

# Constitutionality or Otherwise of Executive Orders: Analysis of Order 21 Signed by the Executive Governor of Rivers State

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## Abstract

The Chief Executives of the Federation and States in Nigeria in the discharge of the executive functions most often issues Orders to Agencies and Parastatals within the executive arm of government. The Orders so issued carried with them some policies, directives and sometimes command. They also have the force of law and could therefore be enforced. Executive orders are official documents through which the President of a country or Governor of a State manages the operation of the government. Executive orders derive its authority from the constitution and statute. It is purely an enactment, which constitutionally is the functions of the Legislative arm of Government. In this work we will discuss, the meaning and its origin, the constitutional basis of the orders, its validity especially when it is made in bad faith and its implication putting it side by side fundamental Rights provisions in Nigeria. Our emphasis will be the executive order 21 Rivers State. It concludes by showing that Executive Orders negates the principle of separation of powers enshrined in the Nigerian Constitution and serves as a means where the Executive arm of government makes an incursion into the legislative functions of the Legislature.

## 1. Introduction

In recent times, there is a rising use of Executive Orders by the executive arm of government at all levels of government (federal, state and local governments) in Nigeria. The 1999 Constitution of Nigeria adopted the principles of Federalism whereby powers are shared

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between the Federal, State and Local Governments. It establishes three tiers of government. Regrettably, Nigeria mode of Federalism negates the principles of Federalism. It is a fusion of federalism and unitary system. Federalism as a political system creates separation powers amongst the, Executive, Legislature and the Judiciary. The constitution in some sections<sup>i</sup>, explicitly provided for powers exercisable by the three arms of government. The Legislature to make laws, the Executive to implement and enforce the laws made by the legislature and Judiciary to interpret laws made by the legislature and declare any act of the executive or legislative arm that is inconsistent with the provision of the constitution, unconstitutional, null and void. In Nigeria and indeed other democracies that practice federalism the executive powers are vested in the President (Federal) and Governors (State) The Legislative powers are vested in the National Assembly (Federal) and House of Assembly (States)<sup>ii</sup>, while the Judicial powers are vested in the courts<sup>iii</sup>. It is disheartening that the executive arm of government most often makes an incursion into the premises of the legislature and sometimes the Judiciary<sup>iv</sup> through the use of executive orders. The essence of executive orders is to usurp the functions of the legislature to make laws and set rules of engagement with pain of punishment for violators of such orders. At the global level, President Donald Trump of America resorted to the use of executive orders which sort of popularized it in recent times. Here in Nigeria, since the inception of the current administration, President Muhammadu Buhari has signed over ten executive orders covering diverse subject matters such as anti-corruption; ease of doing business; corporate registration; taxation, project management and financial autonomy.

Specifically, in 2020 President Buhari signed Executive Order 10 wherein he sought to give effect to section 81(3) and section 121(3) of the Constitution of the Federal Republic of Nigeria<sup>v</sup> 1999 (as amended) which made provision for financial autonomy for State Judiciary and Houses of Assembly. The 36 State Governors challenged the said Executive Order 10 at the Supreme Court of Nigeria and the Court in a split decision of 6-1 ruled that the Executive Order 10 is ultra vires, unconstitutional, illegal and therefore null, void and of no effect whatsoever.<sup>vi</sup>

Sometimes ago, a Governor of Rivers States<sup>vii</sup> Chief Nyesom Wike signed Executive Order 21<sup>viii</sup> prohibiting public gathering and particularly prohibiting political parties from holding campaigns and rallies using any public facilities without obtaining approval from the State Commissioner for Education and upon payment of non-refundable security fee of ₦5,000,000.00.

In this paper, we will briefly and in a concise manner, examine the provisions of the said Executive Order 21 to ascertain its constitutionality and legality in the face of certain express provisions of the 1999 Constitution<sup>ix</sup> and the Electoral Act<sup>x</sup>. But before setting out in this task, I will try to espouse on the meaning, origin and constitutional basis of executive orders in Nigeria.

## 2. Meaning and Origin of Executive Orders

The Black's Law Dictionary<sup>xi</sup> defines executive order as an order issued by or on behalf of the President, usually intended to direct or instruct the actions of executive agencies or government officials, or to set policies for the executive branch to follow.

Executive Orders are orders issued by a President and directed towards officers and agencies of the government. They have the full force of law, based on the authority derived from statute or the Constitution itself. The ability to make such orders is also based on express or implied Acts of the Legislature that delegate to the president some degree of discretionary power.<sup>xii</sup>

Executive orders originated from the United States of America where the first executive order was issued by President George Washington on June 8, 1789 and it was addressed to the heads of the federal departments, instructing them “to impress me with the full, precise, and distinct general ideas of the affairs of the United States” in their fields.<sup>xiii</sup>

On their part, Okebukola and Kana<sup>xiv</sup> posited that an executive order is a command directly given by the president to an executive agency, class of persons or body under the executive

arm of government. Such a command is in furtherance of government policy or Act of the Legislature. The executive order may require the implementation of an action, set out parameters for carrying out specific duties, define the scope of existing legislation or be a subsidiary instrument within the contemplation of section 37 of the Interpretation Act.

Inherent in the above definitions of executive order is the fact that only a President of a country can issue executive orders. As stated earlier in this paper, President Buhari has issued several executive orders since he came on board as Nigeria's President. The question I will attempt to answer in this paper is whether a State Governor can also lawfully issue an executive order in Nigeria.

### **2.1. What is Law**

A law requires congressional Or Legislative approval before finalization at both the Federal and State level. Laws can be repealed by the legislature, which is not the case with an executive order, it can be accomplished in an indirect way, for example by cutting off the funding process of enforcing the order. In Nigeria the legislature cannot cut off such funding, but could challenge its constitutionality in the appropriate court.

### **2.2. How are the two similar**

As discussed earlier, both executive orders and law may attract punishment for noncompliance. They are also both extensively documented and officially recorded in the case of presidential executive orders and federal laws. Both of them fall under the code of federal regulations, which is the official record of all federal rules and regulation. Despite the differences, someone who stands accused of violating an executive order has the same legal rights and those who are charged with violating a law. An accused person in Michigan has the right to consult a criminal defense attorney for legal advice. It is important that person has adequate representation to ensure fair treatment from the courts. This is also the position in Nigeria, person tried for violating an executive order can also get legal representation for fair leaving.

An executive order are not technically laws, there can still be consequences for violating it. In Rivers State Nigeria, the Governor, Nyesom Wike sealed off premises used for political campaign, the reason is that permission was not sought before such premises are used.

A law requires legislative approval and can be repealed, which is not the case with executive order. A new order would have to be created to eliminate an executive order that is in place, and once the governor leaves office the chief executive of the federation and state in Nigeria and united state of America in discharge of their function most often issues order to it agencies written the executive arm of government. The orders to issued sets out policies, directives and some times commands to the agencies to carry out the function as the other, most of the executive order have the force of law and therefore a enforceable.

The 1999 constitution of Nigeria, created Federal State, where powers are shared amongst the federal, State and local governments. It is three tiers of government, that gave room for the practice of federation. Though regrettable Nigeria mode of federation regrets the principle of federation. It is to an extent a fusion of federation and unitary system federation as a political system creates separation of powers amongst, the executive, legislative and the judiciary. Section 4, 5, and 6 of the constitute explicitly provided for the powers to be exercised by the three arms of government the legislative to make laws, the executive to implement and enforce laws made by the legislative, while the judiciary interprets the law, by declaring any act of the other three arms that is inconsistent with the construction, as unconstitutional null and void.

In Nigeria and indeed other countries that practice federation as presidential system the executive power resides in the president (federal) and the Governor (state) the legislative power resides in national Assembly (state) while the judicial power is relied in the courts, headed by chief judges, president, chief Justice of the federation etc.

Regrettably the executive arm of government most often makes an incursion to the premises of the legislative arm and same ties into the judiciary

### **3. Constitutional Basis of Executive Orders**

The Constitutional basis for executive order is the President's broad powers to issue executive directives, even though there is no specific provision authorizing their issuance under the Constitution.

Section 5 of the 1999 Constitution of the Federal Republic of Nigeria<sup>xv</sup> vests executive powers in the President exercisable by him either directly or through the Vice-President, Ministers or executive powers in the various states of Nigeria.<sup>xvi</sup>

However, as aptly noted by Okebukola and Kana executive orders have legal force only when they are based on the president's constitutional or statutory authority. In other words, the executive orders are valid only where the president acts within the boundaries of his constitutional or statutory authority. The enabling legislative or constitutional authority may empower the president to use Executive Orders to perform strictly defined roles. The Legislature or Constitution can also confer wide discretionary power on the president to issue orders in certain matters. For example, section 315 of the CFRN 1999 empowers the president and other appropriate authorities to "*make such modification in the text of any existing law, as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of this Constitution*".<sup>xvii</sup>

The president or governor can therefore in exercise of their executive powers as provided for under section 5 of the CFRN 1999 issue executive orders to give life or meat to existing laws but in doing so, they must act within their constitutional or statutory authority under the CFRN 1999 or any Act of the National Assembly (in the case of the president) and a Law of the State House of Assembly (in the case of a governor).

Underscoring the need for the president or a governor to operate within the confines of the law, section 5(2)(b) of the CFRN 1999 provides that the exercise of the executive powers by the governor "*shall extend to the execution and maintenance of this Constitution, all laws made by the House of Assembly of the State and to all matters with respect to which the House of Assembly has for the time being power to make laws*".<sup>xviii</sup>

Where in the exercise of their executive powers under the Constitution, the president or governor is alleged to have acted *ultra vires* their constitutional or statutory roles, the Court can be called in to rectify the error. The Court has powers to declare as to the validity or otherwise of any executive order issued by the president or governor.<sup>xix</sup>

It was therefore not surprising that the Supreme Court of Nigeria early this year declared as *ultra vires*, unconstitutional, illegal and therefore null, void and of no effect whatsoever Executive Order 10 issued by President Buhari in 2020 on the ground that the President lacked powers to issue the order under the CFRN 1999. In the suit filed by the 36 state governments against the federal government, they prayed for the following orders:

- (a) a declaration that the Executive Order 10 is unconstitutional and illegal.
- (b) an order compelling the Federal Government to take up funding of capital projects for State High Courts, Sharia Court of Appeal and Customary Court of Appeal, and
- (c) a refund to the 36 states a sum of N66 billion, being amount spent on capital projects for the three courts in their respective states.

My Lord, the Honourable Justice Mohammed Dattijo, delivering the lead judgment declared thus:

*“This country is still a Federation and the 1999 Constitution it operates is a federal one. The Constitution provides a clear delineation of powers between the state and the federal government. The President has overstepped the limit of his constitutional powers by issuing the Executive Order 10. The country is run on the basis of the rule of law”.*

According to their Lordships, the CFRN 1999 has already spelt out the responsibility of the States and the Federal Government concerning the funding of the State High Courts, Sharia Court of Appeal and the Customary Court of Appeal, even if it was silent on capital projects. In sum, the Supreme Court rejected the request of the Attorney General of Abia State and 35 others with regard to the aforementioned (b) and (c) parts of their prayers.

### **3.1. Difference between a Law and Executive Order**

The constitution highlights the roles of both the federal and state governments. These roles can be confusing, particularly in relation to legal matters. For instance in United States of America, State of Michigan most people have heard of executive orders issued by the president or the Governor. Same thing in Nigeria, the Federal government headed by Mohammodu Buhari has issued several Executive Orders and recently the Governor of Rivers State did same with Executive Order 21 and 22

### **4. Is Executive Order 21 of Governor Wike constitutional and valid in Law?**

On 6<sup>th</sup> October 2022, Governor Wike of Rivers State issued an Executive Order 21 prohibiting public gathering and particularly prohibiting political parties from holding campaigns and rallies using any public facilities without obtaining approval from the State Commissioner for Education and upon payment of non-refundable security fee of ₦5, 000,000.00. Can he validly do so? Is the said Executive Order 21 constitutional and valid? We shall show that it is not.

As we have noted earlier, a State Governor can issue Executive Orders in exercise of his executive powers under section 5 of the CFRN 1999. However, such must be done in conformity with the provisions of the Constitution or a Law passed by the House of Assembly of the State. The legislative power of the State House of Assembly is confined to:

- (a) matters not included in the Executive Legislative List set out in Part I of the Second Schedule to the CFRN 1999;
- (b) matters included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the CFRN 1999;
- (c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of the CFRN 1999.<sup>xx</sup>

What the Governor did by Executive Order 21 is to regulate the election or electoral process in the state by spelling out how political parties and their candidates should carry out their campaigns in the state. Section 5(2)(b) of the CFRN 1999 limits the exercise of the executive



powers by the Governor to matters with respect to which the House of Assembly has power to make laws under the CFRN 1999.

So the question is: which Legislature has powers under the CFRN 1999 to legislate on electoral or election matters as it affects the offices of President, Vice-President, Governor, Deputy Governor, National Assembly members and State Assembly members? Is it the National Assembly or the State House of Assembly? A cursory look at Item 22 of the Exclusive Legislative List and Items 11 and 12 of the Concurrent Legislative List shows that that power resides in the National Assembly, save for elections into local government councils in the state. In exercise of its powers, the National Assembly has enacted the Electoral Act, 2022 and made provisions for the regulation of political party campaigns and rallies, giving powers to INEC and the Commissioner of Police in each State of the Federation to regulate same.<sup>xxi</sup>

Therefore, Governor Wike as Governor of Rivers State cannot and does not have powers to issue executive orders with a view to regulating political party campaigns and rallies in Rivers State. Executive Order 21 issued by the Governor of Rivers State is clearly *ultra vires* his powers, unconstitutional, illegal, null and void.

Furthermore, section 95(2) of the Electoral Act, 2022 prohibits any State from creating a situation whereby a political party or its candidate is given advantage or disadvantaged in the campaign process. It states thus:

*State apparatus including the media shall not be employed to the advantage or disadvantage of any political party or candidate at any election.”*

What Governor Wike has done by Executive Order 21 is to scuttle or stifle political campaigns and rallies of opposition political parties in the State, thereby giving advantage to his party and its candidates in the forthcoming general elections and this runs foul of the provision of section 95(2) of the Electoral Act, 2022.

If the concern of the state government is that of protection of public facilities from destruction during political party campaigns and rallies, section 91(1) of the Electoral Act, 2022 has taken

care of that concern by entrusting the Commissioner of Police in each State of the Federation with the responsibility of providing adequate security for proper and peaceful conduct of political campaigns and rallies, including political processions in their respective States. All the political parties are expected to do is to notify the Commissioner of Police any planned or scheduled political rally or procession and secure armed police personnel to provide the needed cover to avoid clashes that could lead to breakdown of law and order and destruction of public facilities.

## **5. Executive Order and Fundamental Rights Provisions in Nigeria**

Assuming without conceding that the Governor of Rivers State has the constitutional or statutory power to issue Executive Order 21, I still believe that the provisions of the said Executive Order 21 violates section 40 of the CFRN 1999.

Section 40 of the CFRN 1999 guarantees the right to peaceful assembly and association to every person in Nigeria. Even though this right is not absolute *per se*, as has been interpreted by the Courts over the years, its derogation can only be in accordance with section 45(1)(a) and (b) of the CFRN 1999 which provides that nothing in section 40 of the CFRN 1999 shall invalidate any law that is reasonably justified in a democratic society –

- (a) in the interest of defence, public safety, public order, public morality or public health; or
- (b) for the purpose of protecting the rights and freedom of other persons.

Can we say that Governor Wike’s Executive Order 21 is reasonably justified in the present democratic dispensation taking into consideration the conditions set out in the said Executive Order 21? The answer is a straight NO.

Executive Order 21 requires anyone wishing to hold political rallies in any public facility to seek and obtain:

- (a) permission from the Commissioner for Education not less than two (2) weeks before the date of the rally; and
- (b) pay a non-refundable security fee of N5,000,000.00.

The Order empowered the Commissioner for Education or Chairman of Local Government Council to prevent or stop any political rally which is in contravention of the Executive Order. These officers are card carrying members of the ruling political party in the State. Under no guise can the imposition of non-refundable security fee of N5 million on political parties for each use of public facility and obtaining permission from your “political opponent” be said to be justifiable in any democratic society.

In any case, the Electoral Act 2022 has already stipulated the election expenses limit to be incurred by candidates for the various political offices in Nigeria.<sup>xxii</sup> Governor Wike cannot lawfully modify this law passed by the National Assembly who has constitutional powers to do so.

It is our opinion that an executive order cannot take away any of the citizen’s fundamental rights as enshrined in Chapter 4 of the CFRN 1999. Only a validly passed law by the Legislature which passes the test under section 45(1)(a) and (b) of the CFRN 1999 can do so. If the President or Governor in exercise of his executive powers under section 5 of the CFRN 1999 issue an executive order that adversely infringes on the fundamental right of citizens, such exercising is self-aggrandizing and unconstitutional.

In the US case of *Youngman Sheet & Tube Co. v. Sawyer*<sup>xxiii</sup> where attempt was made through the President’s executive order to seize a private steel mills at the wake of a national emergency, the US Supreme Court held that the President cannot, in the guise of exercising executive power, deprive citizens of basic rights such as right to life, liberty or property without due process as guaranteed by the Fifth Amendment. This is like the guarantee under Chapter 4 of the CFRN 1999.

What this means is that no invocation of executive powers under section 5 of the CFRN 1999 will validate an executive order that attempts to deprive citizens of their fundamental rights under Chapter 4 of the CFRN 1999 without legislative or judicial authorization. This appears to be the logic of such cases as *Stitch v. Attorney General of the Federation*,<sup>xxiv</sup> *Lakanmi v. AG Western Region*<sup>xxv</sup> and others in that line.

No doubt, the provisions of Executive Order 21 signed by Governor Wike of Rivers State is a gross violation of the citizens' right to freedom of assembly and association under section 40 of the CFRN 1999 and same is liable to be set aside by a court of competent jurisdiction. This is my firm view.

## 6. Conclusion

Governor Wike's Executive Order 21 can only be likened to the draconian and obnoxious Decree 4 under the military regime in Nigeria which gagged freedom of assembly and other rights of citizens hiding under the guise of security breaches.<sup>xxvi</sup> The Order must be and should be challenged immediately by opposition political parties and/or their candidates. The Order is a slap on democracy as it is inconsistent with extant laws of the Federal Republic of Nigeria, the African Charter and international instruments on political and civil rights.

It is not the intention of the CFRN 1999 to make the President or State Governor a law-making body working in competition with the Legislature. There is clear separation of powers with the legislative powers vested in the National Assembly or State House of Assembly as the case may be while executive powers is vested in the President and Governors. Executive Orders are not laws. They do not form part of the Constitution, nor claims parity with it. Therefore, in issuing executive orders, the President or Governors must act as an agent under the authority of the law and the Constitution.

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<sup>i</sup> Ibid sec 4,5,6

<sup>ii</sup> Senate and Federal House of Representatives (Federal) Houses of Assembly

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- iii In Nigeria, High Courts of States are headed by a Chief Judge, Customary and Sharia Courts of Appeal headed by a President and Grand Khadi respectively, Court of Appeal by President and Chief Judge of Nigeria, the Supreme Court.
- iv Code of conduct Tribunal in Nigeria that sacked Hon. Justice Walter Onnoghen, one time Chief Justice of Nigeria
- v See (n.2)
- vi The judgment of the Supreme Court was delivered on Friday 11<sup>th</sup> February 2022.
- vii See (n.1)
- viii Executive Order RVSG – 21 2022. Published in the Rivers State of Nigeria Official Gazette, No. 29, Vol. 58 of 6<sup>th</sup> October 2022.
- ix See (n.9)
- x Electoral Act, LFN, 2022
- xi B. A. Garner, *Black's Law Dictionary* (8<sup>th</sup> ed, West Publishing Co, 2004) 610.
- xii See Mike Ozekhome, 'What are Executive Orders?' available at <<https://www.sunnewsonline.com/what-are-executive-orders/>> accessed 20 October 2022.
- xiii Ibid.
- xiv Okebukola and Kana, 'Executive Orders in Nigeria as Valid Legislative Instruments and Administrative Tools' available at <<https://www.ajol.info/index.php/naujilj/article/view/136320/125810>> accessed 20 October 2022.
- xv CFRN 1999.
- xvi Ibid s 5(2).
- xvii See AG, ABIA STATE & ORS v. AG, FEDERATION (2003) LPELR-610(SC) where the Supreme Court had cause to interpret section 315 of the CFRN 1999.
- xviii Similar provision exist in section 5(1)(b) of the CFRN 1999 for the president's exercise of his executive powers.
- xix See the cases of A-G., ABIA STATE v. A-G., FEDERATION (2003) 4 NWLR (Pt. 809) 124 at 177, para. F; OMOKHAFE v. ESEKHOMO (1993) LPELR-2649(SC); A.G. ANAMBRA STATE v. OKAFOR (1992) 2 NWLR (Pt. 224) 396 at 419; AJAKAIYE v. IDEHAI (1994) 13 NWLR (Pt. 364) 504 at 525 – 526.
- xx See section 4(6) & (7) of the CFRN 1999.
- xxi See sections 91 and 95 of the Electoral Act, 2022.
- xxii See sections 88 and 89 of the Electoral Act 2022.
- xxiii (343) U.S 579 (1952).
- xxiv (1986) 5 NWLR (Pt. 46) 1007.
- xxv (1971) IUILR 201.
- xxvi See Military Governor of Lagos State v. Ojukwu (1985) 2 NWLR (Pt. 10) .ss