

**A CRITICAL ANALYSIS OF PRESIDENTIAL POWERS  
UNDER THE 1999 NIGERIAN CONSTITUTION**

**BY**

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**BEING A THESIS SUBMITTED TO THE POSTGRADUATE SCHOOL  
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## **DECLARATION**

I declare that this thesis is a product of my research work under the able supervision of Dr. Yusuf Bashir Ibrahim and Dr. Yusuf Dankofa in the Department of Public Law and that no part of it has been previously presented for another degree in any university elsewhere. The information derived from other literature has been duly acknowledged in the text and a list of references provided.

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**DATE**

## CERTIFICATION

This thesis entitled: “A CRITICAL ANALYSIS OF PRESIDENTIAL POWERS UNDER THE 1999 NIGERIAN CONSTITUTION”, by Wahab Page Igbuan, meets the regulations governing the award of the degree of Master of Laws – LL.M. of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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## **DEDICATION**

This thesis is dedicated to God Almighty, the Most High, the Beneficent and the Merciful who, in spite of several obstacles, ensured that it became a reality. It is also dedicated to the memory of my late father as well as my mother, whose quest for knowledge remained my driving force.

## **ACKNOWLEDGEMENTS**

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My profound gratitude goes to members of my family for their moral support and understanding throughout the duration of the programme.

Sourcing materials for this research was not in any way an easy task, given the peculiar nature of the subject matter. So, I put on record, the invaluable assistance rendered to me by my dear Bk.

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## TABLE OF CONTENTS

	<b>PAGES</b>
TITLE PAGE	i
DECLARATION	ii
CERTIFICATION	iii
DEDICATION	iv
ACKNOWLEDGEMENTS	v
TABLE OF CONTENTS	vi
ABSTRACT	x
TABLE OF STATUTES	xi
TABLE OF CASES	xiii
<b>CHAPTER ONE: GENERAL INTRODUCTION</b>	
1.1 INTRODUCTION	1
1.2 STATEMENT OF THE PROBLEM	4
1.3 OBJECTIVES OF THE RESEARCH	7
1.4 JUSTIFICATION	8
1.5 RESEARCH METHODOLOGY	9
1.6 SCOPE/LIMITATION	10
1.7 LITERATURE REVIEW	10
1.8 ORGANISATIONAL LAYOUT	17

## **CHAPTER TWO**

2.0	THE CONCEPT OF POLITICAL POWER	19
2.1	Normative View of Power	21
2.2	Post-Modern View of Power	21
2.3	Pragmatic View of Power	22
2.4	The Crux of Political Power	22
2.5	THE NATURE OF PRESIDENTIAL POWERS	23
2.5.1	Origin of Executive Presidency	23
2.5.2	The nature of executive power exercisable by the President	24
2.5.3	The Specific Grant Theory	25
2.5.4	The Residual Power Theory	27
2.5.5	The Inherent Power Theory	29
2.5.6	Power and Prospect of Arbitrariness: Checks and Balances	32
2.6	GENESIS OF THE EXECUTIVE PRESIDENCY IN THE 1999 CONSTITUTION	34
2.6.1	History of Executive Powers of the President	35
2.7	BASIC FEATURES OF THE 1999 NIGERIAN CONSTITUTION	39
2.7.1	Basic Features of the Constitution	40
2.7.2	It is Presidential in Nature	40
2.7.3	Its Supremacy	41
2.7.4	Its Written and Rigid Nature	42

2.7.5	Its Republican Nature	43
2.7.6	Its Federal Nature	44
2.7.7	Separation of Powers	45
2.7.8	Rule of Law and Basic Rights	46

### **CHAPTER THREE**

3.0	A CRITICAL ANALYSIS OF PRESIDENTIAL POWERS UNDER THE 1999 NIGERIAN CONSTITUTION	48
3.1	POWER TO EXECUTE AND MAINTAIN THE CONSTITUTION	48
3.2	SECURITY POWERS	53
3.3	POWER TO APPOINT AND REMOVE FROM OFFICE	55
3.3.1	Ministers and Special Advisers	55
3.3.2	Power to Appoint Federal Attorney-General	57
3.3.3	Civil Service of the Federation	60
3.3.4	Power Over Commissions and Councils	61
3.3.5	Judicial Appointments	64
3.4	POWER OVER PUBLIC REVENUE	65
3.5	PREROGATIVE OF MERCY	65
3.6	EMERGENCY POWERS	67
3.7	POWER OVER EXISTING LAWS	70

## **CHAPTER FOUR**

4.0	A CRITIQUE OF THE EXERCISE OF EXECUTIVE POWERS IN THE 1999 CONSTITUTION	72
4.1	Power to act within the Ambit of the Constitution	73
4.2	Maintenance of Public Safety and Order	75
4.3	Power to Appoint and Remove from Office	77
4.4	Command and Operational use of the Armed Forces	79
4.5	Emergency Powers	82
4.6	Rule Making Power And The Separation Of Powers	89
4.6.1	Implications of Presidential Power under sections 58 and 315 of the Constitution	93

## **CHAPTER FIVE**

5.1	SUMMARY	100
5.1.1	Powers of the President	100
5.2	OBSERVATIONS	104
5.3	RECOMMENDATIONS	107
5.3.1	Redefine the power of the President under section 5(1)(b)	107
5.3.2	Decentralise the Police Force	107
5.3.3	Strengthen National Defence Council	108
5.3.4	President should obtain concurrence before exercising emergency powers	108
5.3.5	Divest the President of Power to make rules	109
5.4	CONCLUSION	109

## ABSTRACT

Constitutional power, being the power fashioned out through the sovereign free will of the people, is basically meant to regulate the conduct of both the government and the governed. It is central to politics. The 1999 Nigerian Constitution vests executive powers in the President who is the Chief Executive. Similarly, the 1999 Constitution confers on the President, the power to assent to bills and modify existing laws. 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. In a country like Nigeria, whose history, especially as regards executive Presidency dates back only to 1979, it is obviously difficult to attempt to imbibe the political model of the United States of America whose executive Presidency is centuries old, without obstacles. When such powers as are conferred by sections 5, 58 and 315 as well as other specifically granted powers in the Constitution are vested in one man called the President, without effective checks and balances, and without a clear frontier as in section 5(1)(b), the tendency is that such powers will be misused. Power, it is said, “tends to corrupt; absolute power corrupts absolutely”<sup>1</sup>. It is in the light of the foregoing that this thesis examines the gamut of the powers vested in the President, particularly as exercised since the coming into being of the 1999 Constitution.

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<sup>1</sup> Acton, L. JEED (1834 – 1902), an English historian and political Scientist, in a letter to Ecclesiastic Mandel Creighton, dated April 1887, over the great crisis in Roman Catholicism over Pope Pius IX’s infallibility. <http://en.wikipedia.org>.

## TABLE OF STATUTES

	<b>Page</b>
1. The Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24, 1999, as amended.	1, 2, 39, 40, 48
2. Ibid, section 1(2).	41, 42
3. Ibid, section 2(2), 3(1)	43, 44
4. Ibid, sections 4, 5, 6	2, 5, 8, 13, 16, 44, 45, 46, 48
5. Ibid section 5(1)(a)	1, 3, 12, 23, 48, 49, 72, 100
6. Ibid, section 5(1)(b)	2, 5, 48, 73, 87, 100, 101, 104, 107, 110
7. Ibid, section 9	43
8. Ibid, section 11(3)(4)(5)	13, 14, 15, 86, 88, 104, 105, 109
9. Ibid, section 14(2)(a)	43, 56
10. Ibid, sections 33 – 46	47
11. Ibid, section 58(1)(4)(5)	14, 15, 46, 93, 99, 103, 104, 109
12. Ibid, section 130(1)(2)	15, 40, 79, 87
13. Ibid, section 143	67
14. Ibid, sections 147, 150, 154, 157, 158(2), 171, 174, 175.	55, 56, 57, 60, 61, 62, 63, 64, 72, 78, 104, 105, 109

15.	Ibid, sections 215, 216.	5, 6, 13, 72, 75, 101, 104, 109, 110
16.	Ibid, section 218.	5, 6, 13, 54, 72, 79, 81, 102, 104, 106, 108, 109, 110
17.	Ibid, sections 231, 232(1)(2)	45, 64, 104
18.	Ibid, section 305(1)(2)(3)	5, 13, 69, 72, 82, 86, 106, 110
19.	Ibid, section 308(1)(a)(b)(c)	41
20.	Ibid, sections 315, 318(4)(b)	5, 8, 13, 14, 15, 55, 70, 71, 95, 103, 104, 106, 109
21.	Third Schedule, Part 1.	77
22.	The Constitution of the United States of America, 1787, as amended.	4, 39
23.	Ibid, Article II, sections 1, 2.	4, 64, 74, 80, 92
24.	Posse Comitatus Act of the United States (1978), 20, Statute 152, 104, S.C. 332 – 333.	51

## TABLE OF CASES

		<b>Page</b>
1.	Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 2 NCR 1, 174, SCN.	63
2.	Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 3 NCLR, 166.	96, 104
3.	Cooper v. Aaron, 358 U.S. 1, 4, 18 – 19 (1958).	51
4.	Cunningham v. Neagle, 135 U.S. 1(1890), p. 83	26
5.	Eghugbayi Eleko v. Government of Nigeria (1931) A.C., 662 – 670.	30, 85, 102
6.	Federal Republic of Nigeria v. Osahon & Ors (Unreported). SC 23/2004	59
7.	Hon. Justice Mamman Kolo v. Attorney-General of the Federation (2002) 45 WRN 53, p. 75.	70
8.	Humphrey v. United States (1934) 295 U.S. 602.	29
9.	Lawal Kagoma v. Governor of Kaduna State (1981) 7 NCLR, 525.	58
10.	Makada v. COP (1985) HCNLR 1141 at p. 1158.	51
11.	Martin v. Mott, 12 Wheat (23 U.S.) 1a (1827).	51
12.	Myers v. United States, 272, U.S. 52.	27, 31
13.	National Assembly v. Tony Momoh (1982), 2 FNR 307; (1983) 4 NCLR 269, CA Lagos.	53
14.	Nigeria Police Force v. Adekanye (No.1) (2002), 15 NWLR (pt 790), 318.	59
15.	Obaba v. Governor of Kwara State (1994) 4 NWLR (pt. 294) p. 31 @ para A – G, F – H.	42

16.	Okike v. LPDC (2005) 21 WRN at p. 23, 721.	70
17.	Okongwu v. State (1986) 5 NWLR (pt 44).	66
18.	Olisa Agbakoba, SAN v. National Assembly & anor. (unreported) Suit No. FHC/CS/941/10.	99
19.	Olusemo v. COP (1988) 11 NWLR (pt. 575) 547.	59
20.	State v. Ilori (1983) 2 S.C. 155.	58
21.	Tende v. Attorney-General of the Federation (1988) 1 NWLR (pt 71) 506 at p. 522	56
22.	United States v. Wilson, 7, Pet, (32 U.S.) 150, 160 – 161 (1833).	66

# CHAPTER ONE

## GENERAL INTRODUCTION

### 1.1 INTRODUCTION

Presidential power under the 1999 Nigerian Constitution<sup>2</sup>, is the totality of executive powers that have been vested in the President. According to Black's Law Dictionary<sup>3</sup>, 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<sup>4</sup> of the Parliamentary model of government which was bequeathed to the country by the colonialists, upon the attainment of independence in 1960.<sup>5</sup> 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

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<sup>2</sup> The Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24, 1999, as amended, referred to in this research simply as the Constitution.

<sup>3</sup> Black's Law Dictionary, Eighth Edition, 2004

<sup>4</sup> 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.

<sup>5</sup> See also the Federal Republic of Nigeria, Proceedings of the Constituent Assembly, Official Report, Vol. 1, Lagos: Federal Ministry of Information, 1978, at pp. 258 – 259.

irrespective of the fact that such powers are granted with a number of safeguards by way of checks and balances.<sup>6</sup>

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

The 1999 Constitution 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 exercised by the president, such circumstances including the poor political sophistication of the country, social and economic forces.

The 1999 Constitution<sup>7</sup> vests the powers of the Federal Republic in three<sup>8</sup> 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-

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<sup>6</sup> Section 5(1)(a), The Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24, 1999, as amended

<sup>7</sup> Op. cit.

<sup>8</sup> Ibid, sections 4, 5, 6

- (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 of 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 1999 Constitution are to be exercised by the President subject to the Constitution and the provisions of any law made by the National Assembly<sup>9</sup>. They are to be exercised by the President either directly or through the Vice President and ministers of the government of the Federation.

Flowing from this is the question of the extent of delegation since the vesting clause appears discretionary. To what extent should the President delegate or not to delegate any of his powers?

This research therefore discusses the powers of the President, both express and inherent, in relation to the extent to which such powers are exercisable, especially the power to maintain all laws made by the National Assembly and to all matters which the National Assembly can legislate upon, and of course, his security and emergency powers.

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<sup>9</sup> The National Assembly comprises of both the Senate (Upper Chamber) and the House of Representatives (Lower Chamber)

The significance of this research is its contribution to knowledge and development of constitutional principles, which could lead to good governance so that those who find themselves in position of leadership, particularly the office of President, should realize that there is, after all, no absolutism in the vesting of the executive powers in the President, and that adequate mechanisms are available to bring such a President to order.

## 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,<sup>10</sup> and the manner that some of those powers are exercised in general terms.

While admitting that the Constitution itself provides for safeguards against the tendency to drift into arbitrariness through violation of its provisions, there are however, a number of core areas which require greater scrutiny, owing to identifiable lapses.

### 1. **Execution and maintenance of the Constitution**

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<sup>10</sup> Ibid, section 5

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. Kehinde Mowoe,<sup>11</sup> 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.

## 2. **Security Powers**

The security powers of the President are largely provided in sections 215, 216 and 218 of the Constitution.<sup>12</sup> 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

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<sup>11</sup> Mowoe, K.M: Constitutional Law in Nigeria (2008) Malthouse Press Limited, Lagos, p. 137.

<sup>12</sup> These sections confer the powers to appoint the Inspector-General of Police, delegation of powers thereof, and the operational use of the Armed Forces.

problem here, as advanced by Oyelowo Oyewo,<sup>13</sup> is that maintenance of one federal Police Force and delegation of power by the President alone, regates the principle of true federalism and defeats the essence of quick response to security threat.<sup>14</sup>

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 Nigeria which is regulated by the National Assembly, the President has the power to deploy troops to quell internal crisis but what 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?

### 3. **Power of rule making**

Whereas the Constitution<sup>15</sup> confers legislative power in the National Assembly, the President is vested with the power to “modify” existing laws.<sup>16</sup> This power is viewed as negating the intent and meaning of the separation of powers,<sup>17</sup> and is capable of portraying the President as being involved in legislation.<sup>18</sup>

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<sup>13</sup> Oyewo, O: Reducing the Risk of Divided and Failed Government (2000) NIALS, Lagos, p. 171.

<sup>14</sup> Akande, J. O.: Introduction to the Constitution of the Federal Republic of Nigeria, 1999 (2000) MIJ Publishers, p. 329.

<sup>15</sup> Op. cit, section 4

<sup>16</sup> Op. cit. section 315

<sup>17</sup> Oyewo, O: Reducing the risk of Divided and Failed Government” in NIGERIA: Issues in the 1999 Constitution (2000) NIALS, Lagos p. 172

<sup>18</sup> Tobi, N: Exercise of Legislative Powers in Nigeria, (2002) NIALS, Lagos, p. 46

#### 4. **Emergency Powers**

Emergency power, as provided in section 305 of the Constitution, has been tested twice – in Plateau and Ekiti 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 removal of the governors and the sack of the states' legislatures were said to be in excess of the grant.<sup>19</sup>

### 1.3 **OBJECTIVES OF THE RESEARCH**

For those countries operating the presidential system of government such as the United States of America<sup>20</sup>, especially as regards the President's powers<sup>21</sup>, and Nigeria, under the 1999 Constitution, presidents, more often than not, tend to abuse such powers vested in them, without actually being brought to book by the invocation of the numerous checks available.

It is against this background that this research aims:

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<sup>19</sup> Atura, B: Emergency Rule in Ekiti as the 1999 Constitution holds: [law.global@nyu.edu](mailto:law.global@nyu.edu) October, 2006. See also Nwabueze, B.O.: Obasanjo Rapes the Constitution: USAfricanonline.com The Newspaper, Honston.

<sup>20</sup> The Constitution of the United States of America, 1787, as amended.

<sup>21</sup> Ibid, Article 11, section 1.

1. To forestall failure of government such as we had under the 1960 and the 1963 Constitutions where lawlessness became the order of the day as a result of power struggle<sup>22</sup> between the then Prime Minister and the President, which led to the intervention of the military in 1966.
2. To ensure that the power granted 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,<sup>23</sup> thereby avoiding a drift into arbitrariness.
3. To ensure that the President does not exercise his security and emergency powers<sup>24</sup> arbitrarily so as not to infringe on private rights in the course of the exercise of these powers.
4. To ensure that the principle of separation of powers and its concomitant checks and balances are observed, particularly in relation to section 315.

#### 1.4 JUSTIFICATION

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<sup>22</sup> Okadigbo, C: Major Causes of Leadership Failure, in POWER AND LEADERSHIP IN NIGERIA (1987) Fourth Dimension Publishing Co. Ltd., Enugu Nigeria, p. 134.

<sup>23</sup> 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”.

<sup>24</sup> The President’s security powers are derived from sections 215, 216, 218 of the Constitution where he can appoint and delegate powers to the Inspector-General of Police, as well as determine the operational use of the Armed Forces, while his emergency power is derived from section 305 of the Constitution.

The Nigerian Constitution provides for the Executive Presidency, whereby all executive powers are vested in the President. Even though the Constitution provides for delegation of certain of those powers, an overbearing president may elect to carry on as if governance revolves round a single man. The wanton expansion of the scope of the executive powers by the President, hiding under the provisions of section 5(1)(b), no doubt, has the potential to lead to failure of government. Instances where the President has unilaterally deployed troops and imposed emergency rules without the conditions precedent having been first satisfied, do not augur well of good governance. The power of the President to make rules is also viewed as a negation of the principle of separation of powers.

This is more apt, for the reason that a constitution, toning down the enormous powers of the president, to make the exercise of powers more effective, will no doubt further the political, and socio-economic interests of the Nigerian state, as this will foster good governance and eschew authoritarianism as exhibited by President Obasanjo<sup>25</sup>.

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<sup>25</sup> Olusegun Obasanjo was president between 1999 and 2007, having served two terms of four years, after a re-election in 2003. He kick-started the operation of the 1999 Constitution.

The 1999 Constitution, modelled alongside that of the United States of America, cannot, in all honesty be said to fit the Nigerian situation, as the Nigerian politicians have not shown sufficient maturity to effectively operate a single executive presidential system.

Here, John Locke's maxim that "power corrupts, absolute power corrupts absolutely", is brought to test.

## 1.5 **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.

## 1.6 **SCOPE/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 to origin of the executive Presidency leading to the making of the 1999 Constitution.

## 1.7 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 and Oyelowo Oyewo.

Ben Nwabueze's 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.<sup>26</sup>

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<sup>26</sup> Nwabueze, B.O: *Presidentialism in Commonwealth, Africa* (1974). C. Hurst & Company, London, in Association with Nwamife Publishers, Enugu p. 4.

Nwabueze,<sup>27</sup> 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.<sup>28</sup>

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:

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.<sup>29</sup>

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

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<sup>27</sup> Ibid p.1

<sup>28</sup> Ibid, p.4

<sup>29</sup> Ibid, p.1

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.<sup>30</sup>

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.<sup>31</sup>

On the need for the President to exercise the power conferred on him by section 5(1) of the 1999 Constitution with caution, and to recognize the limits of such power, Ben Nwabueze<sup>32</sup>, commenting specially on the declaration of a state of emergency on Plateau State<sup>33</sup>, writes:

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 the 1999 Constitution,

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<sup>30</sup> Ibid, pp.7, 8.

<sup>31</sup> Ibid, p.14

<sup>32</sup> Nwabueze, B. O.: "Obasanjo Rapes Constitution by suspending Plateau Assembly and Governor", in US Africa, The Newspaper, Houston USA Africaonline.com

<sup>33</sup> Emergency rule was imposed on Plateau State on May 20, 2004 and an Administrator, Gen Chris Ali appointed by President Olusegun Obasanjo, even before he would communicate with, seek and receive the nod of the National Assembly.

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 or 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 section 11(3), (4) and (5) of the 1999 Constitution...

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 under sections 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 its 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<sup>34</sup> 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. Can this position, be said to be realistic in all instances?

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<sup>35</sup>, 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

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<sup>34</sup> Akande, J.O.: Introduction to the Constitution of the Federal Republic of Nigeria, 1999 (2000), MIJ Professional Publishers Limited, p. 330.

<sup>35</sup> Tobi, N., JSC: The Exercise of Legislative Powers in Nigeria (2002). Institute of Advanced Legal Studies, Lagos, p. 44.

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 58(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.

Another writer, V.C.R.A.C. Crabbe<sup>36</sup> believes that the power of the President to veto legislation by Congress is a legislative power.

I. O. Smith<sup>37</sup>, 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.

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<sup>36</sup> Crabbe, V.C.R.A.C.: The Doctrine of Separation of Powers and the Persuasive Approach to Interpretation of Legislation, (2000) NIALS, Lagos, p. 4.

<sup>37</sup> Smith, I. O.: The Constitution of the Federal Republic of Nigeria, annotated, (1999), Ecovatch Publications (Nigeria) Limited, Lagos (intra, chapter two).

Specifically, he restates the position of the President, vis-à-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,<sup>38</sup> 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 deal with issues as they occur on a day-to-day basis, before they receive the attention of the National Assembly.

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<sup>38</sup> Mowoe, K.M.: Ibid, p. 137

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 11(3)(4) of the Constitution.”<sup>39</sup>

In his contribution to the provisions of sections 58 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*”<sup>40</sup>

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-à-viz modification of existing laws – examines the identifiable pitfalls therein and proffers recommendations to such areas where inadequacies exist.

## 1.8 ORGANISATIONAL LAYOUT

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<sup>39</sup> Mowoe, K.M., Ibid, p. 155.

<sup>40</sup> Oyewo, O.: Ibid, p. 173.

This research has been designed to cover five chapters, bearing in mind the need to examine the preliminary issues leading to the theme of the research as discussed in chapter two. Chapter one presents in an overview, the titles and summaries of the various chapters. They are: Introduction, Objective of the Research, Statement of the Problem, Justification, Scope of the Research, Research Methodology, Literature Review, Organizational Layout and Conclusion.

Chapter Two is presented as a forerunner to the critical analysis in Chapter Three of this research. This chapter discusses in general terms, the concept of political power, the nature of presidential powers, origin and development as well as how executive presidential system came to be adopted in the 1999 Constitution. It also discusses the main features of the 1999 Constitution.

Chapter Three gives a critical analysis of the powers of the President under the 1999 Constitution of the Federal Republic of Nigeria while Chapter Four is a critique of the exercise of the powers thereof.

Chapter Five, the last in this research, summarises the discussions contained in the body of this work, proffers recommendations and draws a conclusion.

## CHAPTER TWO

### 2.0 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 collectivities, 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*"<sup>41</sup>. One of the early philosophers, Max Weber, in one of his works – **Politics as a Vocation**<sup>42</sup> – 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*".<sup>43</sup>

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.

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<sup>41</sup> Black's Law Dictionary, 8<sup>th</sup> Edition, 2004, 1197

<sup>42</sup> Weber, M., Politics as a vocation, p. 130

<sup>43</sup> Arendt, H.: "*On Violence*", (1970), MacMillan Publishers, London, p. 32

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.

## 2.1 Normative View of Power

The normative view of power debate has somehow coalesced into three broad dimensions, viz, decision-making, agenda-setting and preference-shaping. While decision-making, as postulated by Robert Dahl<sup>44</sup>, 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<sup>45</sup> 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.

## 2.2 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

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<sup>44</sup> Dahl, R. A: *Who Really Rules in Dahl's New Haven*, (Yale University Press, 1961)

<sup>45</sup> Ibid

work in *“Discipline and Punish”*<sup>46</sup>, 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 **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<sup>47</sup>.

### 2.4 **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

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<sup>46</sup> Foucault, M.: *Discipline and Punishment* (1978), *Strategy Formulation: Political Concepts*; St. Paul, MN, West Publishing

<sup>47</sup> Gompers, S: *Men of Labor: Be Up and Doing* – *American Federalist*, May 1906, p. 319

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.

## **2.5 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<sup>48</sup>. Therefore, this sub-topic discusses the theories of

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<sup>48</sup> Section 5(1)(a), Constitution of the Federal Republic of Nigeria (Promulgation) Decree No.24, 1999 as amended. See also Malemi, E.: The Nigerian Constitutional Law (2010) Princeton Publishing Co., Lagos. P. 35

executive power and the extent and reality of the powers so exercised by the president.

### 2.5.1 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*”<sup>49</sup>. The position of that committee easily found favour and drew 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

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<sup>49</sup> Akande, J.O.: Introduction to the Constitution of the Federal Republic of Nigeria, 1999 (2000), MIJ Professional Publishers Limited, p. iv.

rigging in the then Western Region, necessitating the military to intervene.<sup>50</sup>

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.

### **2.5.2 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.

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<sup>50</sup> See also Ojo, J.D. (1998). *The Executive under the Nigerian Constitution, 1960 – 1995*; Spectrum Books Limited, Lagos, p. 300

### 2.5.3 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 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*<sup>51</sup>, 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

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<sup>51</sup> *Conningham v. Neagle*, 135 U.S.1 (1890), p.83, per Justice Lamar

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 situation of*

*present and imminent danger to the existence, peace or well-being of the state or society”<sup>52</sup>.*

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**<sup>53</sup>, 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

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<sup>52</sup> Nwabueze, B.O., *Presidentialism in Commonwealth Africa* (1974) C. Hurst & Company, London, in association with Nwamife Publishers, Enugu, p. 12

<sup>53</sup> *Myers v. United States*, op. cit, at p.117; per Taft C.J.

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<sup>54</sup>, quoting with affirmation from Alan Glendhill<sup>55</sup>, 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.

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.

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<sup>54</sup> Nwabueze, BO: *Presidentialism in Commonwealth Africa* (1974), C. Hurst & Company, London, in Association with Nwamife Publishers, Enugu, p.1

<sup>55</sup> Glendhill, A.: Pakistan. The Development of its Laws and Constitution, 2<sup>nd</sup> ed. (1967) p.42

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<sup>56</sup>, 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 outrightly prohibited by law. This was the view followed in **Myers v. United States**<sup>57</sup>, 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.

### 2.5.5 The Inherent Power Theory

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<sup>56</sup> Humphrey v. United States (1934), 295 U.S.602

<sup>57</sup> Quoted in Justice Mc Renolds’ discenting judgment in Myers v. United States, 272 U.S. 52 at p. 229-30.

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<sup>58</sup>.

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<sup>58</sup> Roosevelt, T: Autobiography, pp. 388-9

But this position has been sharply criticized by Ben Nwabueze<sup>59</sup>, 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**<sup>60</sup>, 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”*.

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**,<sup>61</sup> 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...”.

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<sup>59</sup> Nwabueze, B.O. op. cit, p. 5.

<sup>60</sup> Eshugbayi Eleko v. Government of Nigeria (1931) A. C. 662-670

<sup>61</sup> Myers v. United States, 272, U.S. 52, op. cit at p. 237

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...<sup>62</sup>

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<sup>63</sup>, 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 which every grant of power is construed as including by implication, all such powers as are reasonably incidental thereto and not expressly excluded.

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<sup>62</sup> Locke, J: *Two Treatises of Government* (Morley, ed.), Bk.11, Ch.14, p. 159-66

<sup>63</sup> Nwabueze, B.O., Op. cit, p.8

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.

### 2.5.6 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...*"<sup>64</sup>. 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"<sup>65</sup>. 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

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<sup>64</sup> Lord John Emerich Edward Dalberg Acton, an English historian and political scientist (1837-1869), 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*"

<sup>65</sup> "*The Possibilities of the Presidential System in Developing Countries*", in *Parliament as an Export*, ed. Sir Alan Burns (1969), p.195

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<sup>66</sup>.

As an American author<sup>67</sup> 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 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.

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<sup>66</sup> President Landon Johnson in 1868 and President Bill Clinton over the Monica Lewinski Case

<sup>67</sup> Clinton Rossiter: *The American Presidency*, 2<sup>nd</sup> ed. (1960) pp. 52-3

## 2.6 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 Alahji 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,<sup>68</sup> 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

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<sup>68</sup> 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.

the June 12, 1993 general elections. Then, a twist in constitutionalism ensued 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 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.

### **2.6.1 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.<sup>69</sup>

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<sup>69</sup> Azikiwe, v. Governor-General: Call for a Republican State: Daily Express, Nov 18-25, 1961 at p.5

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 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 15<sup>th</sup> 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.<sup>70</sup>

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<sup>70</sup> Federal Republic of Nigeria: Report of the Constitution Drafting Committee containing the draft Constitution, Vol. 1, Lagos: Federal Minister of Information, 1976, p. xiii.

At the end of the debates, the members recommended to the Constituent Assembly a presidential executive system of government<sup>71</sup> 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.

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<sup>71</sup> See also Ojo, J.D.: *The Executive Under the Nigerian Constitution – 1960 – 1995*, (1998), Spectrum Books Limited, Ibadan, p. 301

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”<sup>72</sup>.

## 2.7 BASIC FEATURES OF THE 1999 NIGERIAN CONSTITUTION

The Constitution of the Federal Republic of Nigeria<sup>73</sup>, like that of the United States of America<sup>74</sup>, along which it is modeled, has similar main features. It is supreme, written, rigid, republican, federal, presidential and upholds the principle of separation of powers.

For the purposes of convenience, its United States counterpart is anchored on three broad features from which the framers of the Nigerian Constitution drew their inspiration.

While the Constitution of Nigeria is generally verbous and tends to treat every issue in specific terms, on comparative basis, that of the United

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<sup>72</sup> Akande, JO: *Introduction to the Constitution of the Federal Republic of Nigeria, 1999* (2000), MIJ Professional Publishers Limited, p. iv

<sup>73</sup> The Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24, 1999 (as amended)

<sup>74</sup> The Constitution of the United States of America, 1787, as amended

States is compact, leaving the bulk of the details to be marshaled out by the Congress<sup>75</sup>.

### **2.7.1 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.

### **2.7.2 IT IS PRESIDENTIAL IN NATURE**

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<sup>76</sup>, 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 in accordance

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<sup>75</sup> Congress of the United States of America is the legislative arm of government of the U.S.A. It is a bi-cameral legislature, with Upper (Senate) and Lower (House of Representatives) Chambers

<sup>76</sup> Ibid – section 130(2)

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 of 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<sup>77</sup>.

### 2.7.3 Its Supremacy

The 1999 Constitution<sup>78</sup>, 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 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”*.

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,

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<sup>77</sup> Ibid – section 308(1)(a)(b)(c).

<sup>78</sup> Ibid.

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<sup>79</sup>.

Being the basic law, i.e., the grund norm, 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**<sup>80</sup>.

#### 2.7.4 Its Written and Rigid Nature

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 encapsuled 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

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<sup>79</sup> Ibid, section 1(2)

<sup>80</sup> Obaba v. Governor of Kwara State (1994) 4 NWLR (pt. 294) p. 31 @ 39, para A-G, F-H

Constitution<sup>81</sup> 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 8 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.

#### 2.7.5 Its Republican Nature

A republic is defined by Black's Law Dictionary<sup>82</sup> 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*".

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<sup>81</sup> Op. cit.

<sup>82</sup> Black's Law Dictionary, Eighth Edition, 2004, p. 1330.

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<sup>83</sup>.

### 2.7.6 Its Federal Nature

The Constitution<sup>84</sup>, 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 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<sup>85</sup>, 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 1 of the Second

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<sup>83</sup> Constitution of the Federal Republic of Nigeria, 1999, section 14(2)(a).

<sup>84</sup> Ibid, sections 2(2), 3(1)

<sup>85</sup> Ibid, sections 4, 5 & 6.

Schedule to the Constitution<sup>86</sup>. 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<sup>87</sup>.

Similarly, no authority or person shall make law on any item reserved for the Local Government Council to legislate upon as provided in the Fourth Schedule to the Constitution<sup>88</sup>.

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<sup>89</sup>.

Even though the Constitution clearly spells out the federal structure of the country – federal, state and local governments – the governor of a

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<sup>86</sup> Ibid, section 4(2)(3).

<sup>87</sup> Ibid section 4(5). See also *Governor of Ondo State v. Adewunmi* (1988) 3 NWLR 9 (pt. 82) p. 280.

<sup>88</sup> Ibid, section 7(5).

<sup>89</sup> Ibid, section 232(1)

state, in exercising the authority vested in 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<sup>90</sup>.

### **2..7.7 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<sup>91</sup> - 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 as a 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

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<sup>90</sup> Ibid, section 5(3)(a)(b)(c).

<sup>91</sup> Ibid – sections 4, 5, 6.

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<sup>92</sup>.

### 2.7.8 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.

To this extent, the Constitution<sup>93</sup> provides guarantees and protects the individual's basic rights. The rights are non-negotiable and cannot be abridged, 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 the purpose of protecting the rights and freedoms of other persons. These rights are enforceable against the government or any other

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<sup>92</sup> Ibid – sections.58(1)(4)(5).

<sup>93</sup> Ibid – sections 33 – 46.

authority or person without prejudice to the right to damages under the law.

## **CHAPTER THREE**

### **3.0 A CRITICAL ANALYSIS OF PRESIDENTIAL POWERS UNDER THE 1999 NIGERIAN CONSTITUTION**

The Constitution<sup>94</sup>, in its Chapter 1, 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 rule making, and (5) prerogative of mercy.

### **3.1 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 it is a very

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<sup>94</sup> Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24, 1999, as amended.

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 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 and National Population Commission, 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, in conformity 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 of 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<sup>95</sup>.

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<sup>96</sup>. 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.<sup>97</sup>

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

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<sup>95</sup> Posse Comitatus Act of the United States, 1978, 20 Statute, 152, IOU. S.C. 332-333.

<sup>96</sup> Killian & Beik: The Constitution of the United States of America: Analysis and Interpretation, p. 45.

<sup>97</sup> Martin v. Mott, 12 Wheat (23 U.S.) 1a (1827). See also Cooper v. Aaron, 358 US 1, 4, 18-19 (1958).

President's executive powers extend to "all matters with respect to which the National Assembly has, for the time being, power to make laws". This is in spite 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 the President in other sections of the constitution. This is the implication of the phrase "subject to the provision of this constitution" with which section 5 begins. According to the court in **Senate of National Assembly v. Tony Momoh**<sup>98</sup> the deliberate use of this expression

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<sup>98</sup> (1982) 2 FNR 307; (1983) 4 NCLR 269, CA Lagos.

means that the section to which it precedes should not be construed in isolation, but must be considered with reference to other provisions of the Constitution.

### 3.2 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<sup>99</sup>. Under the Constitution, this power is to be regulated by the National Assembly.<sup>100</sup> 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

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<sup>99</sup> Op. cit, section 218(2)

<sup>100</sup> Ibid, section 218(4) (a) (b)

forces.<sup>101</sup> 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<sup>102</sup>. 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<sup>103</sup>. 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,<sup>104</sup> 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

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<sup>101</sup> Ibid, section 218(3)

<sup>102</sup> Ibid, section 5(4)(b)

<sup>103</sup> Ibid, section 5(5). This is a proviso to section 5(4)(b)

<sup>104</sup> Ibid, section 218(4)

appointment, promotion and disciplinary control of members of the Armed Forces of the Federation.<sup>105</sup>

### **3.3 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.

#### **3.3.1 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 ministers must however, possess the same qualifications as members of the House of Representatives.<sup>106</sup> 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.<sup>107</sup> 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.

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<sup>105</sup> Ibid, section 318(4)(b)

<sup>106</sup> Ibid, section 147(5)

<sup>107</sup> Ibid, section 147(2)

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<sup>108</sup>. In his appointments into the federal executive 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.<sup>109</sup>

It is the President who exercises his power to assign portfolios to ministers as well as the duties of the Vice President from time to time.<sup>110</sup> Thus, in **Tende v. Attorney General of the Federation**,<sup>111</sup> 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 of coordinating their

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<sup>108</sup> Ibid, section 14(2) 147(3)

<sup>109</sup> Ibid, section 147(6)

<sup>110</sup> Ibid, section 148(1)

<sup>111</sup> (1988) 1 NWLR pt. 71, 506 at p. 522. See also Mowoe, K.M.: Constitutional Law in Nigeria (2008), Malthouse Press Limited, Lagos, p. 140.

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

### 3.3.2 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 the 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<sup>112</sup> 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.

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<sup>112</sup> Op. cit. sections 150(2), 174.

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**.

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 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-à-vis his power of instituting or discontinuing criminal proceedings.<sup>113</sup>

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.<sup>114</sup>

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, Economic and Financial Crimes Commission, which, like the Police, are involved in similar activities of investigation and prosecution of

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<sup>113</sup> State v. Ilori (1983) 2 S.C. 155. See also Makada v. COP (1985) HCCLR 1141 at p. 1158.

<sup>114</sup> Lawal Kagoma v. Governor of Kaduna State (1981) 7 NCLR, 525

offenders. The courts have made extensive pronouncements in this regard. In **Olusemo v. Commissioner of Police**<sup>115</sup>, 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 **Federal Republic of Nigeria v. Osahon & Others**,<sup>116</sup> 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:

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

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<sup>115</sup> (1988) 11 NWLR (pt. 575), 547; Nigeria Police Force v. Adekanye (No.1) (2002), 15 NWLR (pt. 790) 318.

<sup>116</sup> Unreported: SC 23/2004, delivered 17<sup>th</sup> February, 2006.

court whether or not the information or complaint is laid in its name.

### 3.3.3 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.<sup>117</sup>

- (a) Secretary to the Federal Government;
- (b) Head of the Civil Service (who must be appointed from among the permanent secretaries or persons of equivalent rank in the Federal or State service);
- (c) Ambassadors, High Commissioners or other principal 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.

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<sup>117</sup> Op. cit. section 171(1)

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.<sup>118</sup> 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.<sup>119</sup> The Federal Civil Service Commission has the 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.

#### **3.3.4 Power Over Commissions and Councils**

By virtue of the provisions of section 153 of the Constitution, 14 statutory executive bodies comprising councils and commissions are established for the 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,

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<sup>118</sup> Ibid, section 171(6)

<sup>119</sup> Ibid, section 172

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.<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup> The Council of State is made up of the President as Chairman, Vice President and Deputy Chairman, all former heads of states and presidents, all former Chief Justices of the Federation, President of Senate, Speaker of the House of Representatives, all governors and the Attorney General of the Federation. Their function is advisory, and the President, though bound to seek their advice, is not bound to take it.<sup>123</sup>

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<sup>120</sup> Ibid, section 154(1)

<sup>121</sup> Ibid, section 154(2)

<sup>122</sup> Ibid, section 154(3)

<sup>123</sup> See Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 2 NCR 1, 174, SCN.

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.<sup>124</sup>

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 158(2).

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<sup>124</sup> Op. cit. section 157(1)

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 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.

### **3.3.5 Judicial Appointments**

The Chief Justice of the Federation and justices of the Supreme Court are appointed by the President, on the recommendation of the National Judicial Commission, subject to confirmation by Senate under section 231(1)(2). Under the 1979 Constitution, the appointment was made at the discretion of the President though still subject to the confirmation by Senate. 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).

### **3.3.6 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*, defined a pardon as: *“An act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed”*.<sup>125</sup>

Section 175 of the 1999 Constitution 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 an offence.

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<sup>125</sup> *United States v. Wilson*, 7, Pet, (32 U.S.) 150, 160-161 (1833).

- c) Substitute a less severe form of punishment for any punishment imposed on that person for such an offence;  
or
- d) Remit the whole or any part of any punishment imposed on that person for such an offence or of 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 convicted though punishment is not yet imposed. According to the court in *Okongwu v. State*,<sup>126</sup> 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.

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<sup>126</sup> (1986) 5 NWLR pt. 44, 721

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 constitutions 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.

### **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 1960 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<sup>127</sup>.

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 declare a state of emergency in that state or any part thereof because of the existence of some of the stated constitutional circumstances.<sup>128</sup>

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<sup>127</sup> Emergency rule was first declared during the Western Regional crisis in 1965.

<sup>128</sup> Op. cit. section 305(3) (a-g).

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.<sup>129</sup> 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 is 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**

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<sup>129</sup> Op. cit. section 305(2)(b)

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.<sup>130</sup> An existing law has effect subject to such modifications as may be necessary to bring it into conformity with the provisions of the constitution,<sup>131</sup> 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 law 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.<sup>132</sup> Any person appointed by any law to revise or rewrite the Laws of the Federation or of a state can also make such

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<sup>130</sup> (2005) 21 WRN 1 at p. 23. See also Hon Justice Mamman Kolo v. Attorney-General of the Federation (2002) 45 WRN 53, p. 75.

<sup>131</sup> Op. cit, section 315(1)(a)(b)

<sup>132</sup> Ibid, section 315(3)

modifications as an appropriate authority, such as in the President or the Governor, in the instant provision.<sup>133</sup>

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<sup>133</sup> Ibid, section 315(4)(a)(iii)

## CHAPTER FOUR

### 4.0 A CRITIQUE OF THE EXERCISE OF EXECUTIVE POWERS IN THE 1999 CONSTITUTION

Presidential powers, that is, the powers exercisable by the President, are those powers conferred by the Constitution on the Executive arm of the federal government. Such constitutional executive powers of the President, are provided in the Constitution<sup>134</sup>, in its section 5, thus:

- (1) 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 of the Federation or officers in the public 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.

Apart from the vesting of all executive powers in the President, by section 5(1)(a)(b), the Constitution goes further to provide for a number of powers that are specifically granted. Some of such enumerated powers<sup>135</sup> include: (1) power to execute and maintain the Constitution; (2) assent to bills from the National Assembly; (3) appointment and

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<sup>134</sup> Constitution of the Federal Republic of Nigeria (Promulgation) Decree, No. 24, 1999, as amended.

<sup>135</sup> Ibid, sections 5(1)(b); 147(3); 171(1); 175(1) 215(1)(a); 218(1)(2)(3); 231(1)(2); 305(1)(2)(3).

removal from office, of political and public office holders; (4) prerogative of mercy; (5) appointment of the Inspector-General of Police; (6) Command and Operational use of the Armed forces; (7) appointment of the Chief Justice of Nigeria; (8) proclamation of state of emergency. Further to the foregoing, there are such powers exercisable by the President, which fall within the sphere of *inherent*, *implied* and *residual* powers.

In all of these, certain pertinent issues are bound to arise, which go to the root of governance, such as the character of the individual president, the political, socio-cultural peculiarity of the country as well as the influence of external forces. No doubt, these go a long way to determine the manner that these powers are exercisable by the President. More often than not, the tendency is there for a President, clothed with awesome executive powers of state, to arrogate to himself, the power to do so many things. Therefore what limit is constitutionally set, beyond which, violations can be established and sanctioned?

#### **4.1 Power to act within the ambit of the Constitution**

Having regard to the provision of section 5(1)(b), it will appear that irrespective of the enumerated powers granted the President, he nevertheless has a wide latitude over powers, that is, to execute the Constitution in all its ramifications, and also to deal in such areas where the National Assembly is considered to have powers to make laws. Now, can the President act on such issues which have not been legislated upon, in anticipation of the legislation?

This would seem to place the President in a position in which he has the right, and a discretion too, to delegate or refuse to delegate some of his powers while at the same time he can expand the scope of his powers while hiding under the clause vesting those power to “maintain and execute” the Constitution, far in excess of the contemplation or intendment of the framers of the Constitution.

In the United States of America, the modern construction of Article II, clause 1, is that the executive power of the U.S. is vested in the President, subject only to the exceptions and qualifications accompanying the grant.

Ben Nwabueze,<sup>136</sup> commenting on a similar scenario, of the U.S.A. Constitution, which is likened to the instant provision in the Nigerian Constitution, holds that:

The United States Constitution, after declaring that the executive power shall be vested in the President, goes 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.

In this respect, it is Nwabueze's belief 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, for there will be no roadmap or basis whatsoever, for such action. The provision of the sub-section however, no doubt, accords with the tenet of the inherent power theory, whereby the President can expand the scope of his powers, provided they have not been specifically forbidden by the Constitution. By and large, the exercise of inherent power will depend on the rationale behind the factors necessitating the exercise of such power, and the perception of it by the governed.

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<sup>136</sup> Nwabueze, BO: *Presidentialism in Commonwealth Africa* (1974), C. Hurt & Company, London, in Association with Nwamife Publishers, Enugu, p. 14.

## 4.2 Maintenance of Public Safety and Order

This brings to fore, the appointment and control of the Inspector-General of Police, whose duty is to enforce the maintenance of law and order within the territory of the country. The Constitution, in its section 215(1)(a), (3), empowers the President to appoint an Inspector-General of Police who shall be the head of the Police Force and that:

The President or such other Minister of the Federation as he may authorize in that behalf, may give to the Inspector-General of Police such lawful directions with respect to the maintenance and securing of public safety and public order *as he may consider necessary*, and the Inspector-General of Police shall comply with those directions or cause them to be complied with.

It is to be admitted that there are wide powers granted the Police in the course of its maintenance of law and order. It is also to be admitted that the authority over the Police is solely vested in the President or any Minister so appointed to act in that behalf. The central control of the Police has however generated calls for State Police to be created, particularly the call by the Government of Lagos State to be allowed to establish its police force, perhaps, in order not only to whittle the President's sole power of control over the Police, but to bring about rapid response to security challenges.

Contributing to the merit or otherwise of the concentration of the control of the Police in the President, J. O. Akande<sup>137</sup> observes thus:

...But it has also been the cause of dissatisfaction among some governors because being responsible for the maintenance of peace and stability within their areas, there are occasions when prompt law enforcement action may avert a bigger crisis; should the Commissioner of Police insist on getting approval from the Inspector-General of Police (acting on the directive of the President) on the spot, the damage might have been done....

This position lends credence to the factor of the nature of the President's personality and leaning, particularly in deference to the intrigues of partisan politics. Such powers, where there are no functional checks and balances, can no doubt be a ready tool against perceived opponents, rather than the primary responsibility of policing every nook and corner and thereby ensuring orderliness.

#### **4.3 Power to Appoint and Remove from Office**

The Constitution provides for a variety of offices to which appointments are made by the President. It is needless to say that he who has the power to appoint, also has the power to remove. He can hire and fire.

The exception to this however, is that there are certain statutory

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<sup>137</sup> Akande, JO: *The Constitution of the Federal Republic of Nigeria, 1999, with Annotations*, (2000) MIJ Professional Publishers Limited, p. 329.

appointments which can be made by the President, with the requisite approval of the National Assembly. Such appointments cannot ordinarily be terminated at will by the President. Were it to happen, it would amount to a violation of the Constitution. They include the appointment of a Chief Justice of Nigeria; Chairman of the Independent National Electoral Commission; Chairman and members of the Revenue Mobilisation, Allocation and Fiscal Commission; and indeed the Federal Executive Bodies established by section 153 of the Constitution<sup>138</sup>. Even though the removal, before their tenure lapses, is subject to the recommendation and approval of the National Assembly or such other regulatory authorities, the President is Chairman of quite a number of the bodies. Without effective checks and balances, the President could choose to fire appointees who have lost favour with him.

It is to be admitted however, that the numerous powers of the President on appointments, attract, as a necessary incident, the inherent power of removal, for otherwise, the President could face some difficulties over his appointees who could not be removed, even in the face of disloyalty or incompetence.

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<sup>138</sup> Op. cit. Third Schedule, Part 1

A test case is the recent removal of Professor Maurice Iwu from the chair of Independent National Electoral Commission (INEC). It became difficult to remove him before the end of his tenure, even in the face of wide-spread criticism over his poor handling of election matters, having regard to the provisions of section 157(1) of the Constitution, which provides thus:

Subject to the provisions of subsection (3) of this section, a person holding any of the offices to which this section applies may only be removed from that office by the President acting on an address supported by two-thirds majority of the Senate praying that he be so removed for inability to discharge the functions of the office (whether arising from infirmity of mind or body or any other cause) or for misconduct.

However, for purely political office holders, they are at the mercy of their appointer, as they are subject to the overall effect of political expedience.

#### **4.4 Command and Operational use of the Armed Forces**

The Constitution<sup>139</sup> 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<sup>140</sup>, 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*”.

The Constitution provides thus:

Section 218(1) 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 his powers relating 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

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<sup>139</sup> Ibid, section 130(1)(2).

<sup>140</sup> Ibid, section 218(1)(2)(3)

(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 the Chief of Defence Staff or to any of the Service Chiefs, respectively.

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 moreso that the power of the National Assembly 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.

In contra-distinction with what is contained in the Nigerian Constitution, the U.S. President is Commander-in-Chief only when American Military is called out to action.

The Constitution of the United States of America<sup>141</sup>, provides: *“The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of several states, when called into the actual service of the United States”*.

The key point in the difference between that of Nigeria and the U.S. is that while it is basically difficult for the American President to manipulate the command structure of the U.S. Armed Forces, the case is the reverse in Nigeria, where the President, permanently Commander-in-Chief, by virtue of his being President, ensures that the tenure of the High Command is at his behest. This, obviously can produce negative loyalty, which is capable of undermining operational capability of the force.

This can be exemplified by the frequent change of guard, upon the emergence of a new political leadership or upon the occurrence of certain events. Corroborating this view, Akande<sup>142</sup>, expresses the fear that *“it would seem that there are no constitutional limitations on the exercise of this power other than the power of the National Assembly to make laws for the regulation of the power”*. Here, a challenge is placed

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<sup>141</sup> Article II, s.2, Clause 1

<sup>142</sup> Op. cit, commenting on the provisions of section 218(1)(2) at p. 332.

at the doorsteps of the National Assembly to ensure that any violation is appropriately sanctioned.

The case of the use of the Armed Forces which manifested in the sack of two communities, ordered by the President in 1999 (Odi Town in Bayelsa State) and in 2001 (Zaki Biam in Benue State) attests to the excessive use of force on defenceless civilians, having taken undue advantage of his position as Commander-in-Chief.

#### **4.5 Emergency Powers**

The term “emergency powers” refers to such powers that have been granted the President to declare a state of emergency over the entire country or any part thereof, in the event that certain conditions develop, including when the nation is at war; in imminent danger of invasion and actual breakdown of public order and public safety in the Federation or any part thereof, requiring extra-ordinary measures to curb<sup>143</sup>. The exercise of this power is constitutionally provided thus:

Section 305(1) subject to the provisions of this Constitution, the President may by instrument published in the Official Gazette of the Government of the Federation issue a Proclamation of a state of emergency in the Federation or any part thereof.

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<sup>143</sup> Op. cit, section 305(1)(2)(3).

(2) The President shall immediately after the publication, transmit copies of the Official Gazette of the Government of the Federation containing the proclamation including the details of the emergency to the President of the Senate and the Speaker of the House of Representatives, each of whom shall forthwith convene or arrange for a meeting of the House of which he is President or Speaker, as the case may be, to consider the situation and decide whether or not to pass a resolution approving the Proclamation.

(3) The President shall have power to issue a Proclamation of a state of emergency only when –

(a) the Federation is at war,

(b) the Federation is in imminent danger of invasion or involvement in a state of war;

(c) there is actual breakdown of public order and public safety in the Federation or any part thereof to such extent as to require extraordinary measures to restore peace and security;

(d) there is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger;

(e) there is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation;

(f) there is any other public danger which clearly constitutes a threat to the existence of the Federation; or

(g) the President receives a request to do so in accordance with the provisions of subsection (4) of this section.

(4) The Governor of a State may, with the sanction of a resolution supported by two-thirds majority of the House of Assembly, request the President to issue a Proclamation of a state of emergency in the State when there is in existence within the State any of the situations specified in subsection (3), (c), (d) and (e) of this section and such situation does not extend beyond the boundaries of the State.

(5) The President shall not issue a Proclamation of a state of emergency in any case to which the provisions of subsection (4) of this section apply unless the Governor of the State fails within a reasonable time to make a request to the President to issue such Proclamation.

(6) A Proclamation issued by the President under this section shall cease to have effect –

(a) if it is revoked by the President by instrument published in the Official Gazette of the Government of the Federation;

(b) if it affects the Federation or any part thereof and within two days when the National Assembly is in session, or within ten days when the National Assembly is not in session, after its publication, there is no resolution supported by two-thirds majority of all the members of each House of the National Assembly approving the Proclamation;

(c) after a period of six months has elapsed since it has been in force;

Provided that the National Assembly may, before the expiration of the period of six months aforesaid, extend the period for the Proclamation of the state of emergency to remain in force from time to time for a further period of six months by resolution passed in like manner; or

(d) at any time after the approval referred to in paragraph (b) or the extension referred to in paragraph (c) of this subsection, where each House of National Assembly revokes the Proclamation by a simple majority of all the members of each House.

The preservation and maintenance of the Constitution is constitutionally a major executive function. The rights of individuals, no doubt, depend largely on the existence of an organized political society. The continuance of that society itself depends upon national security, for without security, any society is in danger of collapse or violent overthrow. National security therefore cannot be handled with levity and measures designed to achieve and maintain security must come first and of course, within the ambit of the law. The point of controversy however, is, in what circumstances and subject to what safeguards,

should the rights of individuals or groups yield to the superior force of extra-ordinary powers of the President?

Commenting particularly on the enforcement of law and order through extra-ordinary measures, Akande<sup>144</sup>, though agrees that the National Assembly ought to be notified of the need for a state of emergency, before it is put into force, observes: *“It must be remembered that the President is the Commander-in-Chief of the Armed Forces and he could deploy them for services within 24 hours of his declaring a state of emergency, a situation which may not be easy to reverse should the National Assembly refuse to approve his proclamation”*.

Admittedly, this scenario played itself out during the Presidency of General Olusegun Obasanjo between 1999 – 2007 where he declared emergency rule in both Plateau and Ekiti States respectively.

The controversy here is, whether or not the President complied with the provisions of the Constitution to the letter; whether he really had the power to suspend the governor as well as the state legislature; and whether the conditions precedent were ripe for such an action.

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<sup>144</sup> Op. cit, p. 332.

Nwabueze<sup>145</sup>, commenting of the declaration of emergency rule on Plateau State under the heading: “*Obasanjo rapes Constitution by suspending Plateau Assembly and Governor*”, states that:

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 time, and to overstep, with some exceptions, the limitations on power arising from the Constitutional guarantee of fundamental rights in Chapter IV. Section 305 of the 1999 Constitution, 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.

Nwabueze’s position is premised on the old case of **Eshugbayi Eleko v. Government of Nigeria**<sup>146</sup>, where the Privy Council invalidated the deportation of the Oba of Lagos, by the colonial Governor, which act was held to be without legal authorization.

He goes further to say that:

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

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<sup>145</sup> Op. cit, on Emergency rule in Plateau State, Emergency rule was declared on Plateau State and both the Governor and the State House of Assembly suspended, on May 20, 2004 and an Administrator, Gen Chris Ali appointed by President Olusegun Obasanjo, even before he would communicate to, and obtain the concurrence of the National Assembly.

<sup>146</sup> Eshugbanji Eleko v. Government of Nigeria (1930) A.C. 662, 670.

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 section 11(3), (4) and (5) of the 1999 Constitution.

As if Nwabueze has not wrapped it all up, another legal commentator, Bamidele Aturu<sup>147</sup>, also commenting on the state of emergency imposed on Ekiti State, believes that the President did not meet the conditions precedent before his declaration and implementation of the emergency rule in both Plateau and Ekiti States, as, according to him, *“the President cannot seek protection under section 11(4) of the Constitution, for that section only empowers the National Assembly to make laws for a state where the House of Assembly is unable to perform its functions by reason of the situation prevailing in that state. From the available facts, the House of Assembly in Ekiti was not unable to perform its function”*.

Obviously on the opposing side of Nwabueze and justifying the imposition of emergency rule on the Plateau, is Akin Olujimi, SAN, then Attorney-General of the Federation, who, commenting on the controversy in the Guardian newspaper of August 27, 2004, said that beyond the enumerated powers of the President as regards his exercise

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<sup>147</sup> Aturu, B., writing under the heading: *“Emergency Rule in Ekiti as the 1999 Constitution holds: [law.gglobal@nyu.edu](mailto:law.gglobal@nyu.edu), October 26, 2006, p..*

of emergency powers, the President is also clothed with the factor of inherent power, having due regard to the combined effect of sections 5(1)(b) and section 130(2). Section 5(1) provides that: *“subject to the provisions of this Constitution, the executive powers of the Federation – (b) shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters to which the National Assembly has, for the time being, power to make laws”* and section 130(2) provides also that: *“the President shall be Head of State, the Chief Executive of the Federation and Commander-in-Chief of the Armed Forces of the Federation”*.

It is the contention of Olujimi that:

The Constitution is the paramount and supreme law of the land and since it enjoins the President in a period of emergency to take extraordinary measures to protect the security of the state or any part thereof, in a situation of actual breakdown of public order and public safety, the suspension of the Governor and the State House of Assembly come within the term ‘extraordinary measure’ when objectively considered... the decision whether or not to declare a state of emergency in any area is a matter of high state policy which should not be dismissed in a facile manner or approached with mental reservation.

It is to be admitted that these constitutional provisions are elaborate, from which the President can draw and exercise enormous inherent powers.

The only check in a situation such as this, is an effective legislature, which will ensure that the President does not hide under these powers to tamper with basic rights, thereby subverting the sovereignty that resides in the people.

In this view, Kehinde Mowoe<sup>148</sup> believes that the power of the President over emergency can be potent, given the provisions of section 11(3)(4) of the Constitution, especially with “an unscrupulous Chief Executive and a cantankerous federal legislature.

Apparently emphasizing the all-powerful disposition of the President, vis-à-vis his powers, an American, Woodrow Wilson<sup>149</sup>, said: *“At the least, it is no doubt true that the loose and general expressions by which the powers and duties of the Executive branch are denominated place the President in a position in which he has the right in law and conscience, to be as big a man as he can, and in which only his capacity will set the limit”.*

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<sup>148</sup> Mowoe, K.M.: (2008), Malthouse Press Limited, Lagos, p. 155

<sup>149</sup> Wilson, W.: Constitutional Government in the United States, (1908) 202, 205. <http://law.oncle.com>

It will appear that the foregoing phrase encapsules the essence of Presidentialism with the concentration of executive powers in the President.

#### 4.6 **Rule making Power and the Separation of Powers**

The modern doctrine of separation of powers is traceable to the French philosopher, Montesquieu, as far back as 1747, when, in his book, “**Espirit des Louis**” (The Spirit of the Laws), he observed that if power was concentrated in the hands of an individual or a group of people, it could result in a tyrannical form of government. To avoid such a situation and with a view to checking arbitrariness on the part of leaders, he suggested that there should be a division of state powers among different organs of government and that the functions of each organ should not overlap the other.

He said:

When the legislative and executive powers are united in the same person, or in the same body or magistrates, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and executive powers. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be an

end of everything, were the same man or the same body to execute these three powers<sup>150</sup>.

Thus, the USA was to imbibe this doctrine after its war of independence by embodying it in its Constitution of 1787 by way of division of powers. It is this pattern that the Nigerian 1999 Constitution has followed. It follows therefore that the underlying essence of the postulate of Montesquieu, is that when state powers are separated and performed by different organs of government, it results in a government of law rather than the whims and caprices of an individual; that it bestows independence on the judiciary as an arbiter, for if the judiciary is misled, the foundation for arbitrariness is laid; and that by and large, the independence and freedom of man are guaranteed.

The doctrine, as popular as it appears, has drawn some criticism, in that in modern day governance, it is difficult to have a water-tight separation of powers, hence the reality and functionality of the doctrine have been partly called to question.

James Madison<sup>151</sup>, a former President of the United States once wrote that separation of powers is not absolute. *"It is instead, qualified by the*

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<sup>150</sup> Reproduced in, C.K. Thakwani: "Lectures on Administrative Law", 4<sup>th</sup> edition, Eastern Book Company, 2007.

*doctrine of checks and balances, and that the legislature, executive and judiciary should not be so far separated as to have no constitutional control over each other*”, hence the system of checks and balances is designed to allow each branch or arm of government to restrain abuse by each of the other arms. The three arms thus represent a huge river comprised of three streams, flowing in one channel but whose waters never mix but perform complimentary roles on each other, in their symbiotic relationship.

In the United States, the Vice President is the de jure President of the Senate although there is always a President pro-tempore, to conduct the affairs of the Senate in the absence of the Vice-President. *“The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided”*<sup>152</sup>. This provision in the U.S. Constitution underscores the complimentary nature of functions in the workings of governmental power organs. The U.S. Vice-President is the second in command of the executive, yet the constitution provides that he perform, de jure, legislative functions.

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<sup>151</sup> James Madison, a former President of the United States, in his book, The Federalist, No. 47.

<sup>152</sup> Constitution of the United States of America, 1787, Article 1, section 3, clause 5.

In the United States, as it is in the Nigerian Constitution, the President exercises the legislative function of assent to bills before they become law, as well as exercises a check over Congress through his power to veto bills but Congress may override any veto<sup>153</sup> except for a pocket veto, by a two-third majority in each of the bi-cameral Congress. When the two Houses of Congress cannot agree on a date for adjournment, the President may settle the dispute whereby either or both Houses may be called into emergency session by the President. The President also dabbles into the sphere of judicial powers by appointing judges, but with the advice of the Senate, as well as make treaties<sup>154</sup>. He also exercises the judicial power to issue pardons and reprieve offences. Pardons are, in the U.S., not subject to confirmation by either of the two chambers of Congress.

Commenting, in concurrence that the doctrine of separation of powers is not water-tight, the Hon. Mr. Justice V.C.R.A. Crabbe<sup>155</sup>, aligning with the position of James Madison,<sup>156</sup> says:

The doctrine of the separation of powers is more a name than a description, though it would be considered a misnomer. Even in the United States of America, Congress, the Supreme Court and the President are practically not separate from one another. Congress

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<sup>153</sup> Ibid, Article II, section 7.

<sup>154</sup> Ibid, Article II, section 2.

<sup>155</sup> The Hon. Mr. Justice V.C.R.A.C. Crabbe (C.V. LL.D.), Commissioner, Statute Law Revision, Ghana, in: "THE DOCTRINE OF THE SEPARATION OF POWERS", NIALS Annual Lecture Series, 2000, Lagos, Nigeria.

<sup>156</sup> James Madison, op.cit.

can impeach the President. We are witnesses to the events that led to the resignation of President Richard Nixon and the subsequent pardon granted him by President Gerald Ford. The doctrine of separation of powers does not confer a privilege, absolute and qualified, on presidential immunity. There is something called justiciability. There is something called accountability. The power of the President to veto legislation passed by Congress is a legislative power. Justices of the Supreme Court on nomination by the President have to face the Senate before taking the oath of office.

This position, as canvassed by the Ghanaian jurist provides a basis to criticise similar legislative functions exercisable by the President under the 1999 Nigerian Constitution, particularly as such functions are outside the purview of the executive branch.

#### **4.6.1 Implications of Presidential Power under sections 58 and 315 of the Constitution**

Constitutionally, the President is not empowered to function within the ambit of the legislature, as legislative powers are expressly vested in the National Assembly by section 4. However, there is a number of areas where the President exercises enumerated, inherent and implied powers 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): The power of the National Assembly to make laws shall be exercised by bills passed by both the Senate and the House of Representatives and except as otherwise provided by subsection (5) of this section, assented to by the President.

Subsection (3) 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 this section expressly vests in the President, the power to finalise and seal the process of law making, subsection (3) 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):

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.

Commenting on this interplay of legislative power, Jadesola Akande<sup>157</sup>, 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 influence the actual course of legislation”*.

Akande’s position here aligns with the view of Crabbe, and the position in the U.S. that separation of powers is not absolute.

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

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<sup>157</sup> Akande, J: “The Constitution of the Federal Republic of Nigeria, 1999, with annotations. MIJ Professional Publishers Limited (2000), Lagos, p. 142.

**appropriate authority** considers necessary or expedient to bring that law into conformity with the provisions of this Constitution.

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

Commenting on the view that even though the power to legislate is vested in the legislature, the President nevertheless, performs legislative functions, Niki Tobi<sup>158</sup>, referring particularly to sections 58 and 315, holds 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...”*.

Niki Tobi, also commenting on *“Existing laws and the New Constitution”*, argues:

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 act. It will not be correct to contend

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<sup>158</sup> Tobi, N.: Exercise of Legislative Powers in Nigeria (2002) NIALS, Lagos, p. 44.

that the power conferred on the President and the Governor come within the provision of section 5 of the Constitution....

His position is anchored on the judgment in **Attorney-General of Ogun State v. Attorney-General of the Federation**<sup>159</sup>, where the court held that the Executive had powers to make modifications on existing laws.

While admitting that the President (Executive) performs legislative functions, Oyelowo Oyewo<sup>160</sup>, 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 section 315) is nothing short of an abdication of legislative power (of the National Assembly) and must be expunged from the Constitution.

To buttress the position of those who argue and hold that the President actually makes laws by virtue of his performance of the function of assent to bills, which seals the process of legislation, the recently “amended” 1999 Constitution has become subject of litigation. While

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<sup>159</sup> AG Ogun State v. AGF (1982) 3 NCLR 166.

<sup>160</sup> Oyewo, O.: “Reducing the Risk of Divided and Failed Government”, in: NIGERIA: Issues in the 1999 Constitution (2000) NIALS, Lagos, p. 172.

some believe that the President's assent is required, the National Assembly and some other individuals believe that Presidential assent is not required. Similarly, the President's proclamations on topical issues, particularly in times of emergency, once gazetted, have the force of law until set aside by the National Assembly.

As a result, a former President of the Nigerian Bar Association, Olisa Agbakoba, SAN, had, on July 5, 2010, approached the Federal High Court by Originating Summons, praying the court to hold that constitutional amendment process, as contained in section 9, must comply with the provisions of section 58 of the Constitution<sup>161</sup>. Agbakoba's position finds favour in two other Senior Advocates of Nigeria, Alex Izinyon and JB Daudu, current President of the Nigerian Bar Association (NBA).

While Agbakoba recalls that the 1960 Constitution was assented to by the then Acting Governor-General, Chief Dennis Osadebay,<sup>162</sup> upon its amendment in July 1961, before it became an Act of Parliament, Alex

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<sup>161</sup> ThisDay Newspaper, Friday, October 8, 2010, Vol. 16, No. 5647 at pp. 1 & 4.

<sup>162</sup> Chief Dennis Osadebay was at that time, acting Governor-General, in the absence of Dr. Nnamdi Azikiwe, who himself was the representative of the Queen of England, Elizabeth II, who was then the Sovereign, before Nigeria's Republican status in 1963.

Izinyon,<sup>163</sup> concurs with the avowed position of an erudite scholar and leading constitutional law authority in Nigeria, Ben Nwabueze, that whereas the U.S. Constitution, in its Article 5, stipulates that the procedure for amendment outlined therein shall be valid and shall form part of the existing constitution, similar provision is lacking in the wording of the entire section 9 of the 1999 Nigerian Constitution.

The interpretation to be given to the Nigerian Constitution as regards section 9 is that for bills to become Acts of the National Assembly, they have to be assented to, except of course where he withholds assent and his assent is overridden by the requisite two-thirds majority.

The foregoing views debunk the position of the National Assembly that constitutional amendment does not require the Presidential assent since the amended sections by themselves are already Acts of the National Assembly.

In the meantime, the Federal High Court, on November 8, 2010, in **OLISA AGBAKOBA, SAN v. NATIONAL ASSEMBLY & ANOR, (unreported)**, in suit No. FHC/L/CS/941/10, had upheld Agbakoba's

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<sup>163</sup> Izinyon, A., a Senior Advocate of Nigeria, in an interview with "Lawyer", a weekly magazine in ThisDay Newspaper of Tuesday, September 7, 2010, in Vol. 15, No. 5616 at p. 1.

position when it ruled that the amendments to the Constitution must comply with section 58(4)(5) of the Constitution of the Federal Republic of Nigeria 1999. However, on the 10<sup>th</sup> day of January 2011, the President finally assented to the Amendment Bill.

Presidential assent to bills is a function in the Nigerian Constitution which the President, while holding office, cannot delegate to any one else, except if he goes on vacation, having transferred power to his Vice or he temporarily transfers power to his Vice under any of the relevant provisions of the Constitution.

## **CHAPTER FIVE**

### **5.1 SUMMARY**

By the theme of this research, being a critical analysis of presidential powers, as enshrined in the Constitution of the Federal Republic of Nigeria,<sup>164</sup> 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

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<sup>164</sup> Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24, 1999 as amended.

therefore provides a conclusion to all issues previously raised, and in doing that, gives a summary of the subject matter and proffers recommendations.

### 5.1.1 Powers of the President

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.

While section 5(1)(a) confers all executive powers in the President, the Constitution, in its subsection (5)(1)(b), provides that *“such power 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”*.

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,<sup>165</sup> 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.

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).

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,<sup>166</sup> commenting on this, observes that this idea of only one Federal Police has been the cause of dissatisfaction among some governors.

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<sup>165</sup> Nwabueze, BO: *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.

<sup>166</sup> Akande, JO: *The Constitution of the Federal Republic of Nigeria, 1999, with Amotations*, MIJ Professional Publishers Limited, 2000.

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's 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 and the Boko Haram crisis. In the United States, the President is Commander-in-Chief **ONLY** when the Army, Navy and the Militia are "called into the actual service of the United States".<sup>167</sup>

Nwabueze's position on the exercise of emergency powers, as it concerned the declaration of emergency on Plateau State, citing the old case of **Eshugbayi Eleko v. Government of Nigeria**,<sup>168</sup> 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

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<sup>167</sup> See the Constitution of the United States of America 1787, as amended, Article 11, Section 2.

<sup>168</sup> Eshugbayi Eleko v. Government of Nigeria (1930) A.C. 662, 670.

arising from the fundamental rights in Chapter IV; hence section 305 relied on by the President grants only the power to declare emergency and not the power to make laws.

The foregoing is the position of Bamidele Aturu,<sup>169</sup> 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.

On the rule making powers of the President, the issues here are whether or not the President, by virtue of his exercise of certain enumerated powers, is part of the legislative process.

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 315(1)(2).

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<sup>169</sup> Aturu, B., writing under the heading: "Emergency Rule in Ekiti as the 1999 Constitution holds": [lawglobal@nvu.edu](mailto:lawglobal@nvu.edu), October, 2006.

Niki Tobi,<sup>170</sup> 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 v. Attorney-General of the Federation**,<sup>171</sup> 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

From the totality of the powers vested in the President, ranging from the blanket grant in section 5, to all the numerous specific grants, among which are sections 11, 58, 157, 215, 216, 218, 231, 305, 315, there is little or no doubt that a man clothed with such enormous powers, in the words of Woodrow Wilson,<sup>172</sup> can place himself in a position “**to be as big a man as he can, in which only his capacity will set the limit**”.

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<sup>170</sup> Tobi, N: Exercise of Legislative Powers in Nigeria (2002) NIALS, Lagos.

<sup>171</sup> Attorney-General of Ogun State v. Attorney-General of the Federation (1982) 3 NCLR 166.

<sup>172</sup> Wilson, W: Constitutional Government in the United States (1908), 202, 205.

It is therefore observed that:

5.2.1 The power vested by the wording of section 5(1)(b) leaves room for the President to expand the scope of his powers in the course of the maintenance and execution of the Constitution as well as to all matters with respect to which the National Assembly has power to make laws. Instances where the President has acted without first securing the approval of the National Assembly include 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.

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.<sup>173</sup>

5.2.2 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

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<sup>173</sup> See Nwabueze, B.: Obasanjo rapes Constitution by suspending Plateau Assembly and Governor, in US Africa, The Newspaper, Houston, May 20, 2004 @ USAfricaonline.com. See also Aturu Benindele: Emergency Rule in Ekiti as the 1999 Constitution hold. Culled from The Guardian, October 20, 2006.

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.

5.2.3 The power of the President to determine the operational use of the Armed Forces<sup>174</sup> is subject to abuse, as the only check against abuse in section 218(4) lacks the desired 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.

5.2.4 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

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<sup>174</sup> Op. cit. section 218

such an action.<sup>175</sup> It is this that easily leaves the President to exceed the scope of such power.<sup>176</sup>

5.2.5 The empowerment of the President to modify existing laws 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 regates the doctrine of the separation of powers and amounts to a usurpation of, and encroachment into the sphere of the Legislature.<sup>177</sup>

### 5.3 **RECOMMENDATIONS**

#### 5.3.1 **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 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

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<sup>175</sup> See Akande, J.O.: Introduction to the Constitution of the Federal Republic of Nigeria, 1999 (2000) MIJ Publishers, Lagos, p. 425.

<sup>176</sup> See Nwabueze, B: (supra).

<sup>177</sup> See 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.

scope of the National Assembly. It is worse if there is a docile National Assembly that is prostrate and cannot invoke the powers contained in section 143, to remove the President.

### **5.3.2 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 use of the Federal Police to harass perceived political opponents.

### **5.3.3 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 to 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).

#### **5.3.4 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.

#### **5.3.5 Diversify the President's Power to make rules**

Given the background to the doctrine of separation of powers, it is recommended that the President should be divested of the power, however delegated, to modify existing laws, as contained in section 315(1)(2). This, no doubt, “is a veritable source of overreaching and unsettling the separation of power... it is nothing short of an abdication of legislative power under section 4 and should be expunged from the Constitution”<sup>178</sup>.

#### 5.4 CONCLUSION

Having analysed the powers of the President as contained in section 5 and several other specifically granted powers particularly as in sections 11, 58, 157, 215, 216, 218, 305 and 315, a conclusion is drawn that some of these powers, particularly under sections 5(1)(b), 216, 218, 305 and 315, require fine-tuning.

The observations and recommendations contained in the body of this work, when put into force, are capable of safeguarding the incident of failed government. They will also contribute in a significant way, to good governance and prevent a drift into arbitrariness by the President.

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<sup>178</sup> Oyewo, O: Op. cit, p. 172.

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