

## THE PROPRIETY OF EXECUTIVE ORDER NO.6 2018, BY PRESIDENT MUHAMMADU BUHARI

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### ABSTRACT

*Nigeria is a democratic country practicing constitutional democracy. In a democracy from across the world, governmental powers is divided into three departments, in the legislative, Executive and judicial arms. The law of the respective countries practicing democracy assigns function to each organ of government. In Nigeria, for example, the 1999 Constitution (as amended) assigned law making to the legislature, the executive enforces the law and the judiciary interprets the law with a provision for check on each other to avoid abuse. Despite the doctrine of separation of power entrenched in the Nigerian Constitution, successive governments in Nigeria continued to violate this time honoured concept with impunity. President Muhamadu Buhari in July, 2018 signed into law, Executive Order No.6 2018 which targets the seizure of Assets of individual suspected to be a product of corruption to the displeasure of many Nigerians who roundly condemned same without mincing word, for been undemocratic. This paper examined the propriety of Executive Order No.6 2018 and concludes that such law is a clear breach of rule of law and constitutionalism and smacks of the despotic posture of the President administration.*

### 1.0 Introduction:

One of the campaign promises of President Muhammed Buhari in 2015 is to fight corruption that has eaten deep into the fabric of Nigeria and possibly eradicate it or at least reduce same to the barest minimum. Soon after he came to power on 29<sup>th</sup> May, 2015, he took the fight against corruption headlong. He has been arresting, prosecuting and recovering the loots from corrupt public officers. Prominent among them were the conviction of two former Governors of Taraba and Plateau States and the recovery of Abacha loot etc. According to him, “if Nigeria did not tame corruption, corruption will tame Nigeria”. In his resolute resolve to tackle corruption and bring it to its lowest ebb or totally eradicate same, President Mohammed Buhari signed into law Executive Order No.6 on 5/5/2018. The said Order is aimed at the preservation of Assets connected with corruption and other related offences. The Executive Order No.6 2018 also restrains owners of assets under investigation from carrying any further transaction on such assets. The Order further mandated the Attorney General of the Federation and Minister of Justice, to publish from time to time, a list of all assets protected pursuant to the Order.<sup>1</sup>The action of the President in enacting the extant law elicited barrage of criticism across the Nation. While some people applaud it as the right tool to prosecute the war against corruption, others condemn the Order saying it amount to breach of separation of powers, usurpation of Legislative Powers, Rule of Law and constitutionalism and smacks of despotic posture of the present administration.

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<sup>1</sup> Voice of the Nation, The President’s Executive Order No.6, Daily Sun Newspaper, Friday July, 13, 2018, P.15

### **1.1 Meaning of Executive Orders.**

Executive Orders can be said to be a Presidential directives issued by the presidents to agents of executive departments. It stems from the executive powers granted by the Constitution to the president to carry out policy matters, and so have the force of law. In Nigeria for example, section 5 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) empowers the President to execute and maintain the provisions of the Constitution, as well as all laws made by the National Assembly. Section 5 (1) of the Nigerian Constitution 1999 (as amended) provides that subject to the provisions of this Constitution, the executive powers of the Federation:

Shall be vested in the President and may subject as aforesaid and to the provisions of any law made by 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 shall extend to the execution and maintenance of this Constitution, and 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.<sup>2</sup>

President Muhammadu Buhari justifying his action in signing the Executive Order No.6, 2018, rightly or wrongly relied on section 5 of the Constitution. The intendment of section 5 of the 1999 Constitution (as amended) does not include the making of law by the executive branch of government but only to execute the law.

### **1.2 Evolution of Executive Orders.**

Executive Orders originated from the United States of America, from where Nigeria copied her presidential system of government. Since 1789 about thirteen thousand(13,000) executive orders have been issued by various US Presidents, beginning with George Washington, and up to President Donald Trump. Article 2 sections (1) and (2) of the Constitution of United States of America grants executive power to the President, to administer the country. Executive Power in Article 2 sections 1 and 3enjoin the President to take care that laws be faithfully executed failure to comply with this could lead to impeachment<sup>3</sup>

In the United States of America, President Abraham Lincoln issued executive order suspending writ of Habeas Corpus and the Emancipation Proclamation during the civil war. President Franklin Roosevelt in 1942 issued executive order that led to the Japanese-American internment camps during world war. In 1948 President Harry Truman used executive orders to integrate the armed forces. In 1957 when crowds prevented desecration of an all-white Central High School, President Dwight Eisenhower used executive order to dispatch federal troops to the high school in Little Rock, Arkansas. Presidents John Fitzgerald Kennedy and Lyndon Johnson also used executive orders to bar racial discrimination in respect of matters of federal housing, hiring and contracting in the 60s. In 1984, President Ronald Reagan used executive order to stop the use of federal funds in advocating for abortion which President Clinton revised in 1993. In 2009, President Barack Obama revoked President George W. Bush 2001 order restricting public access to papers of former

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<sup>2</sup> Section 5 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

<sup>3</sup>Myers v US, 272 U.C 52.

Presidents using executive order. President Barack Obama also issued several orders halting deportation of illegal immigrants who came to United States of America as children and raising the minimum wage from \$7.25 – \$10.10, for workers on federal contracts.<sup>4</sup>

As earlier stated, Nigeria borrowed her presidentialism from the United States of America. Some Nigerian leaders following the example of United States government in this regard had issued executive orders as President Muhammed Buhari is not the first to issue executive order. In *AG Abia State v AG Federation*<sup>5</sup>, the supreme court of Nigeria upheld the validity of the Revenue Allocation (Federal Account, Etc.) (Modification) Order (Statutory Instrument No. 9 of 2002) and held that the President rightly acted pursuant to the provisions of section 315 of the 1999 Constitution and the Order which came into effect retroactively, was thus valid. In 2017 Ag President Yemi Osinbajo issued three executive orders on ease of doing business in Nigeria. The executive orders sought to promote transparency and efficiency in the business environment; timely submission by all statutory and non-statutory agencies of annual budgetary estimate; support for local contents in public procurement by the federal government; ease of matters on procuring permits, licenses, tax documents, wavers, visas, port operations, (24 hours services); automation of CAC, etc.<sup>6</sup>

The United States of America is an advanced democracy and when an executive order is issued by an American President, it is issued for the interest of the American people and when such order(s) are executed it is executed without tramping on rights of the people. Conversely, democracy in Nigeria is still growing; enforcement of Executive Order 6 if allowed to stand might be abused as it appeared to be targeted at certain individuals. Fighting corruption is good but the war against corruption no matter it's good intention must be waged with human face and in accordance with the rule law.

President Muhammad Buhari was a soldier and once a Nigerian Head of State under military regime between 1983 and 1985. He however should be able to differentiate the powers of a President under a constitutional democracy and that of a Head of State under a military regime. The President's Executive Order has a semblance of a decree that obtains only in military administrations. Again Executive Order No. 6 is contrary to section 36 (5) of the 1999 Nigerian Constitution (as amended), which states that "Every person charged with a criminal offence shall be presumed to be innocent on until he is proved guilty"

### **1.3 The Doctrine of Separation of Powers**

By separation of powers is meant that the exercise of the powers or organs of government must be by independent body or group of persons and that there would be no fusion of powers. In other words, the totality of all organs of government must not be consolidated in the hands of one person

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<sup>4</sup> Mike Ozekhome, Buhari's travel ban on targeted Nigerians: an extreme panicky measure of desperation(1), Daily sun Newspapers October 17, 2018 p.43

<sup>5</sup>(2003) 4 NWLR (pt. 809) p. 124 @ 177.

<sup>6</sup>*Ibid* p.43

or group of persons but must be separated, checked and balanced as to avoid discretionary exercise of powers or functions, it is:

The division of governmental authority into three branches of government – Legislative, Executive and Judicial – each with specified duties on which neither of the other branches can encroach<sup>7</sup>

Therefore, the Legislative Power should exclusively be vested with the power of making Laws and members of the Legislature should not be part of any other organ like Executive or Judiciary. The Executive power should exclusively be vested with the power of enforcing the laws made by the Legislature and a person vested with the Executive powers should not be a member of the Legislature or Judiciary, and finally the Judicial Powers should exclusively be vested in the Judiciary for the purpose of interpreting the laws (giving effects to the meaning and intent of the laws made by the Legislature). It is “a preventive measure against abuse of power, which will occur if the three powers are exercised by the same person or group of persons.”<sup>8</sup>

The idea of making separation of power an imperative in modern democratic dispensation is not to make governance efficient or competent but to “fragment governmental power in such a way as to defend liberty and keep tyranny at bay. This is because of the insatiable human nature and the assumption that if unrestrained by external checks, any given individual or group of individuals in power will go beyond the limit of their authority<sup>9</sup> as it is usually said that “power corrupts and absolute power corrupts absolutely”.

The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy<sup>10</sup>

Nigeria in adopting the principles of separation of powers and Presidential Constitution of the United States entrenched the doctrine of separation of powers in 1979 as well as 1999 Constitutions. Thus, relevant section of the 1999 Constitution placed each arm of government into separate branch. Thus Section 4 of the 1999 Constitution vests the Legislative Arm with the power of making law, Section 5 vest the Executive power in the hands of the President while section 6 vests the Judicial Powers in the Courts. Thus, in separation of powers according to the Nigerian Constitution 1999 (as amended), the roles, functions, and responsibilities of the Legislative, Judiciary and Executive are clearly spelt out. There is no doubt therefore that the 1999 Presidential Constitution of Nigeria made provisions for separation of powers which clearly made provisions for smooth running of the nation as to ensure prevalence of the rule of Law and good governance.

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<sup>7</sup> Note no 5 P. 1369.

<sup>8</sup>EseMalemi; *Administrative Law*; 3<sup>rd</sup> Edition, (Princeton Publishing Co., Lagos, 2008), p.52

<sup>9</sup>Maduekwe Vincent Chukset *al* Judiciary and The Theory of Separation of Powers in Achieving Sustainable Democracy in Nigeria(The Fourth Republic) published in “*British Journal of Education, Vol. 4. No. 8 pp84-104,* published by European Center for Research Training and Development UK, August 2016 at p. 86

<sup>10</sup> Note no.5, at p.1370

All arms of government, the executive, the legislature and the judiciary must function strictly in line with their constitutional duties. Sections 4, 5 and 6 of the constitution enshrine separation of powers. Therefore, when the President assumes Executive power to impound other people's property without any court judgment, he will be trespassing in the judicial province. And this is a breach of the separation of powers.

#### **1.4. The Concept of Rule of Law**

The Constitution of the federal Republic of Nigeria is the organic law of the land and therefore an embodiment of the rule of law. Rule of law presupposes that the law is supreme and simply means equality before and obedience to law. For an individual or group of persons or Government to assume the right to invoke the authority of the State against any branch, such a person or body must point at the aspect of his right that was breached or threatened. Several actions of persons and government alike that impinge on the right of individuals have been declared unconstitutional on the ground that the law providing for such right was breached or violated. Example is a breach of the fundamental rights conferred in section 36(1) of the 1999 Constitution (as amended). Once there is a laid down rule or procedure to be followed in a given circumstance and the rule is not followed as specified, it becomes a breached of the rule and disrespect to the rule of law. This was the decision in the case of *Dr. Denloye v Medical & Dental Practitioners Disciplinary Committee*,<sup>24</sup> wherein the Supreme Court of Nigeria held that although the tribunal, the Medical and Dental Practitioners Disciplinary Committee Tribunal was entitled to decide its own procedure and lay down, its own rules of procedure, the rules it laid down were not followed in the matter therefore, the decision was invalid and must be set aside.

The culture of disregard to the concept of the rule of law implanted in the polity during almost three decades of military rule in Nigeria was worse under President Muhammad Buhari. He was a former Military Head of State and President of the Federal Republic of Nigeria, a Military-turned civilian leader who came to power in 2015. He maintained and extended the Military lawlessness in governance in some respects as an exercise of executive recklessness. President Muhammadu Buhari unilaterally and arbitrarily on 5<sup>th</sup> July, 2018 issued Executive Order No.6 aimed at the preservation of assets connected with serious corruption and other related offences. It also seeks to restrain owners of assets under investigation from carrying out any further transaction on such assets. The President in justifying his action relied on section 5 of the 1999 Constitution (as amended), which according to him empowers him to execute and maintain the provisions of the Constitution, as well as all laws made by the National Assembly.

The rule of law without doubt is the important feature of democratic governance. Nigeria runs a constitutional democracy. Unfortunately however, rule of law which is one of the cardinal principles of democracy suffered serious setback due to the antecedent of the operators of the system. Politicians seem to have learnt nothing from the past experience of military dictatorship. Rule of law include obedience to Court Orders. The administration of President Muhammad Buhari is known for its disregard to court orders. The continued detention of former

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24 (1968) ALL NLR p.306, Section 188 (1) of the 1999 Nigeria Constitution

25(2000)9 NWLR (Pt.672)P.341

National Security Adviser, Col. Sambo Dasuki (ret'd) and the leader of the Shites, Sheik Ibrahim El-Zakzakyin disregard to court order that they be released is an example of violation of rule of law with impunity by this present administration. Again, at the opening ceremony of the Annual General Conference of the Nigerian Bar Association in August, 2018, President Muhammad Buhari declared that his administration will continue to place national security and national interest above the rule of law.<sup>11</sup> This statement from the Nigerian President is to say the least an assault on constitutional governance, the rule of law and democracy in the country. These leaders flout the law, abuse their powers of office and trample upon the fundamental rights of the citizens and go scot free because of the weak structure of the government. The situation will be worse for Nigerians if the impunity of this administration is not nipped in the bud.

According to the President, recipients of ill-gotten wealth are a danger to the society. This is a fact, but due process must be followed in the war against corruption. Also the power to order the seizure of any asset resides with the court of law. There are other legislations and legal procedures that can take care of what the executive order is intended to achieve. For instance, sections 28 and 29 of the Economic and Financial Crimes Commission (EFCC) Act deal with the forfeiture of illicit assets pending the outcome of a court decision. Also similar provisions exist in the ICPC law and Money Laundry Act. Sections 28 of EFCC Act, states that:

- a. the assets or properties of any person arrested for an offence under this Act has been seized; or
- b. any assets or property has been seized by the Commission under this Act, the Commission shall cause an application to be made to the Court for interim order forfeiting the property concerned to the Federal Government and the Court shall, if satisfied that there is *prima facie* evidence that the property concerned is liable to forfeiture, make an interim order forfeiting the property to the Federal Government.

Similarly, section 29 of the EFCC Act, 2002 provides that where an arrested person is convicted of an offence under this Act, the Commission or any authorised officer shall apply to the court for the order of confiscation and forfeiture of the convicted person's assets and properties acquired or obtain as a result of the crime already subject to an interim order under this Act. In *Nwaigwe v FRN*<sup>12</sup>, the court held that section 29 of the EFCC Act, clearly imposed punishment on the Appellant by way of forfeiture of property on the basis of suspicion. Furthermore, in *Akingbola v Chairman EFCC*<sup>13</sup>

Flowing from the above, Executive Order is needless and undemocratic because it could lead to the tyranny of the executive arm of government and ultimately endanger the tenets of our democracy. Even in the United States of America where Executive Order can be said to have originated and whose system of government Nigeria copied from, Executive Orders usually issued by their past and present governments does not amount to lawmaking powers of the executive branch of government of the Americans as lawmaking powers is the constitutional right of the

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<sup>11</sup>ChineloObogo and RomanusUgwu, Soyinka warn'sBuhari: Don't tamper with rule of law, Daily Sun Newspaper, 31<sup>st</sup> August, 2018, p.6

<sup>12</sup>(2009) 16 NWLR (pt. 1166) p.169

<sup>13</sup>(2012) 9 NWLR (pt. 1306) p.475i2i

American congress. Thus, Mr. Justice Black in the American case of *Youngstown Sheet and Tube Co. v Sawyer* stated:

...The President's power, if any, to issue the order must stem either for an Act of Congress or from the Constitution itself. There is no statute that expressly authorises the President to take possession of property as he did here. Nor is there any Act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the government to rely on statutory authorisation for seizure<sup>14</sup>

The United States of American Supreme Court also held in the above case that an attempt by President Truman to place all Still Mills under Federal control was unconstitutional, because it was an attempt by the President to make law.<sup>15</sup>

The argument that section 5 (1) (a) and (b) and section 130 of Nigerian Constitution 1999 (as amended) empowers the President to execute and maintain the provisions of the Constitution and all laws made by the National Assembly. And that the President's powers are so enormous that he can do anything to protect the Constitution including making Executive Orders as far as it does not have an inhibitive effect on the provisions of the Constitution or any law made by the National Assembly. Also that the Executive Order No. 6 signed into law by the President of Nigeria is in order because it is made pursuant to and seeks to enforce sections 15 (5) of Nigerian Constitution which obliges him to abolish all corrupt practices of Nigeria. Moreso that Executive Order No. 6 is not inconsistent with the provision of the Constitution of Nigeria especially section 44 of our Constitution. Finally, that Executive Order No. 6 is similar to sections 28 and 29 of the EFCC Act 2004 and that courts have held sections 28 and 29 of EFCC Act as constitutional in a line of cases.<sup>16</sup>

That argument would not fly in the face of the Nigeria Constitution 1999 (as amended) and the principles of democracy. By virtue section 4 (1) of the 1999 Constitution of Nigeria (as amended) and the principles of separation of powers which is enshrined in our Constitution, the President has no powers to make/issue Executive Order No.6 as doing so would amount to usurpation of the powers of the legislature and a negation of the principles of separation of powers. It is the responsibility of the legislature to make laws while the executive implements the laws made by the legislature.<sup>17</sup> A community reading of sections 4 (1), 5(1), 36 (5), 44 (2) (k) and 315 of the 1999 Constitution of Nigeria (as amended), in order to determine the legality of Executive Order No. 6 signed into law by the President of Nigeria, Muhammad Buhari. Thus, section 4<sup>18</sup> vests the

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<sup>14</sup>343 US 579

<sup>15</sup>*Ibid*

<sup>16</sup>*Dame Patience Jonathan v. Federal Republic of Nigeria* (2018) 12 NWLR (pt. 1422) p. 575, *Federal Republic of Nigeria v. Ikedinwa* (2013) LPELR p. 21120 and *Federal Republic of Nigeria v. FaniKayode* (2010) FWLR (pt. 534) p. 181 @ p. 195.

<sup>17</sup>Sections 4 and 5 of the 1999 Constitution of Federal Republic of Nigeria (as amended)

<sup>18</sup>*Ibid*

legislature powers of the Federal Republic of Nigeria in the National Assembly while section 5<sup>19</sup> vests the Executive Powers of the Federation in the President of Nigeria or through the vice President and the Ministers of Government or Officers in the public service of the Federation. However subsection (1) (b) of section 5 of our Constitution talks about execution and maintenance of the Constitution and all laws made by National Assembly. Maintenance of the Constitution and all laws made by the National Assembly does not empower the President to make law, as law making is the primary duty of the legislature<sup>20</sup>. Executive Order No.6 is a usurpation of the powers of the legislature and same has no backing of the law and should not be allowed to stand. The President can initiate a bill called an Executive Bill, but it must be laid before the National Assembly for scrutiny before it can be passed into law. The Executive Order No. 6 was initiated by the President and also signed into law by him without going through legislative process. The fact that section 3 (1) of the Executive Order No. 6 states that any person who alleges that his rights have been violated, are being or are likely to be contravened by any of the provisions of this Executive Order, may apply to a competent court in his jurisdiction for redress, does not cure the defect in the process and would not give Executive Order No. 6 the imprimatur of law.

### **1.5 The Propriety of Executive Order No.6, 2018**

Executive Order No. 6 of President Buhari issued on July 5<sup>th</sup>, 2018 is aimed at seizing assets of corrupt persons and institutions in Nigeria. In other words, any assets of any person whether being prosecuted or not and which is suspected to have been gotten by unlawful or corrupt means shall be confiscated and be forfeited until proven otherwise or pending the final determination by a court. A careful observation of this Executive Order No. 6, 2018 will reveal that the purport of this Order is not only to prosecute the alleged victims but also to persecute all perceived opponents of the government in power. This is because our existing Laws or Acts have provisions on how to deal on assets or properties acquired by unlawful or through corrupt means by anti-corruption agencies as provided by Economic and Financial Crimes Commission (EFCC) Act, 2004 and the Independent Corrupt Practices Commission (ICPC) Act, 2000 which clearly made provisions for forfeitures or seizing the properties or monies etc., gotten through corrupt means. Thus, section 27(4) of EFCC Act Provides, subject to the provisions of section 24 of this Act, whenever the assets and properties of any person arrested under this Act are attached, the General and Assets Investigation Unit shall apply to the Court for an interim forfeiture order under the provisions of this Act.<sup>21</sup> Furthermore the ICPC Act of 2000, provides that: Where in respect of any property seized under this Act there is no prosecution or conviction for an offence under this Act, the Chairman of the Commission may, before the expiration of twelve months from the date of the seizure, apply to Judge of the High Court for an Order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under section 3 to 19<sup>22</sup>

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<sup>19</sup>Section 4 (1) *Ibidi and Kaduna State v. the House Of Assembly Kaduna State &Anor* (supra)

<sup>20</sup>*Youngstown Sheet and Tube Co. v. Sawyer* 343 U. S 579 where the US Supreme Court held that an attempt by President Truman to place all steel mills under Federal Control was unconstitutional, because it was an attempt by the President to make law.

<sup>21</sup> Economic and Financial Crimes Commission Act LFN 2004.

<sup>22</sup> Section 48(1) Independent Corrupt Practice Commission (ICPC) Act, 2000



In dispensation of fair hearing and justice, the Act provides however that the judge to whom the application is made should conduct the matter to avoid persecution and acts of vindictiveness. Thus, the Act provides that:

The Judge to whom an application is made under subsection (1) shall direct to be published a notice in the Gazette and in at least two news papers circulating in Nigeria, which shall be in English language calling upon any person who claims to have an interest in the property to attend before that Court on a date specified in the notice, to show cause why the property should not be forfeited to the government<sup>23</sup>

It is clear that our Laws have taken adequate measures in respect of forfeiture of assets or property or money even to the extent of giving notice where such assets are not attached to any person or the Court or the prosecution is not aware of the owner. The Executive Order No. 6 of 5<sup>th</sup> July, 2018 was no doubt "...to give naked powers to the government agencies to confiscate any Nigerian property on allegation or suspicion of corruption"<sup>24</sup>

Further on this, Abeny Mohammade (SAN) said that: "the Executive Order ... will ridicule the Doctrine of separation of powers, adding that no section of the country's Constitution authorizes the president to make the orders."<sup>25</sup> For Edward Omega Esq., the Executive Order No. 6, 2018 is 'anti-people, draconian, and should have no place in a democratic society.'<sup>26</sup> Continuing, the learned Senior Advocate of Nigeria (SAN) said that:

By obtaining an order of court, you must have found that the person can be indicted based on preliminary investigations; not that the person is already guilty, but that there is a prima facie case established that can lead to a charge, that has been the provision of the law under Act<sup>27</sup>

Furthermore, he opined that:

...the Executive Order which says once you are suspected of a crime the property can be confiscated without going to court to obtain an order to that effect, such order is draconian, uncalled for and not in line with the tenets of laws as far as prosecution of corruption cases is concerned. This order has taken us back to the era of draconian military era where such pronouncement can be made and it becomes binding on the people<sup>28</sup>

Executive Order No. 6, 2018, violated the doctrine of separation of powers and does not make for good governance. Nigeria is no longer in authoritarian regime of 1983 when Buhari as military

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<sup>23</sup> Section 48(2) *ibid* note 76 above

<sup>24</sup> John Chukuazu and Clement A. Oloyede, "Weighing Buhari's Executive Order No.6 online News of "Daily Trust" published on 17<sup>th</sup> July 2018 at 3: 42am at [www.dailytrust.com.ng/weighing-buhari-s-executive-order-no-6-261259.html](http://www.dailytrust.com.ng/weighing-buhari-s-executive-order-no-6-261259.html)

<sup>25</sup> *ibid.*, note no 78.

<sup>26</sup> *ibid*, note 78 above

<sup>27</sup> *ibid*, note 78

<sup>28</sup> *ibid*, note 78

Head of State scuttled or ended the democratically elected civilian government then in a military coup.

It behooves to ask as between our Legislation which is the Act and the Executive Order No 6, which one is legal? There is no doubt that our Act is legal. 'It has covered the field hence the Executive Order is by the doctrine of covering the field a nullity.'<sup>29</sup> Even in the United States of America, "Executive Orders as practiced in the United States of America is to take care of areas where there is (sic) no legislation but the government needs to act fast to tackle the issue."<sup>30</sup> But once that said Executive Order violates any constitutional provision or people's right, such Executive Order will be challenged and subjected to the power of Judicial Review which is an indices of the separation of powers as in the Case of Trumps Executive Order on Travel Ban which was declared unconstitutional by United States of America Circuit Courts but the modification of same Order as opined by the Supreme Court which removed some aspects of policies and acts that violates people's right and the Constitution in the Order and specifically tagged it as "protecting the Nation from Foreign Terrorist Entry into the United States"<sup>31</sup>. The United States Supreme Court upheld the revised and modernized Executive Order on Travel Ban. It held thus:

An American individual or entity that has a bonafide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded. As to these individuals and entities, we do not disturb the injunction. But when it comes to refugees who lack any such connection to the United States, for the reasons we have set out, the balance tips in favour of the Government's compelling need to provide for the Nation's Security.<sup>32</sup>

Like the American situation in Trump's Executive Order on Travel Ban, two Nigerian lawyers, Ikenga Ugochinyere and Kenneth Udeze, had approached the Federal High Court, Abuja, to void Executive Order No. 6, issued on July 5, 2018, on grounds, among others, that it violates citizens' rights to fair hearing and to own property, under sections 36 and 43 of the Constitution, since persons being investigated or standing trial, but not yet convicted, are entitled to own property. The judge held that the Executive Order was constitutional, as the President issued it as a policy directive, which recognized the right of every citizen to approach the court for redress if aggrieved by the enforcement of the order. Unknown to many undiscerning readers or watchers, the judge built into her judgment certain irreducible imperatives that such an order must comply with:

- i. The forfeiture of assets linked to various offences or ongoing criminal investigations by the government can only be enforced in line with the provisions of the Constitution.

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<sup>29</sup>*Ibid*, note 78

<sup>30</sup> Weighing Buhari's Executive Order, *Ibid*, note 78

<sup>31</sup> "All the Laws and Executive Orders Trump has signed so far" Published online at <https://www.vice.com/-/pggbp2//published> on 21/01/2018, accessed on 23/08/2018 at 2:50am

<sup>32</sup> The Supreme Court's opinion on the Revised Trump Executive Order: what does it mean for refugees? Published online on June 12, 2017 at <https://www.migrationpolicy.org/new> accessed on 23/8/2018 at 2:10am

- ii. That the coordinating role imposed on the Attorney-General of the Federation by the Executive Order was subject to section 174 of the Constitution (dealing with the Attorney General's powers to commence, continue or discontinue criminal proceedings); and same must be predicated on the existence of facts.
- iii. The execution of such Executive Orders must not offend the doctrine of separation of powers entrenched in sections 4, 5 and 6 of the Constitution, and as ably propounded by Baron de Montesquieu (a great French philosopher) in 1748.
- iv. That contrary to the contents of the Executive Order, which appears to give the Attorney-General discretion on when to seek court's permission to seize a suspect's property, the Attorney General of the Federation must, at all times, obtain a court order before seizing any such assets.
- v. The court order could be obtained *ex parte*.<sup>33</sup>

It is therefore clear, that what the court did was no more than merely validating Executive Order No. 6, in so far as its operation does not impinge on or violate the rule of law, the fundamental rights of citizens, the doctrine of separation of powers, the provisions of the Constitution; and that the forfeiture must not be made without the Attorney General of the Federation first obtaining an order of court to that effect.

Dissatisfied with the court's decision in the subject matters, the Appellants have since appealed to the court appeal to set aside the judgment of the court below. Their action is in line with the concept of the rule of law and it is hoped that the court appeal will do justice to the matter and overturn the judgment of the court below. This will save Nigerians from the dictatorial tendencies of the Present regime and deepen democracy in Nigeria.

## CONCLUSION

Nigeria is a constitutional democracy. Democracy according to Abraham Lincoln is "government of the people, for the people and by the people". It presupposes that power belongs to the people. Section 14 (2) (a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) states that, "sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority".

The Constitution of the Federal Republic of Nigeria 1999 (as amended) is the grundnorm. Thus, both the ruler and the led are bound by the provisions of the Constitution and anything done without recourse to the provisions of the Constitution is null and void and unconstitutional. The Executive Order No. 6 enacted by President Muhammadu Buhari is contrary to the provisions of the Nigerian Constitution 1999 (as amended), in that it is a breach of separation of powers entrenched in the Constitution. The Executive Order No. 6 signed into law by the present administration under the watch of President Muhammadu Buhari, under the guise of fighting corruption, is highly condemnable, for being absolutely unconstitutional, illegal, wrongful,

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<sup>33</sup> Mike Ozekhome, Buhari's Travel Ban on Targeted Nigerians: An Extreme Panicky Measure of Desperation, Daily Sun Newspaper, 17<sup>th</sup> October, 2018, Page 43

immoral, vindictive, dictatorial, panicky and presumptuous of the victims of guilt without any trial or conviction.

### **RECOMMEDATION**

For good governance in Nigeria, there is need for all arms of government, the executive, the legislature and the judiciary to function strictly in line with their constitutional duties. Sections 4, 5 and 6 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) enshrine separation of powers. Thus, when the President assumes Executive Power to impound other people's property without judicial pronouncement, he will be trespassing in the judicial province and it is a breach of the principles of separation of powers. It also runs contrary to section 36 (5) of the Nigerian 1999 Constitution (as amended) which states that "Every person charged with a criminal offence shall be presumed to be innocent until he is proved guilty". Again, the timing of the Executive Order No. 6, irrespective of the government's argument of its good intentions, could be prone to abuse. And those who feel concerned that it could be applied against persons who are victims of wrong suspicions may not be crying wolf. Well-meaning Nigerians should not rest on their oars in their fight against the implementation of the said Executive Order. The implication of allowing the said order to fly would amount to assault to our nascent democracy and has the potential of encouraging the President to shun out more Executive Orders that will work hardship on the good people of Nigeria. The action of the President is likely to influence State Governors to start shunning out Executive Orders with reckless abandon that may derail our nascent Democracy, if not checked, as witnessed recently in Kogi State when Governor Bello signed Executive Order restricting of heavy duty vehicles on state roads.<sup>34</sup>The action of the present government is nothing less than a descent into totalitarianism, absolutism and fascism and must be nipped in the bud.

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<sup>34</sup> John Adams, Governor Bello signs Executive Order restricting movement of heavy vehicles on state roads, Daily Sun Newspaper, p. 38.