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| Articles | | Page |
|---|-----------------------------------|-------------|
| The Relationship of Law and Morality: Dichotomy or Complementarity | B. O. Okere | 1 |
| Electronic Waste and Developing Economies: What Options for Nigeria? | E. U. Onyeabor | 21 |
| Legal Framework for Nigeria's Investors Protection Fund | E. O. Nwosu & C. Ngozi | 48 |
| Trade Disputes Resolution under Nigerian Labour Law | C. C. Obi-Ochiabutor | 71 |
| The Bar and the Bench as Agents of Consumer Advocacy in Nigeria | E. L. Okiche | 88 |
| Executive Modification of Existing Laws under Section 315 of the 1999 Constitution | M. C. Anozie | 106 |
| A Critical Analysis of the Challenges to and Prospects of the Right to Development as a Human Right | D. U. Ajah | 126 |
| Nigeria and Cameroon: The Bakassi Dispute | J. Ezeilo | 148 |



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EXECUTIVE MODIFICATION OF EXISTING LAWS UNDER SECTION 315 OF THE 1999 CONSTITUTION*

Introduction

The introduction of a new Constitution generally necessitates measures to adapt the existing laws and bring them into conformity with the new legal order. The adaptation may be minor and simple, either changing the names, titles or designations or substituting appropriate functionaries¹ in an existing law; it may of course be extensive, deleting, amending or repealing an existing law.² The adaptation of an existing law is strictly a legislative function. Because it requires prompt action which the cumbersome nature of the legislative procedure may not produce, it has become both expedient and desirable for most countries³ to give this adaptive power to the President or Head of State, i.e. to the executive.⁴

Consistently with this practice, the 1999 Constitution empowers the President or Governor to make such modifications in the text of an existing law as he considers necessary or expedient to bring that law into conformity with the provisions of the Constitution.⁵

Existing laws are laws which were in force immediately before the coming into force of a particular Constitution. Such laws under the 1999 Constitution may be divided into two groups:

- a) Laws relating to matters over which the National Assembly has legislative powers (Federal laws).
- b) Laws relating to matters over which a State House of Assembly has legislative powers⁶ (State laws). In *Governor of AkwaIbom State v Umah*,⁷ the Court of Appeal held that the Local Government Edict of Akwa

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¹ See *A.G. of Ogun State v. A. G. of the Federation* (1982) 1-2 S.C. 13.

² Repeal of the Petroleum (Special) Trust Fund PTF Decree No 25 of 1994.

³ See the Constitutions of some Commonwealth countries, i.e. The Constitution of the Federal Republic of Nigeria, 1999, S. 315. The Constitution of Islamic Republic of Pakistan, Art. 268(2).

⁴ B. O. Nwabueze, *The Presidential Constitution of Nigeria* (London: C. Hurst & Co., 1982) p. 171.

⁵ The Constitution of the Federal Republic of Nigeria, 1999, S. 315 (2).

⁶ J. O. Akande, *Introduction to the Nigerian Constitution 1979* (London: Sweet & Maxwell, 1982) p. 274.

⁷ [2002] 7 NWLR (Pt 767) p. 738.

Ibom State, 1988 came into force on 1st January 1988, and was in operation in the State when the 1999 Constitution came into operation on 29th May 1999. By virtue of section 315(4)(b) of the 1999 Constitution the Edict became an existing law.

Section 315 of the 1999 Constitution, (hereinafter referred to as the Constitution) confers on the President the power to modify federal laws while a State Governor similarly has the power to modify state laws. This implies that the President or a Governor has been given legislative functions to perform without the assistance of the National Assembly or the appropriate State House of Assembly.

It depends on the provision of a given constitution whether the adaptation of the existing laws can be done at any time during the life of that constitution or within a limited time. For instance, the 1963 Republican Constitution of Nigeria provided that the adaptation could be done validly only during the three years immediately following the date it came into force.⁸ The 1999 Constitution provides that the power is exercisable "at anytime" with no express limitation as to time.⁹ But a time limit may be inferred from the fact that the provision conferring it appears under the part of the Constitution headed 'transitional provisions'. This is because a provision designed to facilitate the transition from an old legal order to a new legal order must be temporary in nature and for a short period of time.

The aim of this work is to study the constitutional provision on the modification of existing laws in Nigeria in order to ascertain the limits within which the President or the Governor can modify or adapt an existing law within the scope of section 315 of the Constitution.

a) Nature and Scope of President's or Governor's Adaptive Legislative Power

Section 315 of the Constitution empowers the President or a Governor to make an order modifying an existing law. By this provision, the President can modify any Act of the National Assembly and any other law respecting any matter on which the National Assembly is empowered by the Constitution to make laws. For instance, matters in the exclusive and concurrent

⁸ The Constitution of the Federal Republic of Nigeria, 1963, section 156(2).

⁹ See *A.G. Abia & 35ors v. A. G. Federation* (2003)13 NSCQR 592 where it was held that it is obviously now deliberate that section 315 of the 1999 Constitution has no limited time.

legislative lists are within the legislative competence of the National Assembly, and any law relating to them may be modified by the President. Also, the Governor, empowered to modify an existing law relating to a subject matter on which the House of Assembly is authorized to make laws, can modify laws on the concurrent and residual matters. It is important to note that laws made during a military regime by the Federal Military Government on any matter which the Constitution has now made exclusive to the State Government are by virtue of section 315(1)(b) deemed to be state laws. They can, therefore, be modified by a Governor and not by the President. In *Attorney-General of Lagos State v. Attorney-General of the Federation*,¹⁰ the Federal Military Government passed the Nigerian Urban and Regional Planning Decree No. 88 of 1999 for the entire Federation, on a residual subject matter under the 1999 Constitution. On the coming into effect of the 1999 Constitution, the above law became an existing law by the virtue of section 315 of the Constitution. The question that came before the Supreme Court in this case was whether the above law should be regarded as an Act or a Law.

The Supreme Court held that it was deemed to be an Act of the National Assembly which by the Constitution it could make, under its residual power, but for the Federal Capital Territory, Abuja only. It was also deemed to be a Law of the State House of Assembly which by the Constitution it could make, under its residual power, for the respective State.

As a Law in Lagos State, the Governor is the appropriate authority, who can by order make such modifications in the text of Decree No. 88 of 1992, in the manner he considered necessary or expedient to bring it into conformity with the provisions of the Constitution. He may do so by only omitting all the provisions relating to the Federal Government or may repeal the entire law as it applies to Lagos State according to section 315(4)(c).

But where the subject matter of an existing law is in the concurrent legislative list, then the law will be regarded as a

¹⁰ [2002] 12 NWLR (Pt. 833) p. 592. See also *Fawehinmi & Ors., v Babangida & Ors*(2003)13 NSCQR p. 592 where it was held that since the 1999 Constitution made the tribunals of inquiry a residual subject matter, that the Tribunals of Inquiry Act 1966 promulgated by the Federal Military Government for the entire Federation under the enabling law is an existing law pursuant to Section 315 of the 1999 Constitution and is deemed to be an Act enacted by the National Assembly for the Federal Capital Territory Abuja only and a Law enacted by a State House of Assembly under the residual powers of both legislatures.

federal law or a state law. It is federal law if it is promulgated by the Federal Military Government even if for the benefit of the States. In *Attorney-General of Ogun State and Others v. Attorney-General of the Federation*,¹¹ the adaptations made by the President in the Public Order Act, an existing law on a concurrent matter enacted by the Federal Military Government, were challenged by the State Government as unconstitutional, and an invasion of the legislative powers vested in the National Assembly and House of Assembly. They also contended that the Public Order Act, having been enacted for the benefit of the State, took effect as a State law. The Supreme Court held that since the Act was enacted by the Federal Military Government it took effect not as a State law but as a federal law and is, therefore, deemed to be an Act of the National Assembly. Being an Act of the National Assembly, the appropriate authority to make such modifications or changes in its provisions is the President under section 274 subsection (4) (c) of the 1979 Constitution.

Where the existing law passed by the Federal Military Government was on a subject matter which exceeded the powers conferred on, and the scope of the legislative competence of, the National Assembly under the Constitution, the President must modify the law to bring it in conformity with the Constitution. If the President fails to do so, the law cannot be executed for unconstitutionality. For example, in *Togun v. Oputa (No. 2)*¹², where the Tribunals of Inquiry Act¹³ in its section 1(1) authorized the President to constitute a tribunal to inquire into any matter or thing or into the conduct or affairs of any person, the Court of Appeal held that the Constitution conferred no such powers due to the limitations in sections 4 and 5 of the Constitution. Cap. 447 was therefore void for inconsistency with the Constitution. The Court held further that, had the President exercised his powers under section 315 of the Constitution to modify the statute, limiting it to matters and things within the legislative competence of the National Assembly, it could have been saved. For then in the process, the offending expansive powers could have been removed, limiting the statute to the scope of the legislative competence of the National Assembly. But, he did not. As it is, not having been modified to bring it into conformity with the provisions of the Constitution, it stood invalidated, being

¹¹ (1982) 1-2 S.C. 13.

¹² [2001]16 NWLR (Pt 740) p. 597.

¹³ Cap. 447, Laws of the Federation of Nigeria, 1990.

inconsistent with sections 4 and 5 of the Constitution.

The question which might be asked is: What sort of modifications are allowed? Section 315(4)(c) of the 1999 Constitution provides that "modification" includes addition, alteration, omission or repeal. Accordingly, the modifications allowed are not limited to minor changes such as altering names, dates and titles,¹⁴ but extend to major changes like deleting some sections of a law, or substituting an old section with a new one¹⁵ or completely repealing portions or sections of an existing law.¹⁶ In *Attorney-General of the Federation v Attorney-General of Abia State & 35 others*,¹⁷ the Supreme Court held that the appropriate authority in respect of Cap. 16, a law of the Federation, is the President. Thus, the President has constitutional power, by order, to modify Cap. 16 either by way of addition, alteration, omission or repeal, to bring it into conformity with the Constitution.

It is noteworthy that whereas section 274(2) of the 1979 Constitution provided for "such changes", section 315(2) of the 1999 Constitution provides for "such modifications" in the text of an existing law as he considers necessary or expedient to bring that law into conformity with the provisions of the Constitution.

It has been argued in respect of the 1979 Constitution that since the words 'such changes' were used only in section 274(2) the expression "such modifications" would be construed to permit only clerical or verbal changes like changing names, titles and designations and substituting appropriate functionaries. It does not authorize the repeal or the deletion of the main text of any existing law.¹⁸ However, that argument cannot be sustained in view of the fact that section 274(4) (c) of that Constitution defined "modification" to include "addition, alteration, omission or repeal". Therefore, "such modifications" as were considered necessary under section 274(1) could be the "repeal" of a law itself or a section of it.

That Nwabueze's argument cannot be sustained is now borne out by section 315 of the 1999 Constitution which has repealed section 274 but replaced "such changes" in section 274(2) with "such modifications" in section 315(2). The

¹⁴ *Samuel Igbe v. The Governor of Bendel State* (1981)1 N.C.L.R. 183

¹⁵ *A.G. of Ogun State v. A. G. of the Federation* (1982) 1-2 S.C. 13.

¹⁶ *Usman Mohammed v. A. G. of Kaduna State* (1981) N.C.L.R. 117.

¹⁷ 15(2002)10 NSCQR p. 163.

¹⁸ Nwabueze, *Federalism in Nigeria under the Presidential Constitution*, *op. cit.* at p. 352.

implication is quite clear that the President's or Governor's adaptive power in this 4th Republic even under section 315(1) is not limited to only clerical or verbal changes but include repeal and deletion.

b) Limitations on the President's or Governor's Legislative Power

From the provisions of section 315 of the 1999 Constitution, the power to modify an existing law given to the President, in the case of Federal laws, or Governor, in the case of State laws is limited in two main respects, namely:

- i. Sections 4(1) and (6) of the Constitution limits the power of the President by requiring him to adapt the laws so as to make them conform with the constitutional division of legislative power between Federal and State legislatures. For example, a decree which applied to all parts of the country on a matter that is on the concurrent list should be modified so as to apply as an Act of the National Assembly made within the legislative authorities of the central legislature.
- ii. The primary purpose of the change or modification must be to bring the law into conformity with the Constitution. Therefore, if the law is not in any way inconsistent with the Constitution, there will be no change or modification. Where there is inconsistency, the change or modification should not go beyond making the law conform to the Constitution. In *Adesoye v Governor of Osun State*,¹⁹ the Supreme Court held that by virtue of section 315(2) of the 1999 Constitution, the Governor of a State is allowed to make orders or modifications in the text of any existing law deemed to be a law made by the House of Assembly of that State as considered necessary or explicit to bring the existing law into conformity with the provisions of the 1999 Constitution.

The second limitation should not be interpreted to mean that the President or Governor is not allowed to authorize changes in the substance or policy of the law. He can change the substance or section of an existing law which conflicts with the Constitution. Examples of this are provisions which violate human rights guarantees or the federal character of the country. But this limitation implies that the President or Governor shall not, in the exercise of his adaptive power, act contrary to the provisions of the Constitution. This was illustrated in Pakistan in 1963. In

¹⁹ [2005]16 NWLR (Pt. 950) p. 1.

Hague v Chowdhury,²⁰ Article 274(3) of the 1962 Constitution of Pakistan empowered the President to "direct or order that the provisions of the Constitution shall have effect subject to such adaptations as he may deem necessary and expedient". The Pakistan Constitution also provided that a member of the National Assembly appointed a Minister will vacate his seat. The President appointed two members of the National Assembly as Ministers and since he wished them to retain their seats in the Assembly, he used his adaptive power to amend the provisions of the Constitution which he found inexpedient in this case. The amendment was declared null and void by the court for, if allowed, it would have enabled the President to alter a fundamental provision of the Constitution without resorting to the special amendment procedure.

Also the President should not use his adaptive power to modify an extinct or obsolete law, as this will mean that the President is usurping a legislative function which is contrary to the doctrine of separation of powers embodied in our Constitution. This was what happened in 2004 when President Obasanjo modified the Emergency Powers Act 1961 an obsolete law which was at the time removed from the laws of the Federation by the Law Review Commission. He modified the law in order to declare a state of emergency in Plateau State. His action was wrong; the appropriate thing he would have done was to ask the National Assembly to pass a new Emergency Powers Act which would empower him to declare the State of emergency.

c) Separation of Powers

In order to understand perfectly, why it is possible for the President or Governor who is a member of the executive arm of government, to exercise legislative functions under the Constitution, we have to discuss briefly the doctrine of separation of powers. The doctrine simply means that the governmental powers of a country are divided between three branches of government to wit: the legislature, the executive and the judiciary.²¹ The division of powers is made in such a way that each branch is independent of others and none of the branches should interfere with, or control, the exercise of powers or functions which properly belong to the other, but each branch

²⁰ *Times Law Report* 22 Nov., 1963.

²¹ N. Parpworth, *Constitutional and Administrative Law* (London: Butterworths, 2000) p. 18.

could act as a check on the other.²² Over the years, it was noticed that the application of the pure doctrine of separation of powers was impossible, thus, the doctrine has been modified by the theory of checks and balances. Under this current arrangement, each branch of government is given the power to exercise a degree of direct control over the others by authorizing it to play a part, although only a limited part, in the exercise of the others' functions.²³ The modified doctrine of separation of powers has been adopted by the 1999 Constitution. Under the Constitution, the legislative powers are vested in the legislature,²⁴ the executive powers are vested in the executive,²⁵ the judicial powers are vested in the judiciary,²⁶ and there are in-built checks and balances. The above principle has been given judicial pronouncement in *Paul Unongo v Aper Aku and others*,²⁷ where Kayode Eso, J.S.C., declared as follows:

The Constitution of the Federal Republic of Nigeria 1979 which is hereinafter referred to as the Constitution is very unique compared with the previous Constitutions, in that the executive, the legislature and the judicature are each established as a separate organ of government. There is what can be termed a cold calculate rigidity in this separation, see sections 4, 5 and 6 of the Constitution which establish the legislature, the executive and the judicature respectively. The real connecting link among these three is that they provide checks and balances on one another. But though there are these checks and balances one cannot and must not usurp the functions of the other.²⁸

Under the doctrine of separation of powers the three branches of government are independent, equal and co-ordinate. No branch is controlled by the other, although each acts as a check on the other.

²² M. E. Joye. And K. Igweike, *Introduction to the 1979 Constitution* (London: The Macmillan Press Ltd, 1982) p. 136.

²³ This is why we have provisions in our Constitution which empower the executive arm of government to exercise some legislative functions i.e. ss. 32, 58, 59, 100 and 315 of the 1999 Constitution.

²⁴ S. 4 of the 1999 Constitution.

²⁵ S. 5, *Ibid.*

²⁶ S. 6, *ibid.*

²⁷ (1983)2 S.C.N.L.R., p. 332.

²⁸ *Ibid.*, p. 361

d) Application of Section 315 of the 1999 Constitution

Section 315 of the Constitution and its variant forms in earlier Constitutions have been construed and applied by the courts in a number of situations. Examples include:

- a) the adaptation of the Public Order Act, 1979;
- b) the repeal of the Petroleum (Special) Trust Fund (PTF) Decree 25 of 1994 by President Obasanjo;
- c) Modification of Allocation of Revenue (Federation Account, etc) Act 1990 as amended by Decree (No. 106) of 1992;
- d) the amendment of Local Government Laws, and
- e) the adoption of Sharia law.

(a) The Public Order (Adaptation) Act, 1979

The Public Order Act 1979 was made by the Federal Military Government to apply to the whole country, and replace the divergent state laws on the subject. It was, therefore, an existing law under section 274 of the 1979 Constitution. During the Second Republic, the President, acting under Section 274(4)(c) of that Constitution,²⁹ sought to adapt the Public Order Act. He modified section 1 by:

- a) substituting "Commissioner of Police" for "Military Administrators",
- b) substituting a new subsection (5) for the existing subsection, and
- c) deleting the whole of subsection (6).

Also, section 4(3) was modified by the deletion of the words "after consultation with the Military Administrators" and substitution therefore of the words "with the concurrence of the Governor of the State". In section 6(2), the "Attorney-General of the Federation" was substituted for the "Attorney-General of the State" and in section 12, the definition section, certain consequential amendments were made.

Finally, new sections which conferred specified powers on the Minister charged with the responsibility for police affairs were substituted for sections 10 and 11.

Being dissatisfied with these modifications in the Public Order Act 1979, the then Governments of Ogun State, Bendel State and Borno State challenged their validity in the Supreme Court, and the three cases were consolidated into one case.³⁰ The State Governments contended, *inter alia*, that the adaptations

²⁹ This section is similar to s. 315 of 1999 Constitution

³⁰ *A.G. of Ogun State & Ors v A.G. of Federation* (1982) 1-2-2 S.C. p. 13.

were unconstitutional and in excess of the powers vested in the President by section 274 of the 1979 Constitution. They also contended that the Order made by the President was a plain invasion of the legislative powers vested in the National Assembly and the State House of Assembly. The State Governments contended further that the Public Order Act, 1979 was a State law.

In deciding the above case, the Supreme Court had to answer the question whether the Public Order Act 1979 No. 5 was, before the 1st of October, 1979, the date of coming into force of the 1979 Constitution either a Federal legislation or a State legislation. The Supreme Court held that since the Public Order Act was passed by the Federal Military Government by the constitutional powers conferred on it by section 1(1) to (4) of the Constitution (Basic Provisions) Decree, 1975 No. 32, as a uniform legislation for the whole country to replace the divergent State laws on the subject, it took effect as a federal legislation. This was because the maintaining and securing of public safety and public order was concurrent to both the federal and regional Governments under the 1963 Constitution, being a matter in the concurrent legislative list, i.e. items 18 and 29. Consequently, on 1st October, 1979 when the 1979 Constitution came into force, the Public Order Act (No.5 of 1979), as an existing law by virtue of the provisions of section 274(4)(b) of the Constitution, took effect as an Act of the National Assembly under the provisions of section 274(1)(a) of the Constitution. This was because it was a law the National Assembly had power to enact by virtue of the provisions of sections 4(2) and 11 (1) of the Constitution.

The next question answered by the Court was whether the Public Order Act was an existing law within the context of the Constitution. The Supreme Court held, rightly, it seems, that the Public Order Act was an existing law because under section 274(4)(b) of the 1979 Constitution, the phrase "existing law" was defined as any rule of law or any enactment or instrument whatsoever which was in force immediately before 1st October 1979. Thus, by virtue of section 274(1)(a) of the 1979 Constitution, the Public Order Act became an Act of the National Assembly.

The Supreme Court also answered the question whether the President was right in substituting (or adapting) "the Commissioner of Police" in the 1981 Public Order Act for "the Military Administrator" wherever the latter expression appeared in the 1979 Public Order Act and whether the President was also right in substituting "the Attorney-General of the Federation" in

the 1981 Public Order Act for "the Attorney-General of a State" wherever the latter expression appeared in the 1979 Public Order Act. The Supreme Court held, correctly, that the President was not wrong in failing to retain the phrases "Governor" and Attorney-General of the State in the said Act because under a federal Constitution, the President could not validly or lawfully impose such duties or obligations or rights which could arise under the Public Order Act on a State Governor or State functionary.

Finally, the Supreme Court considered the question as to who was competent under the 1979 Constitution to adapt the Public Order Act, 1979. Having held that the Act was an existing federal legislation, the Supreme Court had no hesitation in holding that the President was the appropriate authority to adapt the Act by virtue of section 274(4)(a)(i) of the 1979 Constitution. The Court further maintained that the President had the power under section 274(2) of the Constitution to make such changes in the text of the Act as he considered necessary or expedient to bring it into conformity with the provisions of the Constitution. In making these changes in the text of the Act, the President could modify the Act within the limits prescribed by the Constitution.

(b) Repeal of the Petroleum (Special) Trust Fund (PTF) Decree No. 25 of 1994

In 1994 the Petroleum (Special) Trust Fund Decree was enacted by the Federal Military Government. Under this law was established the Petroleum (Special) Trust Fund into which should be paid all the monies received from the sale price of petroleum products less the marketer's margin. Pursuant to that, the Federal Military Government established a board known as the Petroleum (Special) Trust Fund Management Board which would have general control of the Fund. The Board was made up of 10 members appointed by the Federal Military Government.

On June 29, 1999, which was precisely one month from the date he assumed office, the President dissolved the Board of the Petroleum (Special) Trust Fund (PTF) and appointed Dr. Harouna Adamu the Sole Administrator of the Fund with mandate to oversee the systematic and orderly winding down of the organization and its activities.

The dissolution of the PTF by the President was informed by the belief that the provisions of Decree No. 25 of 1994 were clearly in conflict with the Constitution and needed to be brought into conformity with it. For example, section 1 (1) of the Decree which provided that all monies received from the sale of

petroleum products less approved production cost per litre were to be paid into the Petroleum (Special) Trust Fund created by the Decree under section 2 was clearly a violation of sections 80 and 162(1) of the Constitution.

Section 80(1) provides that:

All revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National Assembly into any other public fund of the Federation established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the Federation.

Even if it is argued that the Petroleum (Special) Trust Fund was a public fund as provided above, the Decree still contravened section 80(3) and (4) of the Constitution, because these two subsections provide that no money will be withdrawn from any public fund of the Federation except the issue of that money has been authorized by an Act of the National Assembly and in the manner prescribed by the National Assembly. The problem with the Petroleum (Special) Trust Fund is that though it is a public fund, its control is not under the National Assembly. What the President could do, acting under section 315 of the Constitution, was to place the Fund under the authority of National Assembly by requiring that no kobo out of it should be spent except with the authority of the Act of the National Assembly or to dissolve the Fund as he did. Therefore, it is important to note that the violation of the Constitution here was not the continued funding of the Fund but the continued control by the Board of Funds that were supposed to be paid into the Federation Account or Consolidated Revenue Fund. This is because by this control the Board usurped the power of the National Assembly since it controlled the funds which should have been under the control of the National Assembly had the money been paid into the Federation Account. Therefore, its establishment was unconstitutional.

It may, of course, be argued that, the PTF Decree having become an Act of the National Assembly on the 29th of May 1999 by virtue of Section 315 of the 1999 Constitution, there was no breach of section 80 of the Constitution.³¹ I strongly disagree with this view because the PTF Act enabled the Board to control money paid into the Petroleum Trust Fund (which could be referred to as a public fund). This is, of course, contrary to the provisions of section 80(3) and (4) of the Constitution which

³¹ *The Guardian*, July 8, 1999, p. 8.

clearly stipulates that the money paid into the Consolidated Revenue Fund or any other public fund must be subject to the control of the National Assembly.

Section 162(1) stipulates that the Federation shall maintain a special account called the Federation Account into which shall be paid all revenues collected by the Government of the Federation. Section 162(3) also provides that:

Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the Local Government Councils in each state on such terms and in such manner as may be prescribed by the National Assembly.

Thus the continued diversion of public funds into the PTF was clearly a violation of this subsection because the Federal and State Governments and Local Government Councils would be denied their proper share of the revenue of the Federation. Besides, such funds when pooled into the Federation Account are to be shared out in accordance with a formula prescribed by National Assembly. Therefore, having a special trust fund to be controlled and managed by a Board outside the authority and control of the National Assembly is inconsistent with section 162 of the Constitution.

Also powers conferred on the Petroleum (Special) Trust Fund (PTF) Management Board by section 3(1) (d) of Decree No. 25 of 1994 were powers already conferred on the various ministries of the Federation. For example, the power to award contracts for the construction of roads or maintenance of roads throughout the country is within the jurisdiction of the Ministry of Works. The continued funding of the Petroleum (Special) Trust Fund would give rise to duplication of powers and functions.

The President's action was criticized by the Senate as an unwarranted usurpation of legislative functions, and on the 3rd of July 1999, the Senate, by a resolution nullified the President's action.³² However, since the President created a law, only another law or a judicial decision could nullify it. It is only the judiciary that has this constitutional right to decide whether the President acted unconstitutionally or illegally when an action against the President's action is properly brought before it. This action of the Senate was criticized by Late Chief Rotimi Williams (SAN) a legal luminary, who stated that:

³² *The Guardian*, July 8, 1999, p. 8.

...I do not think that it is within the competence of that legislative body to pass a motion to "nullify" the executive action of the President. The Senate is an arm (no doubt a very important arm) of the National Assembly. But it is not by itself alone, the National Assembly. One can imagine the confusion which could be created if the House of Representatives were to take a view diametrically opposed to that reflected in the Senate resolution. The strongest objection to the action of the Senate in passing the resolution of 3rd July 1999 is the fact that it constituted itself the accuser as well as the judge of the constitutionality of the action of the President. Moreover, and again with the most profound respect to the Honourable members whose majority passed the motion in question, the limit of the powers of the Senate was disregarded. The function of the Senate is to make laws and to do everything incidental to its law making powers. But the Senate has no authority or power to interfere on control the President in the exercise of his executive powers. It cannot by a mere resolution or motion give any directive to the President regarding his exercise of executive powers nor can it undo what the President has done in the exercise of his powers. The only way in which the exercise of the executive powers of the President can be regulated is by the enactment of an Act of the National Assembly with respect to particular matters relating to such powers.³³

It could be argued that if the President acted under section 315 of the Constitution and made a law to bring the Petroleum (Special) Trust Fund (PTF) Act in conformity with the Constitution, a mere resolution of the National Assembly could not change it. The National Assembly can only nullify a law passed by the President under section 315 by enacting a new law to repeal or modify it. In *Stockdale v. Hansard*,³⁴ Stockdale sued Hansard (the Parliamentary Printers) for a libel contained in a report of prison inspectors printed under the authority of the House of Commons. Hansard pleaded that the report was published on the order of the House of Commons and was, therefore, privileged. The House of Lords held that privilege extended to papers circulated to members of Parliament but not to those sold to the public, and that mere resolution of the

³³ *Ibid.*

³⁴ 9 Ad & E. I.

House of Commons could not change the law of the land.

The abolition of the Petroleum (Special) Trust Fund by the President could be defended on the ground that the President acted within the provisions of section 315 of the 1999 Constitution. The section provides that:

- (2) The appropriate authority may at any time by order make such modifications 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.

The appropriate authority in this respect is the President since the law in question is an existing law and also a federal law. It is also important to note that the modifications which the President could make to an existing law were explained in section 315(4)(c) to include addition, alteration, omission or repeal. Thus by the provisions of this subsection the President could repeal an existing law if it is not in conformity with the Constitution.

(c) Who Can Challenge the Executive Act of the President?

The 1999 Constitution is a federal Constitution which declares that it is the supreme law of the land.³⁵ The implication of this is that the actions of the three arms of government, the executive, the legislature and the judiciary, are subject to the Constitution. Sections 1(1) and 5(1)(a) of the Constitution clearly illustrate that the executive functions of the President are not absolute and could be challenged, where the President acts unconstitutionally or arbitrarily. In such a case, the President's action can be challenged in a court of law by any person who has sufficient interest in the subject matter in issue. This simply means subjecting the President's action to judicial review.

Regarding the repeal of the PTF Decree, the parties who could challenge the action of the President seem to include any of the State Governments, any of the corporations or individuals who have contractual relationship with the PTF, and the National Assembly. When the party which challenges the action of the President has established that it has a *locus standi*, the court would assess the executive act, determine its constitutional validity and, possibly, nullify it by declaring it null and void. Only the courts in an action properly brought before it can nullify an executive act for unconstitutionality. Therefore, it may be argued that the Senate, by nullifying the President's act of scrapping the PTF on 3rd July, 1999, wrongly usurped judicial

³⁵ See section 1(1) of 1999 Constitution.

functions and therefore acted unconstitutionally. Beside, since the President's action was in nature legislative, the Senate can nullify it only by seeing that a suitable enactment is passed as stated earlier on.

However, it is noteworthy that the President subsequently rescinded the initial announcement of abolishing PTF by constituting a six member interim management committee to oversee the affairs of the PTF³⁶ and for its winding up. This does not mean that the President accepts acting unconstitutionally. The President merely softened his position in order to avoid unnecessary tension between the executive and the legislature. At the time, the Republic was still too young to experience such a conflict and confrontation between the two arms of government.

(d) Modification of Allocation of Revenue (Federation Account, etc.) Act 1990 as amended by Decree (No. 106) of 1992.

With the coming into effect of 1999 Constitution and the Supreme Court decision³⁷ the purport of section 162(3) of the Constitution is that the formula for allocation of revenue in Allocation of Revenue (Federation Account etc) Act, 1990, as amended by Decree No. 106 of 1992, is in direct contradiction to the Constitution. In accordance with section 162(2) of the Constitution the President was advised by the Revenue Mobilization Allocation and Fiscal Commission to table before the National Assembly "proposals for the revenue allocation from the Federation Account". The President tabled the proposals before the National Assembly. When the National Assembly was not forthcoming, the President invoked his powers under section 315(1) of the Constitution.

The President relying on section 315 of the Constitution made an Order i.e. Allocation of Revenue (Federation Account etc) Order 2002 modifying the Allocation of Revenue (Federation Account etc) Act 1990 as amended by Allocation of Revenue (Federation Account, etc.) Decree (No. 106) of 1992 as follows: - Section 1 of the principal Act is hereby modified by substituting therefore the following:

1. The amount standing to the credit of the Federation Account, less the sum equivalent to 13 per cent of the revenue accruing to the Federation Account directly from any natural resources

³⁶ *Daily Champion*, July 13, 1999, p. 12.

³⁷ *A.G. of the Federation v. A. G. of Abia State and 35 Others (supra)*.

as a first line charge for distribution to the beneficiaries of the derivation funds in accordance with the Constitution shall be distributed among the Federal and State Governments and the Local Government Councils in each State of the Federation on the following basis that is to say:

- a) The Federal Government 56 per cent
- b) The State Governments 24 per cent
- c) The Local Government Councils 20 per cent

Section 2 of the principal Act was modified by substituting for subsections (1) and (2) there of the following new subsections:-

- 2(1) The 56.00 per cent specified in section 1(a) of this Act shall be allocated to the Federal Government utilized as follows:-
 - a) Federal Government 48.50 per cent
 - b) General Ecological Problems 2.00 per cent
 - c) Federal Capital Territory 1.00 per cent
 - d) Stabilization Account 1.50 per cent
 - e) Development of Natural Resources 2.00 per cent
2. The 24.00 per cent standing to the credit of all the States in the Federation Account as specified in section 1(b) of this Act shall be distributed among the States of the Federation using the factors specified in this Act. Section 3 of the principal Act was modified by substituting therefore the following new section:-
3. Subject to the provisions of this Act the amount standing to the credit of Local Government Councils in Federation Account shall be distributed among the States of the Federation for the benefit of their Local Government Councils using the same factors specified in this Act.

The above Order was challenged by the 36 States of the Federation in *Attorney General of Abia and 35 Others v Attorney General of the Federation*,³⁸ where they contended that the President had no power, constitutional or statutory, to issue the said order “with particular regard to paragraphs 2(1)(a) and 3 therefore”. They also contended that the President had trespassed into the realm of powers essentially belonging to the legislature i.e. the National Assembly. Dismissing the above contentions, the Supreme Court held that since the revenue allocation formula in Allocation of Revenue (Federation Account etc.) Act 1990, as amended by Decree No. 106 of 1992 has been rendered

³⁸ (2002)13 NSCQR p. 373.

unconstitutional, the President's only option was to invoke his powers under section 315(1) of the Constitution and modify the Act to bring it into conformity with the Constitution. This, the President has done.

(d) Amendment of Local Government Laws

During the military rule, the Military Governors enacted local government edicts providing for the establishment, structure and election of local government councils. Under the edict of each State, the state executive council could, in certain circumstances, remove an elected council and set up a caretaker committee in its place. But the 1979 Constitution made a fundamental change in our local government system. It provided in section 7 that a system of local administration by democratically elected councils was guaranteed to Nigerians.³⁹

During the Second Republic some of the State Governors modified the Local Government Laws, while some Governors effected some changes in the local government system without first modifying or amending the local government laws. The Governor of Bendel State, elected under the Constitution issued an order, dissolving an elected council and replaced it with a caretaker committee appointed by him. The Constitutionality of the action was challenged in *Jideonwu v. Governor of Bendel State*.⁴⁰ Here, the Governor of Bendel State, by an order, dissolved the local government councils in the State without modifying the provisions of section 100(1)(b) of the Local Government Edict 1976, an existing law, which provided that the executive council of the State was vested with the authority to suspend or dissolve a local government council, if it was satisfied that the local government council had not discharged its functions under the Edict in a manner conducive to the welfare of the inhabitants of the area of its authority as a whole.

The court held that, for the Governor to be invested with the authority to suspend or dissolve a council there must be an amendment to the provisions of section 100 of the Local Government Edict 1976. The court further held that, according to section 274(2), the Governor is the appropriate authority to modify section 100 of the Local Government Edict 1976 and since this modification was not done, the action of the Governor was unlawful and unconstitutional and *ultra vires* his powers.

³⁹ The 1999 Constitution also has an identical provision of local government councils in its section 7.

⁴⁰ (1981)1 N.C.L.R. 4

(e) Adoption of Sharia Law by Some States of the Federation.

On the 27th of October, 1999 the Zamfara State Government adopted the complete application of Sharia Law in the State. This generated a lot of controversy. For instance, Justice Aniagolu, a former Justice of the Supreme Court, described the action of the Zamfara State Governor as treasonable. A former Chief Justice of Nigeria, Justice, Bello, had been quoted in the news media⁴¹ as saying, in a paper he presented at the Consultative Meeting of Islamic Groups on Sharia, organised by the Jam'atuNasil, that the States had the constitutional right to declare Sharia as the law of their States. To buttress his point, he relied on Sections 315(1)(b), 315(4)(b) and 315(1) of the 1999 Constitution. The view of the former Chief Justice cannot be sustained because a Governor can only exercise his powers under section 315 to modify an existing law in order to bring it in conformity with the Constitution. This is not what the Governor of Zamfara State did. There was no existing law which the Governor modified; so his action cannot be protected by section 315 of the 1999 Constitution. Besides, as Justice Bello himself later stated, his action is inconsistent with certain provisions of the Constitution, particularly those provisions guaranteeing human rights - the right to freedom of religion, the right to freedom from torture and degrading treatment and the right to freedom from discrimination. The Constitution itself in section 10 provides that no government in Nigerian should adopt any religion as state religion. In view of all the above provisions of the Constitution, the Governor of Zamfara State cannot by any stretch of imagination claim or pretend that, in adopting the Sharia system of law, he was trying to bring any existing law into conformity with the Constitution under section 315.

Conclusion

From the above discourse, it has been noticed that the adaptive powers given to the President/Governor is desirable to facilitate the transition from an existing legal order to a new legal order, in this instance, from the military dispensation to the 1999 Constitution regime. Our discussion has shown that even though the powers of adaptation conferred on the executive appear quite extensive, in practice, it is not as extensive as it appears. It is a power that must be exercised within narrow limits so as not to run into conflict with other arms of government especially the legislature. Since the inception of the Fourth Republic, we have

⁴¹*This Day*, November, 28 1999

noticed the slow pace at which the National Assembly and the State Houses of Assembly discharge their legislative functions. If the provisions of section 315 of the Constitution were not included in the Constitution, transition to the new legal order would be adversely affected. The task of adapting some of the existing laws would fall on the judiciary, and the burden would be very heavy and unbearable for the courts.