operational use of the Armed Forces of the Federation.
>
> (4) The National Assembly shall have power to make laws for the regulation of-
>
> (a) the powers exercisable by the President as commander- in-Chief of the Armed Forces of the Federation; and
>
> (b) the appointment, promotion and disciplinary control of members of the Armed Forces of the Federation.

The effect of this provision is that the President, while at all times, the Commander-in-Chief, may not exercise the power of command by himself, as he may at his discretion delegate such power to either Chief of Defence staff or to any of the Service Chiefs, respectively.

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[149] Section 130(1)(2) CFRN.
[150] Section 218(1)(2)(3) CFRN.

The vesting of the power of command on the President presupposes that he has independent powers to utilize the military not only to protect the Nation from attack but to further the Nation's interests, and that this power may not be subject to limitation or effective checks. This is more so that the power of the National Assembly to endorse a declaration of war says little about other myriad resorts to the use of force, particularly when there is the need to quell internal insurrection or riots.

3.9 IMPLICATION OF PRESIDENTIAL POWER UNDER SECTIONS 58 AND 315 OF THE CONSTITUTION

The 1999 Constitution under Section 4 expressly vest the power of law making in the National Assembly. However, there are number of areas where the President exercises enumerated, inherent and implied power that are clearly legislative in form and content.

The enumerated powers of the President which border on his legislative functions include the provisions of section 58, which though vests legislative powers in the National Assembly, requires that any bill so passed shall be assented to by the President before it becomes an Act of the National Assembly.

Section 58(1) provides thus:

> The power of the National Assembly to make laws shall be exercised by bills passed by Senate and the House of Representatives and except as otherwise provided by subsection (5) of this section, assented by the President.

Subsection (4) also provides that where a bill is presented to the President for assent, he shall within thirty days thereof signify that he assents or that he withholds assent.

Here, while Subsection (1) of Section 58 expressly vests in the President, the power to finalise and seal the process of law making, Subsection (4) vests in him the veto power, which he

exercises when he is not comfortable with a piece of legislation. This power of veto is however brought to check by the National Assembly's power to override, in its subsection (5).[151]

Commenting on this interplay of legislative power, Akande,[152] believes that although in legislative matters, the National Assembly is expected to be the dominant branch of the Government, it is not put in a position to arrogate to itself all powers. So the President is given a qualified veto tool to prevent the National Assembly from overstepping its boundaries and to enable him to powers the actual course of legislation.[153]

One other critical area where the functions of the President border on legislation is in Section 315(1)(a) & (2) of the Constitution, which provides that:

> (1) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be.
>
> (a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and
>
> (2) The appropriate authority may at any time, by order, 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.

Here, appropriate authority, on interpretation, mean the President or any person or body to whom he may delegate such powers.

Even though the power to legislate is vested in the legislature, the President nevertheless, performs legislative functions, Niki Tobi,[154] referring particularly to sections 58 and 315, was of the opinion that, although the 1999 Constitution provides for separation of powers and that

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[151] Section 58(5) provides that where the President withholds his assent and the bill is again passed by each house by two-thirds majority, the bill shall become law and the assent of the President shall not be required.
[152] Akande J., The Constitution of the Federal Republic of Nigeria, 1999, with annotations, MIJ Professional Publishers Limited (2000), Lagos, 142.
[153] Ibid.
[154] Tobi, N., Exercise of Legislative Powers in Nigeria (2002) NIALS, Lagos, 44.

the Executive is not empowered under the Constitution to make laws, the Executive is involved in certain areas of law-making. The first is section 58 which involves the assent of the President to Bills while the second is section 315 which deals with modification of existing laws.

Justice Niki Tobi, also commenting on "Existing law and the Constitution argues thus:

> By this provision, the President and the Governor of a state would appear to have been vested with legislative functions, which the Constitution, in essence, does not bestow on them The interpretation is valid because if a change in the text of an existing law materially affects the text of the original provisions, such an act is nothing short of a legislative alt. it will not be correct to contend that the power conferred on the President and the Governor come within the provision of section 5 of the Constitution...[155]

This position is anchored on the judgment in *Attorney-General of Ogun State v. Attorney-General of the Federation,*[156] where the court held that the Executive had powers to make modifications on existing laws.

While admitting that the President (Executive) performs legislative functions, Oyewo,[157] is however, critical that such overlapping of functions represents a diminution of legislative independence. He says:

> The Executive power of rule-making and the exercise of delegated powers constitute a veritable source of overreaching its limits and unsettling the separation of powers. From the legislature or even the checks and balances in the interplay of powers and functions. This seemingly delegated legislative power (over existing laws as in section315) is nothing short of an abdication of legislative power (of the National Assembly) and must be expunged from the Constitution.[158]

On a whole, Presidential assent to Bills is a function in the Nigerian Constitution which the President, while holding office, cannot delegate to anyone else, except if he goes on vacation,

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[155] Ibid.

[156] *AG Ogun State v. AGF (1982) 3 NCLR 166.*

[157] Oyewo, O., Reducing the Risk of Divided and Failed Government in Nigeria: Issues in the 1999 Constitution (2000) NIALS, Lagos, 172.

[158] Ibid.

having transferred power to his Vice or he temporarily transfers power to his Vice under any of the relevant provisions of the Constitution.

CHAPTER FOUR

THE CHALLENGES AND PROSPECTS OF PRESIDENTIAL POWERS UNDER THE 1999 CONSTITUTION

4.1 THE CHALLENGES OF PRESIDENTIAL POWERS UNDER THE 1999 CONSTITUTION

1. CONFLICT OF ROLES

The role conflict has to do with is in respect to budget endorsement, execution and evaluation processes. The executive and legislature under the 1999 Constitution were empowered to prepare and approve budgets of the Federation respectively.[159] Consequently, Sections 80 and 81 of the Constitution further established the mode of approving and implementing the budgets. However, Section 81, Part 1, reserves the exclusive right to the executive in budget preparations. There are cases budget proposals from the executive which have been hampered by the legislature for approval. For example in 2002, the budget sent to the National Assembly for approval was gridlock for five months before it was later passed into law. The proposed budget was a total of N1.06 trillion which has about N297 billion, capital expenditure and over N588 billion for recurrent expenditure. Instead of passing the budget the legislature, however, increased the capital allocation as well as slashing the current allocation. This does not go down well with the President who later revised the budget estimate and proceeds with implementation of the revised version of the 2002 budget. This action prompted the legislature to embark on impeachment process against the President. Additionally, in 2003 similar budget conflict ensued between the executive and the National Assembly. The budget which was sent to the legislature in mid of November 2002 with the hope of passing it into law was eventually

[159] Ihemeje Chidiebere C. Godswealth and Zaid B. Ahmed and Jayum Anak Jawan, 'Factors Influencing the Executive and Legislative Conflict in Nigeria Political Development' (2016) 21 8(7) *IOSR Journal of Humanities and Social Sciences* <https://www.iosrjournals.org> accessed 24th June, 2019, 22.

stocked and later approved by the legislature eight months after, in May and then signed into law by July 2003.[160] Also the passage of the 2016 budget was postponed by the National Assemble on discrepancies reasons. The N6.08 trillion budget proposal had capital expenditure of N1.80 trillion, constituting 30 percent of the total budget. Meanwhile, non-debt recurrent expenditure was estimated to be N2.35 trillion.[161] The National Assembly instead of passing the appropriation bill suspended it indefinitely. The act of passing the appropriation bill into law by the National Assembly is challenge that is posed by the Constitution on the powers of the President.

2. CONFIRMATION OF PRESIDENTIAL APPOINTEES

Ordinarily, Section 147 of the Constitution relates to the appointment and confirmation of nominees for the office of Ministers of Government of the Federation which requires the confirmation of the Senate. The Section also specifies that appointment of Minister must reflect the federal character[162] and each state must have at least one Minister. However, Section 171 provides that power to appoint persons to hold or act in the offices to which this section applies and to remove persons so appointed from any such office shall vest in the President. The offices were listed as follows:- Secretary to the Government of the Federation, Head of Civil Service of the Federation, Ambassador, High Commissioner or other principal representatives of Nigeria abroad, Permanent Secretary, Secretary in any Ministry or Head of any Extra-Ministerial Department of the Government of the Federation how so ever designated and any office on the personal staff of the President. Provided that any appointment to the office of Ambassador, High Commissioner or other principal representative of Nigeria abroad shall not

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[160] Ibid.

[161] Editorial, 'National Assembly Postpones Passage of 2016 Budget on Discrepancies' <https://www.financialnigeria.com/national-assembly-postpones-passage-of-2016-budget-on-discrepancies-news-354.html> accessed 24th June, 2019.

[162] See Section 14(2) of the Constitution of the Federal Republic of Nigeria (as amended).

have effect except the appointment is confirmed by the Senate. The effect of the above provisions is that before any appointment of President, that the above section relates can be valid, the Senate must approve after screening of that nominee.[163] For example, the approval of the nomination of Ibrahim Magu as the Chairman of the Economic and Financial Crime Commission is one of the most controversial approval that the Nigerian Senate witnessed. The President presented Ibrahim Magu who had been acting chairman to the Senate for approval but the Senate caused a security report to be prepared by the Directorate of Security Service (DSS) on him. Based on this report that indicted Ibrahim Magu, he was rejected by the Senate. The Senate refused to confirm Barrister Obono-Obla as a Commissioner in Nigeria Communication Commission, The Senate also refused to confirm Pastor Benjamin Ezekiel Yisa as a member of the commission citing some excuses as the reasons for his rejection. One Mr Gbajabiamila who is a brother to Hon. Femi Gbajabiamila was also not confirmed as chairman of Nigeria Lottery Commission because he is related to Femi Gbajabiamila (the then House Leader).

Any nominees whose appointment is not confirmed cannot be sworn in. This in great extend has pose a challenge on the presidential powers to appoint candidates of his own choice into various executive offices.

3. OVERSIGHT FUNCTIONS OF THE LEGISLATORS

The oversight functions of the legislature in any given society cannot be overemphasized. How these oversights create conflict in the relations between executive and legislature for the development of Nigeria is what this section will look it. First and foremost, the 1979 and 1999 constitution of the Federal Republic of Nigeria provides basis and powers to the legislature's

[163] Olufemi Abunfarin, 'Legislative Approval of Executive Appointments by the National Assembly in Nigeria: A Vindictive or Constitutional Duty? (2018) 9 (2) *NAUJILJ* <https://www.ajol.info/index.php/naujilj/article/download/168836/158302> accessed 24th June, 2019, 136.

departure to promote unity and political development, section 147 (2); 153, 154 and 171(4) of the Constitution. Invariably, without the oversight of the lawmakers, it is possible for the executive to govern with impunity and not accountable to any person for their actions and inactions about the public funds.

The Nigerian legislature is empowered to conduct inquiries on all matters of governance. There is a gamut of supervision performed by the legislature in the Nigerian Fourth Republic. And these oversights sometimes clashes with the perception of the executive which later results in conflicts of both institutional relationships. One of the Administrations so disturbed is former president Olusegun Obasanjo 1999-2007. Though Obasanjo has a high Military trait, he was admittedly infuriated by the then Legislature's antagonistic stance. While the issue of oversight power of the legislature is constitutional, through its investigative committee, the legislatures can indict the executive and recommend his impeachment if found wanting of misuse of powers.

4. NULLIFICATION OF EXECUTIVE ORDERS

Executive orders are the expression of presidential authority through the use of executive orders necessarily occurs in a political and institutional context. Thus, in framing and issuing executive orders, the President considers the reaction of opponents, its implementation and costs or benefits of relying on alternative tools of command such as legislation or court orders.[164] 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

[164] Elijah Oluwatoyin Okebukola and Abdulkarim A. Kana, 'Executive Orders in Nigeria as Valid Legislative Instrument and Administrative Tools' (2012) *NAUJILJ* <https://www.ajol.info/index.php/nauljilj/article/view/136320> accessed 24th June, 2019, 62.

statutory authority. They are valid only where Presidents act "within the boundaries of their constitutional or statutory authority.[165]

Alternatively, the Legislature or Constitution may confer wide discretionary power on the President to issue orders in certain matters.[166] 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.[167] Alongside the executive order, the President may use other tools, for example, presidential memoranda, to communicate his command and instructions to the bodies and agencies of the executive arm of government.[168]

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, however, do not hesitate to invalidate unlawful or unconstitutional executive orders. All powers, legislative, executive and judicial must ultimately be traced to the Constitution.[169]

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.

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[165] Ibid.
[166] Ibid.
[167] See Section 315(2) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)
[168] Okebukola and Kana, Op. Cit. (N 100), 63.
[169] Ibid. 63.

4.2 THE PROSPECTS OF PRESIDENTIAL POWERS UNDER THE 1999 CONSTITUTION

1. TRUE SEPARATION OF POWERS

There are three arms of government- Legislature, the Executive and the Judiciary. In Nigeria, these three arms of Government came into existence at the same time and by the same act of creation under the 1999 Constitution. They are triplets born the same day or deemed to be so, by virtue of sections 4, 5 and 6 of the Constitution. Accordingly, in Nigeria, no one arm of government is superior to the other; neither is any subordinate to the other. Each organ is independent within its own sphere of powers.

However, 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.[170]

2. ADHERENCE TO THE RULE OF LAW

Rule of law or supremacy of law is the observance of civil laws, that is, laws which are reasonably justifiable in a democratic society. It is the application and respect of civil or regular laws in a country. It connotes that a country is governed by civil or regular laws as against draconian, oppressive and arbitrary laws. The opposite of the rule of law is rule by force, arbitrariness, despotism, dictatorship, tyranny and ultimately anarchy and chaos.[171]

Strict adherence to the rule of law offers a unique opportunity to improve the President's powers on other arms of government to grant approval to the policies of the executive arm. Imbibing the rule of law culture will no doubt remove some of the bottleneck hindering the President from making policies, especially as it relates to the fight against corruption which is the cardinal agenda of the present administration, poverty reduction, environmental

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[170] *AGF v Abubakar (2007) 10 NWLR (pt. 1041) 1.*

[171] Ese Malemi, The Nigerian Constitutional Law (Princeton Publishing Company, 2006).

sustainability and global partnership. No nation would want to partner with lawless country. Thus, the task of achieving a rule of law state is fundamental to the overall growth of the nation.

3. MAKING CHANGES TO EXISTING LAWS

The constitutional provision which, in effect, gives the Nigerian President power to legislate without the participation of the National Assembly is section 315 of the 1999 Constitution. This section applies to all existing laws, which means; "any law which was in force immediately before May 29, 1999, or which having been made before that date came into force after that date". Under section 315(2) of the Nigerian Constitution, the appropriate authority may at any time, by order, make such changes 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 the Constitution. The appropriate authority in relation to any law of the federation is specifically designated to be the President.[172] Accordingly, this provision empowers the President, acting without the National Assembly, to alter any law made before the 1999 Constitution took effect. In doing so, the President in effect, exercises an independent power to legislate without recourse to the National Assembly.[173]

With the above provisions, the President can assert a wide area of discretionary authority in this regard under section Constitution.

4. ORDINARY REGULATIONS

Regulations constitute the bulk of subsidiary legislation made by the executive branch through express delegation of power in that regard by the legislature. It is sometimes argued that in exercising the power to make regulations or subsidiary legislation, the executive acts as agent of the legislature and to that extent neither the legislature abdicated its legislative power nor

[172] See Section 315 (3)(b) of the Constitution.

[173] Imo J. Udofa, 'Presidential Law-Making Power in Nigeria and America: Turning Presidents into Supermen? (2017) 5 (3) *Global Journal of Politics and Law Research* <https://www.eajournals.org> accessed 24th June, 2019, 7.

did the executive usurp same.[174] Besides, the regulation or rule made by the executive derives its validity from the power granted by the legislature through an enabling legislation. It is, however, submitted that in spite of these arguments, it cannot be denied that the regulation was actually enacted by the executive and implemented by it. The President while making such regulations will exert his powers and discretionary powers and to see that the regulation is being implemented to the later. It is trite that the legislature, established by or under the Constitution cannot cope with the task of law-making in all fields and for all purposes. Hence, the need for the executive to make certain regulations to guide some specified areas.

[174] Ibid.

CHAPTER FIVE

5.1 SUMMARY OF FINDINGS

By the theme of this research, being an examination of Presidential powers' as enshrined in the Constitution of the Federal Republic of Nigeria,[175] it was necessary to discuss, by way of preamble, the concept of power, the nature of, and extent of such powers, both enumerated, implied and inherent, which the President exercises in the course, of the performance of his duty of governance, by virtue of his position as Chief Executive and Commander-in-Chief of the Armed Forces. This chapter therefore provides a conclusion to all issues previously raised, and in doing that, gives a summary of the subject matter and proffers recommendations.

1. The framers of the 1999 Constitution, in their wisdom considered that a clear departure from the Westminster-type democracy, pre-1979, was going to usher in a period of progressive democracy, hence their recommendation that executive powers be vested in the President.
2. While section 5(1)(a) confers all executive powers in the President, the Constitution, in its subsection (5)(1)(b), provides that "such powers shall extend to the execution and maintenance of this Constitution, all laws with respect to which the National Assembly has for the time being, power to make law".
3. The grant contained in section 5(1)(b) is obviously a blanket cheque to the President in the exercise of his powers, according to Ben Nwabueze,[176] who believes that it will be unconstitutional for the President to take any action on such issues that are neither explicitly provided for in the Constitution or legislated upon by the National Assembly.

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[175] Constitution of the Federal Republic of Nigeria 1999 (as amended).

[176] Nwabueze, B.O: Presidentialism in Commonwealth Africa (1974), C. Hurst & Company, London, in Association with Nwamife Publishers, Enugu p.14. See also Mowoe, K.M: (2008) Constitutional Law in Nigeria, Malthouse Press Limited, Lagos. P. 135

4. On the power to maintain law and order, what comes to mind readily is the use of the Police to enforce law and maintain order. This power to appoint the Inspector-General of Police is granted the President in section 215(1)(a) & (3).
5. It is to be admitted that there are wide powers granted the Police under the Police Act, to maintain law and order and that the Inspector-General of Police, is subordinated only to the President, hence the penchant calls for the amendment of the Constitution, to allow for State Police. This is more so, given the obvious inability of one Federal Police to have the desired security impact across the states. Jadesola Akande,[177] commenting on this, observes that the idea of only one Federal Police has been the cause of dissatisfaction among some governors.
6. On the President's power of command and operational use of the Armed Forces as provided in section 218(1), the vesting in the President, of the ' power of command presupposes that he has the powers, in consultation with the National Assembly (in theory only), to deploy the military not only to protect the nation from attack but to further the nation's interests and that this power may not be subject to limitation or effective check. This is given the fact that the National Assembly power to endorse a declaration of war says little about other myriad resorts to the use of force, short of an all-out war, particularly when there is the need to quell internal insurrection or riots such as you had in Odi and Zaki Biam, and now in Niger Delta, the Boko Haram and Farmers and Fulani Herdsmen crisis. In the US, the President is Commander-in-Chief only when the Army, Navy and the Militia are "called into the actual service of the US.".[178]

[177] Akande, J.O: The Constitution of the Federal Republic of Nigeria, 1999, with Annotations, MIJ Professional Publishers Limited, 2000.
[178] The Constitution of the United States of America 1787, as amended, Article II, section 2.

7. Nwabueze position on the exercise of emergency powers, as it concerned the declaration of emergency on Plateau State, citing the case of *Eshugbayi Eleko v. Government of Nigeria*,[179] is that emergency power comprises two distinct powers, viz, the power to declare a State of Emergency, and the power to make laws and execute them, and to overstep, with some exceptions, the limitations on power arising from the fundamental rights in chapter IV; hence section 305relied on by the President grants only the power to declare emergency and not the power to make laws.
8. The foregoing is the position of Bamidele Aturu,[180] on the emergency rule in Ekiti state where he believes that the President did not meet the conditions precedent before his declaration of emergency rule in the state, in the course of the exercise of his powers.
9. On the rule making powers of the President, the issues here are whether or not the President, by virtue of his exercise by certain enumerated powers, is part of the legislative process.
10. Section 58(1)(3) expressly vests in the President, the power to assent to Bills before they become Acts of the National Assembly, as well as the power to veto a Bill, respectively. Similarly, the President (the Executive), is vested with the power to modify existing laws, under section 31 5(1)(2).
11. Niki Tobi,[181] commenting on the effect of section 58 and 315, posits that "although the 1999 Constitution provides for separation of powers and that the executive is not empowered under the Constitution to make laws, the executive is involved in certain areas of law-making. The first is section 58 which involves the assent of the President to Bills while the second is section 315 which deals with modification of existing laws...". He adds, citing with approval, the authority of *Attorney-General of Ogun State*

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[179] *Eleko, E., v. Government of Nigeria (1930) A.C. 662, 670*

[180] Aturu, B., writing under the heading: "Emergency Rule in Ekiti as the 1999 Constitution holds": lawglobal"nvu.edu, October, 2006.

[181] Tobi, N: Exercise of Legislative Powers in Nigeria (2002) NIALS, Lagos

v. Attorney-General of the Federation,[182]that when a change in the text of an existing law materially affects the text of the original provisions, then, such an act is nothing short of a legislative act.

5.2 OBSERVATIONS

Instances where the President has acted without first securing the approval of the National Assembly include:

1. The declaration of emergency rule in both Plateau and Ekiti States, where their governors were not only removed, the legislatures were also sacked, by President Obasanjo in 2004 and 2006 respectively which has not been remedied.
2. Similarly, President Obasanjo unilaterally deployed troops to sack the two communities of both Odi and Zaki Biam, in Bayelsa and Benue States respectively. In these instances, the President was thought to have exceeded his powers.[183]
3. The provisions in section 11, as ideal as they are, are beclouded by the maintenance of only on Federal Police Force where, by the provisions in section 216 of the Constitution, the Police Council, with the approval of the President, may delegate powers to the Inspector-General of Police or any other officer. This leaves no room for Governors of the States to exercise any power over the Police. This arrangement therefore runs counter to the principle of true federalism and it represents a fatality on 'the governors' ability to appropriately respond to security threats.
4. The power of the President to determine the operational use of the Armed Forces[184] is subject to abuse, as the only check against abuse in section 218(4) lacks the desired

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[182] *Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 3 NCLR 166.*

[183] Nwabueze, B: Obasanjo rapes Constitution by suspending Plateau Assembly and Governor, in U.S Africa, The Newspaper, Houston, May 20, 2004 " U.S.A Africaonline.com. See also Aturu Bamidele: Emergency Rule in Ekiti as the 1999 Constitution holds, Culled from the Guardian, October 20, 2006.

[184] Section 218 CFRN

regulatory force. There are instances where the President has ordered troops out in the Niger Delta, the various sectarian crises across the country, without the National Assembly making any regulatory laws to that effect or seeking the advice of the National Defence Council, to determine the magnitude of response.

5. The position of the Constitution in section 305(1)(2) that the President can issue a proclamation of a State of Emergency, and in fact, for the emergency to be in force before he transmits copies of the official Gazette to the President of the Senate and the Speaker of the House of Representatives, is like treatment before diagnosis. In such a situation, if the reasons for the emergency are found not plausible enough to secure the concurrence of the National Assembly, it could be too late to reverse such an action.[185] It is this that easily leaves the President to exceed the scope of such power.[186]
6. The empowerment of the President to modify existing law as provided in section 315(1)(a),(2),(4)(a)(i) without checks, invariably confers on the President, the power of rule-making. It thus negates the doctrine of the separation of powers and amounts to a usurpation of, and encroachment into the sphere of the Legislature.[187]

5.3 RECOMMENDATIONS

1. REDEFINE THE POWER OF THE PRESIDENT UNDER SECTION 5(1)(b)

Having due regard to the rationale behind the Presidential system of Government and the need to have an executive President, vested with all executive powers, the benefits thereof notwithstanding, it is necessary to redefine the second limb of section 5(1)(b), to have clear frontiers. When a President is vested with the power to act on issues which the National

[185] Akande, J.O: Introduction to the Constitution of the Federal Republic of Nigeria, 1999 Constitution of the Federal Republic of Nigeria, 1999 (2000) MIJ Publishers, Lagos, p. 425.
[186] Nwabueze. B: (supra)
[187] Tobi Niki: The Exercise of Legislative powers in Nigeria (2002) NIALS, Lagos, p.44, See also Oyewo, O: Reducing the risk of Divided and Failed Government (2000) NIALS, Lagos p. 172

Assembly has power to legislate upon, even when there is no legislation yet in place, the tendency is for an unscrupulous President to expand the scope of that power beyond the legislative scope of the National Assembly. It is worse if there is a doctrine that National Assembly that is prostrate and cannot invoke the powers contained in section 143, to remove the President.

2. DECENTRALISE THE POLICE FORCE

It is recommended that the Nigeria Police Force should be decentralized. That is, states should be allowed to establish their own Police Force, with stringent constitutional guidelines.

This is to ensure that security issues that arise across the states are given speedy attention, rather than wait for the Inspector-General of Police, acting under the instructions of the Nigeria Police Council, to issue directive before a situation is brought under check. This will also prevent the Federal Police to harass perceived political opponents.

3. STRENGTHEN NATIONAL DEFENCE COUNCIL

The powerful position of the person and office of the President in a Presidential system notwithstanding, it is recommended that the President should not be left alone to determine the operational use of the Armed Forces, as contained in section 218(1). The phrase, "in consultation with the National Defence Council", should be added to the wording in section 218(1). The National Defence Council should also be saddled with the power to advise the President on the operational use of the Armed Forces. This should be in addition to its role under part 1 of the Third Schedule to the Constitution. This will put the President in check, in the course of exercising his power under section 218(1).

4. PRESIDENT SHOULD OBTAIN CONCURRENCE BEFORE EXERCISING EMERGENCY POWERS

It is possible that there could be instances where grave situations would demand immediate response. In order however, to forestall abuse of power, before the proclamation of a State of Emergency anywhere in the country can take effect, particularly in a state, the President should comply with the provisions of section 305(2) and secure the concurrence of the National Assembly as well as comply with the provisions in subsection 4. This will give such issues necessitating the imposition, of emergency to be well thought out, thereby avoiding a situation where the National Assembly could decline granting approval, by which time it would be too late to make immediate reversal.

5. NOMINATIONS OF MINISTER SHOULD BE FORWARDED WITH PORTFOLIOS TO THE SENATE FOR SCREENING

To have quality screening and save time the names of ministerial nominees should be accompanied with their portfolios in order to know their area of competence to enable Senators ask them reasonable questions within jurisdiction on where they are going to serve

Nigerians have expressed anger at the recent ongoing screening of ministerial nominees without portfolios describing it as dangerous to National development

5.4 CONTRIBUTION TO KNOWLEDGE

1. This work is of the view that the best suitable type of political process this country should have in order to reduce excessive powers is the parliamentary system of government. This is because the parliamentary system of government is a fusion of the legislature and the executive. Thus, reducing the powers of the President drastically therefore curbing arbitrariness

2. This study has identified the arbitrariness in the execution of presidential powers and has made the case for the strengthening of constitutional provision to curb the arbitraries.

5.5 SUGGESTED AREAS FOR FURTHER STUDIES

The following areas are suggested for further reading:

1. The Political Relationship Between the Legislature and the Executive: The Constitutional Impediments.
2. An Examination of the Causes and Consequences of the Conflict Between the Executive and the Legislature in Nigeria.

5.6 CONCLUSION

The challenge with the presidential system 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

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 it is not understood the exercise of executive power undermines or fosters liberty, right and property of citizens, we will muddle the debate and injure society. It is hoped that this work had espoused the problems inherent in the powers of the presidential under the 1999 constitution with a view to amending them to prevent arbitrary use of presidential powers

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