

## Executive Lawlessness and Implications for the Rule of Law in Nigeria

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### Abstract

This paper examines the phenomenon of executive lawlessness under civilian administrations in Nigeria and its implications for the Rule of Law. It is observed that the enormous powers wielded by the executive branch of government especially under a presidential system of government as practised in Nigeria, are being abused through acts of executive lawlessness. Ironically, the civilian administrations that have ruled the country have engaged in these acts of lawlessness in an era of constitutional democracy with its requirement that governments must operate within the principles of constitutionalism and the rule of law. The paper adopts the post-colonial state theory as the explanatory tool. Using the ex post facto design as the major research methodology, it argues that acts of executive lawlessness on the part of civilian administrations in Nigeria have had negative implications for the rule of law among which are the reign of arbitrariness over recourse to the due process of law and the elevation of executive might over the law. A cardinal recommendation of the paper is that the immunity clause in the constitution should be expunged so that the president and state governors will be made to answer for their lawless acts.

### Keywords:

Executive  
lawlessness,  
Constitutionalism,  
Rule of law,  
Presidential System,  
Civilian  
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## **Background to the Study**

There is no denying the fact that the modern day executive branch of government is enormously powerful. In the fashion of a behemoth, the exercise of the executive power is felt across the length and breadth of a nation's political landscape. The vast expansion of the scope of state activity has endowed the executive branch with more powers and responsibilities (Johari, 2009) and giving it more visibility than the other branches. The foregoing is evident in a presidential system of government as is practiced in Nigeria where a president and his counterpart at the state level, the governor, are constitutionally vested with enormous executive powers (CFRN, 1999, as amended), which make them independent though not immune from legislative and judicial control.

Because executive powers are prone to be abused, constitutionalism, which is a cardinal principle around which constitutional democracies are operated, sets the limits within which such powers should be exercised. An impetus to constitutionalism is the doctrine of the rule of law which maintains that the law is supreme and that everybody including the functionaries of government is subject to its dictates. In essence, the exercise of executive powers must conform to the principles of constitutionalism and the rule of law. This also implies that executive acts must be within the ambit of lawfulness and not otherwise.

In practice, however, what obtains deviates substantially from theory. This is especially true in a nation like Nigeria operating a presidential system of government. Bolstered by the immunity clause in the Constitution and weak institutional checks, the executive branch has exhibited a habitual proclivity to be lawless in most of its conducts, hence, the phenomenon of executive lawlessness. Certainly, this phenomenon comes with its unpalatable consequences. This paper, will therefore, discuss this phenomenon under civilian administrations and its implications for the rule of law in Nigeria.

## **Theoretical Perspective**

This paper will be anchored on the Marxian post-colonial state theory. This theory has its underpinning in the works of Marx and Engels (1977), who viewed the state as an instrument in the hands of the dominant class to ensure its continued dominance. Following Marx and Engels, scholars like Alavi (1973); Miliband (1977); Ake (1985); Ekekwe (1986), and a host of others, have adopted this view of the state to the specificities of states at the periphery most of which emerged from colonial rule, hence, the tag of post-colonial states. The major assumption of the theory is that the post-colonial state is a creation of imperialism and its development trajectory and philosophy are dictated by the interests of the metropolitan capitalists and their local collaborators, so-called indigenous bourgeoisie, and not by the interests of the majority of the citizens. Ekekwe (1986), argued that the colonial state provided the foundation upon which the post-colonial state rests and like its precursor, provides the enabling environment for primitive accumulation of power by the metropolitan bourgeoisie and their local collaborators.

Notably, the power and might of the post-colonial state like those of its predecessor, the colonial state, are felt through the executive arm personified in the President and the Governor-General respectively. The executive arm is imbued with the notion of being the

“Alpha and Omega” and conducts itself in the most arbitrary and lawless manner. It is therefore within this context that we appreciate the phenomenon of executive lawlessness and its bearing on the rule of law.

### **Conceptual Clarifications**

#### **Executive Lawlessness**

The Oxford Advanced Learners Dictionary (2009: 836) defines lawless as “where laws do not exist or are not obeyed”. The term, “Executive Lawlessness” may simply mean a situation where the Executive acts or conducts the affairs of the state without the backing of the law. Acts which are actions or omissions of the Executive that are ultra vires the Constitution and/or any law whatsoever, the term may also mean disobedient to the law. In other words, executive acts which include executive actions or omissions that violate the law. Executive lawlessness may also connote a situation where the Executive behaves in a manner that suggests it is not under the restraints of the law or that it is above the law. While the first connotation may not necessarily involve willful disregard for the law, the second connotation involves blatant disregard for the law.

In examining such acts, the word “Executive” from the provisions of the 1999 Constitution, as amended, is so wide that it covers the President, Vice President, the Ministers, the Federal Public Service, the Governors, the Deputy Governors, the Commissioners or Officers of the State Public Service. As a corollary, it may be adequate and/or correct to argue that any acts which include the actions or omissions of any of the above-mentioned functionaries that are lawless may be tantamount to executive lawlessness. It is obvious that such executive acts that are without the backing of the law procedurally or otherwise, are deemed to be lawless acts of the executive.

#### **Rule of Law**

The expression, “Rule of Law”, has been derived from the French phrase 'le principe de legalite meaning a government based on the principle of law. The notion of the rule of law is perhaps the most powerful and often repeated political ideal in contemporary global discourse. Significantly, the rule of law is a major source of legitimating for governments in the modern world. Where a government appears to abide by the rule of law, such government is regarded as good and deserving of respect.

The rule of law simply means that the law rules or reigns (Nwabueze, 2007: 3-8). This envisages where everything is done in accordance with the law thereby excluding any form of arbitrariness (Nwabueze,2007:3-8). The concept, as has been appreciated and espoused in developed societies where democratic ethos have long been entrenched and where dictatorship is now confined to the dustbin of history, implies and equally connotes that the citizens' relationship amongst themselves inter se and with the government bodies and their agencies shall be beholden unto the law which shall not be ignored by anyone except at their peril and if by government, this will promote anarchy and executive indiscipline capable of wrecking the organic framework of the society (Pats-Acholonu, 1995: 43-47). It is a way of preventing the abuse of discretionary power.

The very first attempt to articulate the concept of the rule of law in precise legal and intellectual form was by Professor A. V. Dicey in 1885. According to Dicey, the doctrine of the rule of law has three aspects. In the first place, it means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary powers. Secondly, it means equality before the law, or the equal subjection of all classes to ordinary laws of the land administered by the ordinary courts. This means that any person irrespective of his rank or status in life is subject to the ordinary law of the land. Thirdly, the rule of law may be used as a formula for expressing the fact that the law of the Constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the courts (Dicey, 1885). These rights are found in most national constitutions as well as in some regional and international instruments dealing with human rights.

Since Dicey's articulation, there have been attempts by some legal theorists to expand the scope and dimension of the concept. Sir Ivor Jennings would equate the rule of law with democracy as understood by the liberal tradition. It demands in the first place that, the powers of the Executive should not only be derived from the law as A. V. Dicey said, but also that they should be limited by law. The essence of the rule of law, according to Professor A. L. Goodhart, is that public officers (and this is inclusive of presidents, governors, ministers, public administrators, police and other security personnel, city and town clerks, secretaries of government departments and their subordinates, etc.), are all governed by law, and which law limits their powers.

### **Executive Lawlessness under Civilian Administrations**

It is not strange that in a typical military regime, the observance of the law and constitutionalism is virtually non-existent. This derives from the basic character of such a regime as a regime of force and an unconstitutional one. Contrarily, under a democratic dispensation which has as one of its pillars, the observance of the rule of law, the executive branch of government as well as other branches are under obligation to conduct their acts within the limits of the law. However, experience in Nigeria has shown that the phenomenon of executive lawlessness is as much a defining feature of civilian administrations as it was of military regimes. As in the case of the military, the chief operators of the executive branch operate with "Alpha and Omega" mindset and the delusion of being above the law. Acts that constitute executive lawlessness and which are threats to the rule of law, include but not limited to, violations of the Constitution, disobedience to court orders, violations of fundamental human rights, intimidation and harassment of functionaries of the other arms of government, interference with the powers and functions of the other branches, disregard for the due process of law, etc. This paper will further examine some of these acts under some of the civilian administrations in Nigeria. However, it needs to be pointed out that the cases discussed concerning the selected administrations are not exhaustive and are just a sample of a broader pattern of executive lawlessness in the civilian era.

### **The Shagari Administration**

The Shagari administration (1979-1983), was inaugurated on October 1, 1979, after 13 years of military rule, making Shagari, the first president of Nigeria under a presidential system of government. Although the administration came to power through a controversial presidential election that saw Nigerians divided along party and ethno-religious lines, expectations of most Nigerians that the administration would mark a departure from the military era and tow the path of lawfulness and constitutionalism were dashed. For instance, under the immediately preceding Obasanjo military regime, incidents of the harassment of ordinary citizens by military personnel abounded and all these showed that the military in power usually saw itself as above the law. But this is an anathema in a civilian government under the rule of law.

Barely four months after assumption of office, the Shagari administration exhibited its first act of executive lawlessness and blatant disregard for the rule of law. On January 24, 1980, Nigerians were greeted with the news of the deportation of a fellow Nigerian, the majority leader of the Borno State House of Assembly, Alhaji Shugaba Abdulrahman Darma. He was declared a prohibited immigrant by the Federal Minister of Internal Affairs, Alhaji Maitama Yussuf, and was deported to the Chad Republic where he was dumped by a riverside. The purported grounds for his deportation were that he was considered by the government as a serious danger to public safety, public order as well as a danger to the rights and freedom of others in Nigeria (Nwabueze, 1985:205). These were serious allegations that the rule of law would demand thorough investigation before the applicant was declared as such. At the immigration office before his deportation, he had insisted that he was a Nigerian and that his claim should be investigated. Rather than agreeing to investigate the truth or otherwise of his claim, and seek an order of the court authorizing his deportation, the internal affairs minister purportedly acted under the Immigrations Act, 1963. Interestingly, Shugaba was of the Great Nigerian Peoples Party. While the central authority was controlled by the National Party of Nigeria, his party had an overwhelming majority in the Borno State House of Assembly, and the party's candidate also won the governorship election (Nwabueze, 1985:205). Although the deportation order was quashed by the Borno State High Court and later affirmed by the Federal Court of Appeal (Federal Minister of Internal Affairs & Others v. Shugaba Darma, 1982: 953; Shugaba Darma v. Federal Minister of Internal Affairs & Others, 1981: 516, cited in Nwabueze, 1985), it is evident that the illegal deportation was politically-motivated. There was a preponderance of instances of breach of the rule of law, ranging from exercise of executive power without constitutional authorizations, to unconstitutional interference with judicial and legislative powers (Nwabueze, 1985:205).

### **The Obasanjo Administration**

As in the case of the Shagari administration, the Obasanjo civilian administration (1999-2007), assumed the reins of government at the termination of a military interregnum that lasted for 16 years. Of worthy of note is that President Obasanjo himself was a victim of military highhandedness being jailed for life over a phantom allegation of plotting alongside others, to overthrow the General Abacha military regime. Therefore, on the assumption of power after being released from jail given his victory at the presidential



polls in 1999, the expectations of Nigerians that under Obasanjo, whose prison experience supposedly transformed into a “reformed democrat” , a new era of respect for the rule of law would dawn, were dashed. Indeed, some commentators (Akanbi and Shehu, 2012) believe that the Obasanjo's government would, perhaps go down in the constitutional history of Nigeria as the worst in ranking for the abuse of the rule of law and constitutionalism through acts of executive lawlessness although given the excesses of the Buhari government, the foregoing view may be contested. There are several instances of acts of executive lawlessness under the Obasanjo's administration ranging from violations of the provisions of the Constitution, abuse of human rights (Nwabueze, 2007:116), and illegal interference in the affairs of the legislature to masterminding removal of state governors who were opposed to his leadership style (Shehu, 2009:175-183). Nwabueze's (2007) account of how President Obasanjo subverted the rule of law cannot be faulted on any account. One striking instance of the administration's act of executive lawlessness was the invasion of Odi community in Bayelsa State on November 20, 1999, by the Nigerian military over the killing of 12 members of the Nigeria Police by a gang of militia near Odi on November 4.

The invasion left on its trail, the extrajudicial killing of innocent and defenseless civilians. A wide range of estimates was given for the number of civilian casualties. Human Rights Watch (1999) cited in Wikipedia, the free encyclopedia, was of the conclusion that “the soldiers must certainly have killed tens of unarmed civilians and that figures of several hundreds dead are entirely possible”. The attack came in the context of an ongoing conflict in the Niger Delta over the rights of the indigenes to their vast oil resources and inhabiting pollution-free environment. It was widely believed to be sanctioned by the Obasanjo administration. The proof of this was when in February 2013, a Federal High Court sitting in Port Harcourt in its judgment in a suit brought against the Federal Government by the Odi community, berated the government for a “brazen violation of the fundamental human rights of the victims to life and to own property and to live peacefully in their ancestral home”(Premium Times, November 13, 2018). More worrisome was the fact that no law of the land authorized the Obasanjo administration to engage in the extrajudicial killing of innocent and defenceless civilians under any guise.

### **The Jonathan Administration**

The Jonathan administration (2010-2015), came on the heels of the short-lived Yar'Adua administration. On the death of President Yar'Adua in 2010, then Acting President Jonathan assumed the reins of government as President. In the fashion of its forebears, the administration severally engaged in acts of executive lawlessness that portrayed it as being above the restraints of the law. Instances of such acts abound. In 2010, President Jonathan suspended the then President of the Federal Court of Appeal, Justice Ayo Salami in clear breach of Section 292 (1) (a) (i) of the 1999 Constitution, as amended, which provides for the removal and not the suspension of a certain category of judicial officers which includes the President of the Court of Appeal by the President on proven allegation of misconduct or inability to discharge the functions of his office on the part of the judicial officer and that such removal must be a sequel to an address supported by a two-thirds

majority of the senate. Even when the National Judicial Council which had earlier unconstitutionally recommended the suspension of Salami reversed itself after absolving him of any wrongdoing and requested President Jonathan to reinstate him, the President remained adamant. (The Nation, May 28, 2012:58).

The administration was to take its proclivity for being lawless to a disturbing height when on November 20, 2014, on the orders of the Presidency, men of the Nigeria Police and other security agencies locked out members of the Aminu Tambuwal-led House of Representatives and went as far as tear-gassing them. This action violated the principle of separation of powers as enshrined in the Nigerian Constitution. The Constitution does not authorize the executive branch or any of its agencies to interfere either directly or indirectly with the powers of the other arms of government. Unarguably, the use of the Police and operatives of other security agencies to perpetrate such unconstitutionally was a gross abuse of executive power and set a precedent too dangerous for Nigeria's nascent democracy.

### **The Buhari Administration**

The Buhari administration (2015 till date), came on the mantra of change, but it is doubtful if there has been a noticeable departure from the old order of executive lawlessness. In the fashion of a dictator, no thanks to his military background, the administration has ruled the country with repression and iron fist reminiscent of his days as a military Head of State. Under Buhari's watch, the rule of law and constitutionalism have been reduced to rubbles through acts of executive lawlessness. Among the acts of lawlessness for which the administration is notorious, are the disobedience to court orders, violations of citizens' fundamental human rights and intimidation and arm-twisting of the functionaries of the other arms of government.

On December 29, 2015, the former National Security Adviser to President Jonathan, Colonel Sambo Dasuki (retired), was arrested and detained by the operatives of the Department of State Security (DSS), a security agency under the control of the executive arm, over an alleged diversion of \$2.1 billion meant for the purchase of arms to fight the Boko Haram insurgency. Dasuki, who was subsequently charged to court, was granted bail by the same court on hearing his bail application. The DSS acting under the directives of the Buhari presidency, blatantly refused to abide by the court's order (Vanguard, July 2, 2018). Similar conduct was exhibited by the DSS in the matter of the leader of the Islamic Movement in Nigeria, Sheik Ibrahim El-Zakzaky and the convener of *Revolution Now*, Omoyele Sowore, both of whom were granted bail by different courts but the DSS refused to release them. El-Zakzaky was taken into the custody of the DSS following a clash in December 2015, between his followers and the convoy of the Chief of Army Staff, General Buratai during which 347 of the followers including one of El-Zakzaky's wives, Zeenat, and his son, Aily, were killed by the troops (This Day, May 15, 2018). The case of Omoleye Sowore was even more dramatic. On August 3, 2019, Sowore was arrested by the DSS for alleged treason after calling for a protest tagged *Revolution Now*. On September 24, he was granted bail by the Federal High Court, Abuja. The DSS refused to release him claiming ignorance of the court order (Wikipedia, the free encyclopedia).

Still, on December 6, the court again ordered the DSS to set Sowore free, but instead of complying with the order, operatives of the DSS mounted a Gestapo-style raid on the Nigerian judiciary, causing members of the public, lawyers and a sitting judge to flee for safety. In the ensuing mayhem, Sowore was dragged out of the court by the DSS operatives and rearrested under the guise of a failure to meet the bail conditions (Adekoya and Johnson, 2019).

### **Implications for the Rule of Law**

The acts of executive lawlessness for which past and present civilian administrations have acquired notoriety, obviously have some implications for the rule of law in Nigeria. The rule of law makes it obligatory for the acts of government to accord with the provisions of the law. This requirement rules out any form of arbitrariness by the government. Acts of executive lawlessness are arbitrary acts carried out to satisfy the personal whim and caprice of the president or a state governor. Such arbitrariness does not recognize the supremacy of the law and runs contrary to its function of providing the standard for guiding the conduct of both the citizens and the government. The invasion of the private residences of some judges by the DSS in early October, 2016 with neither a search warrant nor a warrant of arrest, was an act of arbitrariness perpetrated by the Buhari presidency.

Acts of executive lawlessness signal the elevation of the executive might over and above the rule of law, in effect assigning an inferior position to the latter. The rule of law in its classical conception means that the law rules or reigns (Nwabueze, 2007). It maintains that the law is supreme over all persons and authorities in a state and all their actions must conform to the dictates of the law. However, in Nigeria, an act that is accomplishable through the sheer display of executive might, the legality or otherwise of such act is not put into consideration. Notably, this elevation of the executive might over the rule of law continuously feeds the appetite of the executive branch of government for unrestrained lawlessness. This implies also that those who deploy executive might are themselves above the law and cannot be made to answer to it. An instance of the elevation of the executive might over the rule of law was how the Obasanjo presidency was orchestrating and aiding the unconstitutional impeachment of some state governors not in the good books of the presidency, deploying the federal executive might.

Most acts of executive lawlessness are dictated by political and other self-serving considerations which are giving primacy over the law. This implies that where the requirements of the law stand in opposition to the pursuit of some political interest, the law is usually subsumed in the interest. The unconstitutional suspension of Justice Ayo Salami during the Jonathan administration and that of the former Chief Justice of Nigeria, Justice Walter Onnoghen by the Buhari administration preparatory to the 2011 and 2015 presidential elections respectively, obviously had political undertones.

The unbridled acts of executive lawlessness have made almost ineffectual, the constitutional guarantees for the protection of human rights in Nigeria. One of the core pillars on which the rule of law, according to A. V. Dicey stands, is the protection of civil liberties of the citizens by the state. Although the courts in Nigeria have in some deserving



cases pronounced on the inviolability of human rights of citizens and have made orders for the protection of these rights, the executive branch of government has serially disobeyed these orders there by leaving the affected citizens at the mercy not of the law, but at that of the executive branch. The Dasuki, El-Zakzaky and Sowore cases under the Buhari administration are some notable instances.

In the final analysis, executive lawlessness has a broader implication for national development. One of the hallmarks of a strong development-oriented state is its ability to ensure the reign of rule of law (Rotberg, 2003; 2013). Where a government that is supposed to enforce the law is the major culprit in the violation of the same law, the state will soon be on its descent to a failed state because some citizens and groups will have no sense of obligation to obey the law of the land. In this scenario, anarchy and breakdown of law and order will reign supreme and national development in all aspects will be halted. Besides, given the global obsession with the rule of law and the insistence by most multilateral international organizations and development agencies that governments especially in the developing countries, should always abide by this, non-compliance on the part of any government may deny its country, the direly needed international development assistance and goodwill. The case of Coted'ivoire under Laurent Gbagbo exemplifies this. The acts of executive lawlessness in Nigeria which have grave implications for the rule of law, are placing the country inexorably on the path of a failed state with its dire implications for national development.

### **Conclusion**

This paper discussed the phenomenon of executive lawlessness during the civilian administrations in Nigeria and its implications for the rule of law. It is not strange that during military regimes, the rule of law is given a secondary place or is virtually non-existent because such regimes are regimes of force and are unconstitutional. On the contrary, civilian administrations are constitutional and democratic by nature and must operate within the confines of the principles of constitutionalism and the rule of law. Regrettably, the civilian administrations in Nigeria under the presidential system of government have shown habitual inclination to be lawless in their actions and conducts and these acts which amount to executive lawlessness, have had some untoward implications for the rule of law. Some of the implications include, the reign of arbitrariness over the due process of law, the elevation of the executive might over and above the rule of law, amongst others.

### **Recommendations**

Given the foregoing, this paper recommends as follows:

1. The immunity clause in the 1999 Constitution, as amended, by which the president and state governors are immune from any civil or criminal proceedings arising from their acts, omissions or commissions during the pendency of their tenures, should be expunged. It is observed that presidents and state governors hide under the protection provided by the clause to perpetrate acts of executive lawlessness.

2. The legislative and judicial branches should stand up and resist acts of executive lawlessness. The legislature, in particular should deploy the weapon of impeachment against any President or State Governor as the case may be, found to have violated the law.

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