

PRESIDENTIAL POWERS UNDER THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999: A COMPARATIVE ANALYSIS

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ABSTRACT

Executive powers in a presidential system of government are usually vested in a corporate sole called the president. This is a practice of constitutional law that has gained global acceptance. Nigeria is part of this global practice. In Nigeria, the vesting of executive powers in the president is enshrined in the constitution of the Federal Republic of Nigeria 1999 (as amended). This paper analytically compares this practice in Nigeria with other independent States practicing presidential system of government. It is found that the heavy concentration of so much power on a single person may be too much for a bad president who may be mischievous, while a good president may not need such powers for the advancement of the nation. It is also found that the Nigerian Stat like most of its African counterparts, while attempting to avoid dictatorship has rather created a subtle imperial presidential system of government. This paper shall dwell analytically with the constitutions of political States that operate the presidential system of government on a comparative basis in order to appreciate the powers of the president under the Constitution of the Federal Republic of Nigeria, 1999 (as amended). On the basis of the analysis and findings, recommendations and conclusions are made.

Keywords: Constitution of the Federal Republic of Nigeria.

INTRODUCTION

In the executive presidential system of government, governmental powers are usually horizontally divided among three arms which are the legislature – the branch that makes laws for the people; the executive – the branch that executes the laws enacted by the legislature; and finally the judiciary – which interprets the laws. The rationale behind this concept is the need to avoid tyranny that may arise from vesting of all governmental powers on one arm of government or person. The purpose as stated by Justice Louis Brandeis, “*was not to avoid friction, but by means of the inevitable friction incident to the distribution of governmental powers among different departments, to save the people from autocracy*”.

In a presidential system of government like that of Nigeria, it is usually the president as head of the executive branch that is vested with the executive powers of the federation while the executive power of a State is vested in the governor of the State. The executive arm of government in a presidential system seems to be the most prominent as its activities directly affect the people more than the other arms.

Executive Powers and the Office of the President

In order to fully appreciate the relationship of executive power and the office of the president, it is necessary to look at the import of the phrase executive power. To do this, it is necessary to examine the word executive from a morphological perspective. The root word is executed which according to the Oxford Advanced Learners Dictionary means to do a piece of work, perform a duty, put a plan into action etc. It also means to carry (plan, command, law, judicial sentence, will) into effect (U.S. Supreme Court, 1925). The above definitions of the word execute suggest physical action of some sort, and would therefore exclude any function that does not involve such action.

According to the same Advanced Learners Dictionary the word power means ability to control people or things. Executive power therefore means the ability to carry into effect the enactments of the legislature, plans, commands, Will of the people, and judicial sentence. This seems to be a broader understanding of executive powers in Nigeria as opposed to that of the United States, with which the meaning ascribed to the term by the Black's Law Dictionary reflects. It defines executive power as the power to see that the laws are duly executed and enforced. While executive powers generally mean the power to execute laws or carry them into effect, in the general practice of modern government, however the formulation of policies and administering of laws are among the most vital functions of the executive. As the name implies, executive powers are vested and exercisable by the executive branch of the government which is sometimes said to be the residue of all government after subtracting the judicial and legislative powers.

Executive power may be vested in a single chief executive or a plurality of executives of co-ordinate authority. In a presidential system of government, executive power is vested in a single chief executive, while in a parliamentary system of government executive power is vested in plurality of executives. One of the plural executives in a parliamentary system is the Prime Minister. Either case, the decision of the people as reflected in the constitution of a nation should have the overriding consideration of unity of the executive in organising an effective executive government.

It may be disadvantageous to vest executive powers in a single executive as this may concentrate such a very important aspect of governmental powers in one person. This may lead to abuse and misuse. However, the demerits of a plural executive system appear to outweigh the single executive. The latter undermines responsibility as it weakens the authority of the Prime Minister to enforce collective responsibility and by making it difficult to determine on whom the blame or punishment for misconduct should fall. The unity of the executive which is present in single chief executive structures is a necessity dictated by the demands and pressures of modern government. It is little wonder to find that the plural executive of the parliamentary system is, in many countries plural only in theory (Nwabueze, 1993).

Since independence, Nigeria has experienced governance under three major forms of executive power. The first one was under the 1960 and 1963 Constitutions where the executive power of the federation, under a parliamentary system of government was shared between the president who was the head of state and commander-in-chief of the armed forces, and the Prime Minister in whom the executive powers of the federation was stated to be vested. Naturally, this often led to conflict of personalities between the two executive heads, which contributed to the eventual demise of the first republic through military coup d'état. The second was under military

rule, in which Nigeria was exposed to another form of executive governance, under which all executive authority of the nation was vested in the military head of State who was also the chairman of the legislative body. The third form of executive authority, which Nigeria has experienced, is the executive presidential type which was seen as preferable to the parliamentary type because it reduces the areas of conflict.

In a presidential system like Nigeria, executive powers of the federation are vested in a single Chief Executive, which is the President. The mandate for occupation of the office of the president of the Federal Republic of Nigeria secures two offices and personalities, and as such the presidency consists of two soles - the President and the Vice President – yet executive power is vested only in the President, who can and may exercise same through the Vice President, Ministers, Public Servants etc of the federation. The exact extent of presidential executive powers both statutorily expressed and inherently conferred has given rise to considerable disagreements in politico-legal circles so that there are two different schools of thought – the Specific Grant Theory and the Residual or Inherent Power Theory.

The Specific Grant Theory

This theory maintains that executive power is simply power to execute the laws, to carry into effect the provisions of the laws, either by enforcement against persons contravening them or by doing work or taking some other action required there under. There must be in existence a law, including the law of the Constitution, in execution of which the action of the executive is done. Whilst conceding that, in addition to the execution of the laws, executive power also embraces other specific grants contained in the constitution, they maintain that the provision vesting executive power in the president is not itself a grant of power because it is not specific (Mowoe, 2008).

This theory appears to have the firm support of the judicial interpretation of the relevant provisions of the United States constitution by the Supreme Court in *Myers v United States* when it held that “*the vesting of the executive power in the president was essentially a grant of the power to execute the laws*”, though this extends to the law of the constitution. In further support to this theory, Professor Taft (1916) in his book states thus: The true view of the executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary in its exercise. Such specific grant must be either in the federal constitution or in an Act of congress passed in pursuance thereof. There is no undefined residue of power which he can exercise because it seems to him to be in the public interest.

However, theorists and ardent followers of the inherent power theory have vehemently argued against this position which we shall now briefly consider.

The Residual or Inherent Power Theory

This theory postulates that, besides the powers expressly granted the chief executive by the Constitution and other legislative enactments by the National Assembly, the chief executive is empowered to exercise all other powers not expressly granted which are also not expressly excluded. In the words of Professor Alan Gledhill, executive power 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. This theory has been given a classic expression by President Theodore Roosevelt in his autobiography when he said.

The most important factor in getting the right spirit of my administration 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 (Akanke, 2000). My view was that every executive officer, and above all every executive officer in high position, was a steward of the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. 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 needs of the nation demanded unless such action was forbidden by the constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the president and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare; I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition.

However contested the theory of inherent presidential powers, the practice in the United States has been one of expansion of those powers. Depending on the provisions of a particular constitution, the difference between the two approaches may not be much. It is now necessary to consider the powers of the president under the 1999 Constitution of the Federal Republic of Nigeria.

Powers of the President under the 1999 Constitution of Nigeria

The office of the President of the Federal Republic of Nigeria is a creation of the constitution of Nigeria. The Constitution of Nigeria did not only create the office of the President of the federation but also vests the executive powers of the federation in the person who shall occupy the exalted office. The president as a person has also been granted constitutional discretion on how the executive power vested in him may be exercised. Very apt in this regard are the provisions of section 5(1) of the 1999 Constitution thus:

Subject to the provisions of this Constitution, the executive powers of the Federation:

1. 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.
2. 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.

One issue that has constantly confronted legal scholars and political scientists have been the extent to which the above constitutional provision empowers the president. The executive powers of the President extend to the execution and maintenance of the Constitution, all laws made by the National Assembly, and all matters with respect to which the National Assembly has, for the time being, power to make laws. This therefore implies that the powers earlier granted under subsection 1 (a) above beyond mere execution of laws or maintenance of the constitution because of the use of the phrase “*shall extend to*”. Presidential powers are generally

defined by the Exclusive Legislative List, contained in the Second Schedule to the 1999 Constitution. This list contains 66 items on which the National Assembly is empowered to make laws (Taft, 1916).

In order to properly analyse the powers of the president under the 1999 Nigerian constitution, this work shall divide the executive powers granted into the three basic elements comprised in the above section (Aguda, 2000). These are:

1. Execution and maintenance of the Constitution.
2. Execution and maintenance of the laws made by the National Assembly.
3. Execution and maintenance of all matters within the legislative competence of the National Assembly but on which it has yet made no law.

Execution and Maintenance of the Constitution

The first element provided for by section 5 of the 1999 Constitution Nigeria in reads thus: *“Subject to the provisions of this Constitution, the executive powers of the Federation... shall extend to the execution and maintenance of this Constitution...”* 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 as it is not free of uncertainty as to the actions it empowers the president to take (Nwabueze, 2003). It is with regards to this that Nwabueze posited that the constitution of Nigeria attempts to answer the question as to the extent of executive power, not however with the degree of clarity and certainty that we would wish. This is especially so as the constitution is a living charter which presupposes a community of people of differing individual interests but bound together by a common desire for the stability and security of the society as a nation.

The duty of execution and maintenance of the constitution under section 5 (b) of the constitution means the President is responsible for making sure that the provisions of the constitution are brought into effect (Asante, 2002). Execution of government and its functions is covered for the most part by specific powers explicitly granted in the constitution. Some of such Specific powers of the President include the powers to (i) determine the Ministries that will assist in the discharge of the executive powers and appoint suitable persons to fill the Ministries, (ii) appoint, subject to the confirmation of the Senate, the members of a number of Commissions and Councils, such as the Code of Conduct Bureau, the Council of State, the Federal Character Commission, the Federal Civil Service Commission, the Federal Judicial Service Commission, the Independent National Electoral Commission, the National Defence Council, the National Economic Council, the National Judicial Council, the National Population Commission, the National Security Council, the Nigeria Police Council, The Police Service Commission, and the Revenue Mobilisation Allocation and Fiscal Commission; (iii) initiate a budget and lay it before the National Assembly (iv) exercise the prerogative of mercy, including granting a free or conditional pardon, (v) issue a proclamation declaring a state of emergency in the country; (vi) enter into treaties on behalf of the Federal Republic of Nigeria; (vii) make regulations with respect to Chapter 3 of the Constitution, which provides for the meaning, acquisition, and loss of citizenship; (viii) accept and declare the population census on the advice of the Council of State; and (ix) determine the operational use of the Armed Forces of the federation, including the appointment and removal of the heads of the Armed Forces. These powers show clearly that in

certain circumstances, the President exercises legislative and judicial powers, etc. these, being specific grants are known and regular powers, and therefore free of uncertainty.

This also extends to 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 executive head, has the duty of redressing such infraction either judicially or, if the case so demands, through the use of force. Apart from specific functions explicitly granted by the constitution, the execution of government also implies a host of other powers, that is, powers arising by implication. However, these implied powers seem not to properly fall within this element, hence shall be given attention under the third element.

Execution and Maintenance of the Laws Made by the National Assembly

As provided for in section 4 of the Nigerian 1999 constitution, the National Assembly which is vested with the legislative power of the federation is empowered to make laws on the specific items listed in the exclusive legislative and concurrent legislative lists. Sequel on the above, laws validly made by the National Assembly within the limits of its power under the constitution are the predominant source of executive power, since there is hardly any law that does not call for one kind of executive action or the other. Thus subject to other provisions of the constitution, for example, the National Assembly is empowered to make laws in relation to the establishment, equipment and maintenance of the Nigerian Police Force, and the armed forces of the federation. The two forces are under the authority of the president who is therefore responsible for making sure that the laws made by the National Assembly are executed in accordance with the provisions of the constitution.

Such executive action as is called for under the laws is the constitutional prerogative of the president by virtue of the vesting of the executive power in him and his more specific power to execute laws made by the National Assembly. The passing of a law requiring execution calls the power into existence without any specific authorisation to that effect in the law itself. This is the respect in which it is said to be an executive function to maintain law and order in society as such laws must be viewed not only individually but also as a mass forming a system. In the United States case of *Youngstown Sheet & Tube Co. v Sawyer* the Supreme Court (as Per Chief Justice Vinson) stated thus:

Unlike an administrative commission confined to the enforcement of the statute under which it is created, or the head of a department when administering a particular statute, the president is a constitutional officer charged with taking care that a mass of legislation be executed.

There is yet another point of divergence between the United States and that of Nigeria as international treaties do not form part of the Nigerian Constitution but can only be enforced after such has been domesticated by the National Assembly. As such in Nigeria, though the president is empowered to enter into international agreements with other countries on behalf of the country, he cannot enforce same until they are domesticated by the National Assembly, unlike in the United States where treaties are by their constitution incorporated into the municipal laws.

Execution and Maintenance of All Matters within the Legislative Competence of the National Assembly but on which it has yet Made no Law

Apart from the general powers of the President listed in the constitution, which is similar to that of its predecessors, 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 starts. According to the court in *Senate of the National Assembly v Tony Momoh*;

The deliberate use of this expression means that the section to which it precedes should not be construed in isolation, but it must be considered with reference to other provisions of the constitution.

Whilst the grant to the president of power to execute all matters within federal legislative competence is of an indefinite extent, i.e. it is not specific in the sense required by the specific grant theory it is nonetheless a grant of power explicitly made by the law of the constitution. It can hardly be denied that the provision empowers the president, without any further authorisation by law made by the National Assembly to carry into effect or do anything with regards to the items listed in the second schedule to the constitution for which the National Assembly is empowered to make laws. The only implied derogation is contained in the same section 5 which subjects all the express powers conferred on the president to other provisions of the constitution specifically restraining the president from exercising such power.

Also, it seems also clear that the power to take executive action on all matters within the legislative competence of the National Assembly does not enable the president to do so in respect of matters which by their nature, do not admit of executive action in advance or in the absence of legislation regulating them, e.g. bankruptcy and insolvency; banking i.e. the regulation of banks and banking; commercial and industrial monopolies, combines and trusts; control of capital issues; copyrights; currency, coinage and legal tender etc.

At this point the two schools of thought on the extent of executive power are agreed, namely, that without authorization by law, either the law of the constitution or one made by the legislative assembly, the president cannot on his own inherent authority, i.e. authority flowing from his power to execute the government or to an act on all matters within the legislative competence of the assembly, do anything that violates the rights or interests of the individual or which interferes with his freedom of action. The Nigerian constitution affirms this, but perhaps not in its entirety by making executive power 'subject to the provisions of this constitution the provisions to which the power is made subject include, above all, provisions guaranteeing individual rights and freedoms.

There is no doubt that the only reasonable construction that can be placed on the method of grant of executive power under section 5(a) of the 1999 Constitution is that it goes beyond powers expressly granted to the president in other provisions of the constitution, except where the power or authority is expressly prohibited by the constitution or a law made by the National Assembly by virtue of the exercise of its constitutional powers. This is because the constitution or National Assembly cannot envisage all issues that may confront the president in his enormous duty of seeing to the day to day running of the business of the nation.

A Comparative Analysis of Presidential Powers in Nigeria

Having examined the powers of the president of Nigeria under the 1999 constitution of Nigeria above, which appears to have practically created an imperial president, this work shall now turn to comparatively analyse other politically independent States practising Presidentialism. The constitutional aspects to be compared both theoretically and practically with regards to the vesting and exercise of executive presidential powers include the vesting of executive powers and delimitation of executive presidential powers.

Vesting of Executive Powers

Though as stated above, executive powers of the federation is vested in the president who is a single chief executive by virtue of section 5 of the 1999 constitution, this is to be read subject to other provisions of the constitution, conferring some other forms of specific executive powers on executive bodies created by the constitution. This furnishes the earlier maintained position that the powers of the president, though said to be executive powers, they are by no means absolute. They are subject to the constitution and laws validly made under it.

The Nigerian Constitution establishes certain independent functionaries or agencies charged with functions essential to the maintenance of democracy and liberty as well as to an impartial administration, which should, for that reason, be divested from the president to whom they belong as part of the executive power vested in him. Thus, while the executive power vested in the president embraces as a necessary incident the appointment, promotion, removal and disciplinary control of the staff in the ministries, departments and other executive agencies of government, these incidents of the power are largely divested from the president.

Furthermore, the 1979 and 1999 Constitutions of Nigeria prescribed a code of conduct for public officers, including the president himself, and its implementation is vested in two independent bodies the Code of Conduct Bureau and Code of Conduct Tribunal. Two vital and sensitive functions election and census which should normally form part of the power of the president, are vested in executive bodies by the constitution the Independent National Electoral Commission and the National Population Commission.

Having the above Nigerian position in mind, the American model of the single executive may well have carried the principle too far by vesting in one person virtually the entirety of executive power. The model has had therefore to be modified to meet the needs and circumstances of particular countries, mainly by lodging in independent functionaries or agencies, free from control and direction by the president to whom they normally should belong, certain functions essential; to the maintenance of democracy and liberty and to an impartial administration of government.

In Malawi, the executive authority, in the executive branch of government is vested in the President who is also Head of State. The President is assisted in the exercise of his or her duties by a cabinet made up of several members, for which no constitutional size limit exists. Cabinet members advise the President on areas within their respective portfolios. They are appointed by the President. Cabinet members are vested with significant executive authority and power as heads of their respective Ministries and take informed decisions together with the President as a unit. This position does not appear to be similar to the Ghanaian position under its 1992 Constitution. As far as the presidential powers are concerned the executive authority of Ghana is

vested in the president who is empowered to exercise such authority either directly or through his subordinates. The president is assisted by the cabinet in determining the general policy of the government as provided for in Article 76, but it should be emphasized that executive power is vested exclusively in the president and not the cabinet.

Delimitation of Powers of Executive President

The United States which has been on the lead in presidential democratic system did not only vest executive powers of the federation in the president; but leaves no executive check on the exercise of the power. In the United States, the application of the principle of a single chief executive goes too far in that the constitution casts no obligation on the president to exercise his executive power in council with other executive functionaries or otherwise to consult with them or to seek their advice collectively or individually. While the office of the minister or departmental head as it is called is recognised, as a collective body they (the ministers) have no existence whatever in the constitution. The reference to writing in the provisions empowering the president to require the written opinion of a departmental head suggests that the constitution never contemplated a collective opinion or advice. The authoritarianism of President Lincoln, and his predilection for personal government with only occasional cabinet meetings now and again, was due to a large extent to the failure of the constitution to provide for a cabinet.

On the other hand, in Nigeria, one of the most important modifications in this respect is the establishment of a cabinet in the constitution and the obligation thus cast on the president to consult with it, the object being by subjecting him to the advice and influence of a cabinet, to prevent him from assuming dictatorial powers. The establishment of a cabinet in the commonwealth African presidential constitutions was in order to ensure that, by subjecting him to the advice and influence of a cabinet, the president “*would not be able to assume dictatorial powers*”.

The constitution goes further than merely casting on the president an express or implied obligation to consult with the cabinet. It requires him to hold regular meeting with the vice-president and all ministers. It requires him to exercise them, not alone in the solitude of his office or bedroom, but in council with the vice-president and ministers. The aim is to bring the collective views of the president, the vice-president and ministers to bear upon such matters, but without depriving the president, as the sole repository of the power, of his authority to override the views of the rest of the council if and when he thinks fit (Legum, 1966).

Be that as it may, the constitution does not contemplate or require that every executive action of the president must be preceded by the advice of the executive council. Apart from the case of the Executive Council where consultation is made obligatory on the president, there are other executive bodies established by the Nigerian Constitution and invested with the power to advise him on a variety of matters.

The difference between these bodies and the Executive Council is that the power vested in the former to advise the president implies no obligation on his part to seek advice, so that failure by him to do so in no way affects the validity of decisions or actions taken by him, though the spirit of the provisions is that the president should seek their advice. But a “*power*” to advise does imply a right of initiative, a right to give advice without being asked.

CONCLUSION AND RECOMMENDATION

The presidential powers under the 1999 constitution of the Federal Republic of Nigeria, as earlier stated are too much for a bad individual in power as president, who may out of the executive powers so vested constitute himself into an executive tyrant. On the other vein, it may be too much for a good individual as president to need for good governance.

While one may conveniently assert that the executive powers of the president of the United States appear to be lacking constitutionally, the Supreme Court of the United States has given a broader interpretation which encapsulates the inherent power theory, which derives its ethical justification in the fact that the entire country is the constituency of the President. This lacuna was quickly identified and has been constitutionally resolved in Nigeria by vesting ample executive powers on the President which appears to have created a tyrant in the executive branch. This is justified by the fact that the president is not bound to accept the opinion or counsel of his cabinet, whether reasonable or not.

From the totality of examinations of the executive powers of the president under the 1999 constitution of the Federal Republic of Nigeria alongside other politically independent States, this work proffers the following recommendations:

1. The check placed by the 1999 Constitution of Nigeria on the exercise of executive powers by the president to consult his cabinet should not be a mere window-dressing. The advice of his cabinet should be made a sine qua non to his making of vital decisions for the country by the constitution except on exigent circumstances. This is to ensure that the executive cabinet's role in good governance is not made illusory. This should be in line with the status of certain executive bodies established by the constitution, such as the National Council of State, National Defence Council etc, whose advice are of right and a sine qua non to the exercise of executive power by the President.
2. Also, all the powers not directly exercisable by the president which are not incidents of his office should out-rightly be vested in the relevant officer or agency. Since Nigeria operates a single chief executive method of presidentialism, the vesting of executive powers of the federation should remain in the President while this power should extend to the supervision of such other executive powers constitutionally conferred on other individuals or agencies.

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