EXECUTIVE ORDERS AND DELEGATED LEGISLATION: CONSTITUTIONAL LIMITS IN AUSTRALIA, NIGERIA AND THE UNITED STATES*

Abstract
This article examines the constitutional limits of executive law-making through a comparative analysis of Australia, Nigeria and the United States. It argues that Executive Orders are constitutionally valid only where they derive authority from the Constitution or enabling legislation. Based on Baxter v Ah Way,[1] Trump v. Barbara,[2] and Attorney-General of Abia State and 35 Others v Attorney-General of the Federation,[3] the research illustrates that executive orders derive their legitimacy from the Constitution and enabling law rather than from inherent executive authority. Adopting doctrinal and comparative legal methodology, it concludes that judicial review continues to be the primary safeguard against the misuse of delegated legislative power and suggests comprehensive statutory regulation of executive orders in Nigeria.

Keywords: Executive Orders, Delegated Legislation, Constitutional Limits, Australia, Nigeria, United States

1. Introduction

This research is comparative constitutional law research on recent judicial decisions in Nigeria and the United States with an Australian background concerning the use and adoption of Executive Orders in these jurisdictions. Executive Orders are administrative instruments used to communicate government policies arising from the inherent executive authority and delegated legislation. The research adopts a comparative methodology approach with deep analysis of the key judicial authorities and the principle of delegated legislation. The research begins with the Concept and Legal Status of Executive Orders, followed by Parliamentary Supremacy and Delegated Legislation, Analysis of the *Trump v Barbara* case, then Executive Orders in Nigeria and then finally Comparative Lessons and Recommendations for a more robust and clearer Executive Orders legal framework in Nigeria. Hence, this study proposes a three-tier constitutional framework for assessing executive law-making: (i) constitutional authority, (ii) statutory delegation, and (iii) judicial supervision.

2. Concept and Legal Status of Executive Orders

Executive Orders are signed written instruments by which the head of the executive arm of government,[4] usually the President or other head of the executive arm of government, communicates a policy directive that may have binding legal effect where authorised by the Constitution or statute, or to regulate actions of governmental agencies or, in appropriate circumstances, members of the public.[5] Nevertheless, to have legal effect, its legitimacy must arise from an Act of Parliament or the Constitution itself.[6] Similarly, Parliament can nullify an executive order issued pursuant to the powers delegated to the President through effective law-making. An Executive Order can be impermanent, as a sitting president can revoke any previous Executive Order by a previous administration.

An Executive Order is conceptually distinct from delegated legislation. It is a presidential instrument through which executive authority is exercised, whereas delegated legislation refers to law-making authority conferred by the legislature. An Executive Order may, however, be issued pursuant to delegated statutory authority.[7] This is because delegated legislation ordinarily obtains its authority from an enabling Act through which Parliament confers specified regulatory powers upon the Executive. An Executive Order, by contrast, may arise directly from constitutional executive authority and need not necessarily constitute delegated legislation. Nevertheless, where an Executive Order purports to create substantive rules having the character of law, the question becomes whether the President possesses a valid constitutional or statutory source of such law-making power. Moreover, according to Article VI, Clause 2, of the United States Constitution[8], the U.S. Constitution is the Supreme Law of the land; federal statutes enacted by Congress prevail over inconsistent executive action, and then Executive Orders are valid only where they are in conformity with the Constitution and statutory authority.

3. Parliamentary Supremacy and Delegated Legislation

It is firmly established in law that under the doctrine of separation of powers the Parliament makes the law, the executive enforces laws, and the judiciary adjudicates disputes about the law. To this end, under Dicey's classical formulation of parliamentary sovereignty, Parliament possesses the legal authority to make or repeal any law, and no other institution may override or invalidate its legislation.'[9] In the words of Dicey, officials exercise authority because Parliament has

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[1] *Baxter v Ah Way* (1909) 8 CLR 626, 638

[2] *Trump v Barbara* (US Supreme Court, No 25-365, 30 June 2026)

[3] *Attorney-General of Abia State & 35 Ors v Attorney-General of the Federation* (2022) SC/CV/655/2020. (Executive Order No. 10 case).

[4] Kevin T Richards, 'Executive Orders: An Introduction' (Congressional Research Service, Report No R46738, 29 March 2021) 1

[5] Department of the Senate, *Odgers' Australian Senate Practice*, ch 15 'Delegated Legislation' (online)

[6] Kevin (n 4)

[7] Kevin (n 4)

[8] US Const art VI cl 2

[9] A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan and Co, 1915) 172.

granted it, not because they possess independent sovereign power.[10] Moreover, based on the principle of separation of powers, the evidence indicates that legislative authority should never be granted unduly to the executive or any institution. But it is practical for Parliament to delegate certain lawmaking powers to the executive for the smooth exercise of governmental affairs.

The 1932 Donoughmore Committee[11] identified unforeseen contingencies and the 'need for flexibility' as reasons for delegated legislation. Even though it can be argued that delegated legislation does not give room for rewriting an Act of Parliament or contradicting it. Therefore, it suffices to say that an executive power can implement legislation, but it cannot become an independent source of legislative power. In the case of *Baxter v. Ah Way*,[12] a foundational Australian delegated legislation case, it was established that the Commonwealth Parliament may legally confer limited law-making powers on the executive without unlawfully surrendering its legislative authority. In this case, the Commonwealth Parliament of Australia, under Section 52 (g) of the Australian Customs Act of 1901,[13] authorised the Governor-General in Council to ban the importation of specified goods by Proclamation. Pursuant to that power, a Proclamation was issued on the 29th of December 1905 and published in the Commonwealth Gazette on the 30th of December 1905.[14] In 1909 Ah Way, who was prosecuted for importing such opium, challenged the validity of the Proclamation on the ground that the Commonwealth Parliament had impermissibly delegated its legislative power to the Executive.[15] The High Court of Australia rejected the challenge, holding that the provision constituted conditional legislation rather than an unconstitutional delegation, and that Parliament itself had determined the legal consequences of the prohibition while leaving the Executive to determine the goods to which the statutory prohibition would apply.[16]

In fact, in the words of Justice O'Connor, 'I think, therefore, that the full powers of legislation which are conferred upon the Commonwealth parliament to deal with Customs and to deal with trade and commerce between the Commonwealth and other countries embody a power to enact the conditional legislation now in question, which enables the Executive Government, in keeping a watchful eye upon the interests of the Commonwealth, to act in the public interest on some sudden emergency which it would have been impossible for any legislature, no matter how great the extent of its prescience, to foresee.'[17] Therefore, this article argues that the classical case above provides for the practical justification for delegated legislation. In the sense that Parliament cannot foresee every future circumstance, especially sudden emergencies. Hence, Parliament can establish a legislative framework and confer on the executive a limited or specified power to respond to circumstances that Parliament could not reasonably anticipate. The *ratio decidendi* was that Parliament had itself determined the legal consequences of prohibited imports; the Governor-General merely determined the factual circumstances in which the statutory prohibition would operate.

But it is important to note that Australia does not have a formal instrument called an 'Executive Order' instead it uses 'Proclamation' or 'Regulation'. Nonetheless, this is closer to subordinate or delegated legislation than a U.S-styled executive order that is issued from inherent or constitutional executive power. The important thing, to note insofar as this research is concerned is that both raise the same core question, what is the valid source of law-making authority exercised by the executive? However, in the case of *Attorney-General of Abia State and 35 Others v. Attorney-General of the Federation*,[18] the Nigerian Supreme Court was confronted with Executive Order No 10 of 2020, which seeks to achieve about five objectives, including financial autonomy of state legislatures and judiciary, preventing state governors from withholding the money, making their allocation a First Line Charge (FLC), requiring states to reflect the autonomy in their budgets and strengthening judicial infrastructure.[19] In the court, it was argued that the Order was consistent with an already existing constitutional provision of Section 121 (3).[20] The FG's stated position was therefore that the Order was enforcing an already existing constitutional requirement and not establishing an entirely fresh policy. But the evidence indicates that the constitutional issue arose from the enforcement mechanism adopted by Executive Order No 10, particularly the purported power of the Accountant-General of the Federation to deduct funds directly from State allocations.

By contrast, in a 6-1 majority decision, the Supreme Court opined that the Executive Order was ultra vires the presidential powers, unconstitutional, illegal, null and void. In particular, the court found that the Executive powers under section 5

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[10] Ibid 9
[11] Ceylon Constitutional Reform Commission, *Report of the Special Commission on the Constitution of Ceylon* (1932).
[12] *Baxter v Ah Way* (1909) 8 CLR 626, 638
[13] *Customs Act 1901* (Cth) s 52(g)
[14] Baxter (n 12)
[15] Baxter (n 12)
[16] Baxter (n 12)
[17] Baxter (n 12)
[18] *Attorney-General of Abia State & 35 Ors v Attorney-General of the Federation* (2022) SC/CV/655/2020. (Executive Order No. 10 case).
[19] Presidential Executive Order No 10 of 2020 (Nigeria), *Implementation of Financial Autonomy for the State Legislature and State Judiciary and for Other Related Matters*.
[20] Constitution of the Federal Republic of Nigeria 1999 (Nigeria) s 121 (3)

of Nigeria's constitution did not confer on the President control over state public funds simply because he considers such an Order necessary to enforce constitutional financial autonomy. The court specifically found that the President's authorisation of the Accountant-General to deduct money from a state's Federal Account allocation pursuant to the Executive Order was beyond executive powers.

Therefore, it can be said that despite the Parliament granting conditional legislative powers to the executive, the executive cannot assume a power simply because the objectives it seeks to realise are constitutionally desirable. This article argues that the power must legally be conferred by the Constitution or the enabling Act. The practical necessity of executive flexibility does not in itself constitute a source of executive authority. Therefore, delegated legislative power must be derived from a valid legislative grant, and any executive order must remain within the boundaries of that grant.

4. *Trump v Barbara*: Facts, Judgement and Constitutional Principles

On 20 January 2025, President Donald Trump, barely after resuming his second and non-consecutive term, issued an Executive Order 14160, titled 'Protecting the Meaning and Value of American Citizenship.'[21] The Order directed federal agencies not to recognise U.S. citizenship for certain children born in the United States who, at the time of birth:

'The mother was unlawfully present, and the father was neither a U.S. citizen nor lawful permanent resident; or the mother's presence was lawful but temporary, and the father was neither a U.S. citizen nor lawful permanent resident.'[22] The Order claimed that children falling within these categories were not 'subject to the jurisdiction'[23] of the United States and therefore were not entitled to citizenship under the Fourteenth Amendment or the Immigration and Nationality Act (INA).[24] Several affected parents and children challenged the Order on grounds that contradict the Immigration and Nationality Act, the Fourteenth Amendment and the Citizenship Clause. The Fourteenth Amendment and the Citizenship Clause provide that:

> All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[25]

The litigation commenced in the United States District Court for the District of New Hampshire, which agreed to their submission and granted a preliminary injunction before the Supreme Court granted certiorari before judgment. In contrast, the United States Supreme Court granted review before judgment by the Court of Appeals for the First Circuit. The Supreme Court took the case by certiorari before judgment. Hence, the First Circuit did not determine the merits of the case. Nevertheless, the fundamental question before the Supreme Court was: Does the Fourteenth Amendment guarantee citizenship to children born in the United States to parents who are unlawfully or temporarily present? However, for this research, there is a second and more important question, which is; Can the President, through an Executive Order, change the legal meaning or application of a constitutional rule established by the Fourteenth Amendment and implemented by federal statute?

The Supreme Court, in its determination by a 6–3 judgment, although Justice Kavanaugh concurred in the judgment only in part on statutory grounds, meaning the constitutional majority opinion was joined by five Justices, while Thomas, Alito and Gorsuch dissented in full. Nevertheless, the Court concluded that children born in the United States to parents who are unlawfully or temporarily present are 'subject to the jurisdiction'[26] of the United States and therefore are citizens at birth under the Fourteenth Amendment. The majority opinion was delivered by Chief Justice Roberts along with other justices, while Justices Thomas and Alito, with Gorsuch in relevant portions, dissented. The Court concluded that the phrase 'subject to the jurisdiction thereof' refers essentially to the United States' power to govern persons within its territory. Children born in the United States to parents who are unlawfully or temporarily present are therefore ordinarily subject to that jurisdiction. Consequently, the evidence opines that the Court's reasoning was substantially based on constitutional text, historical understanding of the English common law, and precedent, particularly in the judicial case of United States v. Wong Kim Ark,[27] an 1898 landmark U.S Supreme Court case that established the principle of birthright citizenship under the Fourteenth Amendment. The U.S. Supreme Court further rejected the argument that citizenship should depend upon the parents' domicile or immigration status. It emphasised that the words 'mother,' 'father,' 'lawful,' and 'temporary' which appeared in Trump's Executive Order are absent in the Citizenship Clause.

[21] Exec Order No 14160, 90 Fed Reg 8449 (20 January 2025).
[22] Ibid 21
[23] US Const amend XIV § 1.
[24] Exec Order No 14160, 90 Fed Reg 8449 (20 January 2025).
[25] US Const amend XIV § 1.
[26] US Const amend XIV § 1.
[27] United States v Wong Kim Ark, 169 US 649 (1898)

It is important to state that the second and more important above connects directly with our delegated legislation and executive law-making discussion. Accordingly, it is paramount to state that in this case, the court did not primarily decide a delegated-legislation question. But rather it decided a constitutional interpretation. Nonetheless, the case established a powerful constitutional principle. Nonetheless, this article argues that the decision in Trump v. Barbara has established that the executive cannot unilaterally alter the legal effect of a constitutional command. Therefore, the case demonstrates that an Executive Order must always operate within the confines of the Constitution and cannot place itself above the Constitution. Similarly, in a situation whereby Parliament has passed legislation consistent with the Constitution, the President cannot merely replace the statutory rule with a different rule through executive fiat. Therefore, it can be said that *Baxter v Ah Way* established that Parliament may delegate authority to the executive because Parliament cannot foresee every future contingency. Whereas AG Abia v AG Federation holds that the President cannot assume executive powers merely because the objective is desirable. But the power must always be valid and derived from the Constitution or the enabling law. On the other hand, Trump v. Barbara illustrates the boundary of executive authority, and that an Executive Order cannot redefine or displace a constitutional guarantee simply because the President wishes to adopt a different policy.

Moreover, this article argues that the President of the United States attempted to direct federal agencies not to recognise citizenship for a class of persons whom the law protects. But the court, in its findings, held that that cannot be justified merely by describing the instrument as an Executive Order but rather the Executive Order itself must yield to the Constitution. Therefore, it is evident that an Executive Order is only a means of exercising an executive authority; it is not, by its mere issuance, a source of superior legal power, and it cannot be issued unless the law permits. It cannot also validly contradict or displace any or part of a statutory rule unless the Constitution or the enabling law confers on the executive the power to so do.

5. Executive Orders in Nigeria: Constitutional Limits and Judicial Control

Constitutional Foundation of Executive Orders

Contrary to the U.S. Constitution, the Nigerian Constitution never makes mention of Executive Orders; rather, their legal basis is found in section 5 (1) (a) and (b)[28] of the Constitution, which vests the executive powers of the federation in the President, empowering him to execute and maintain the Constitution and laws enacted by the National Assembly. Hence, an Executive Order in this sense can mean an administrative instrument by which the President directs the enforcement of the constitutional and statutory powers and not an independent source of legislative authority.

Constitutional Limits on Executive Orders

This study indicates that the Nigerian President's power to issue Executive Orders is not without limitations, and there is no Act of the National Assembly that specifically empowers him to do so; rather, the power is inherent to his executive authority under the Constitution. The first limit is constitutional supremacy under Section 1 (3).[29] This provision is to the effect that any Executive Order not in conformity with constitutional provisions is null and void to the extent of its inconsistency. Executive authority is therefore subordinate to the Supremacy of the Constitution.

Second is the inherent powers belonging to the individual branches of government or the doctrine of separation of powers. Sections 4, 5, and 6 of the Nigerian Constitution.[30] By virtue of these provisions, each tier of government has its separate powers. Section 4 confers law-making powers exclusively to the National Assembly and Section 5 vests executive power in the President, whereas Section 6 vests judicial power in the courts; as a result, therefore, an Executive Order cannot modify, repeal or alter an Act of the National Assembly or the Constitution.

Third, the Federalist system of Government. Nigeria's Supreme Court has reaffirmed this position in several landmark cases, including *Attorney-General of Abia State and 35 Ors v. Attorney-General of the Federation,*[31] where the court held that the structural autonomy of all recognised tiers of government is an unalterable constitutional requirement. Furthermore, in *Attorney-General of Lagos State v. Attorney-General of the Federation and 35 Ors*,[32] the court strengthened this position by ruling that true federalism demands strict adherence to enumerated powers, prohibiting federal overreach and protecting the residual authority of constituent states. Nigeria operates a federalist system of government with certain powers reserved for the states. Hence, the President cannot legitimately assume powers exclusively reserved to the states or local governments without legal backing. Wherever an Executive Order is issued to enforce a regulation or policy, it must always remain within the enabling legislation.

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[28] Constitution of the Federal Republic of Nigeria 1999 (Nigeria) s 5
[29] Constitution of the Federal Republic of Nigeria 1999 (Nigeria) s1(3)
[30] Constitution of the Federal Republic of Nigeria 1999 (Nigeria)
[31] *Attorney-General of Abia State and 35 Ors v. Attorney-General of the Federation,* Suit No SC/CV/343/2024(Decided July 11, 2024). (State financial autonomy/federalism case).
[32] Attorney-General of Lagos State v. Attorney-General of the Federation and 35 Ors. Suit No SC/CV/541/2025. (Decided May 22, 2026).

Judicial Control of Executive Powers

The fundamental mechanism for controlling Executive Powers is through judicial review of executive administrative acts. Judicial review constitutes the principal constitutional mechanism through which Nigerian courts supervise the legality of executive and administrative action. According to Ese Malemi, the purpose of this judicial review is to ascertain whether a 'particular exercise of delegated power is ultra vires, inordinate or otherwise'.[33] He maintained that judicial review is 'commonly granted by a court where delegated legislation is challenged on grounds of breach of the rules of natural justice, lack of fair hearing or other failure to observe the due process of law.'[34] Moreover, in the case of *Checkpoint Technologies B. V. Nigeria Ltd v Federal Inland Revenue Service*, although decided by the Tax Appeal Tribunal, it opined among other things that regulations made under an enabling Act are valid only if: a) the enabling statute delegates the power; b) the authorised body exercises that power; and c) the regulation remains consistent with the parent Act.

Similarly, in the leading case of *AG Abia State and 35 others v AG Federation*, the Supreme Court reviewed Executive Order 10 of 2020, which sought to enforce local government financial autonomy, and held that the president had overstepped the legal boundaries of his executive powers, declaring it null and void. The court concluded that Section 5 did not vest the president with the power to create new mechanisms affecting state finances beyond those envisaged by the Constitution. Therefore, one can make the point that Executive Orders in Nigeria are legally permissible but must remain subject to constitutional limits and judicial control. Hence, an Executive Order is valid only insofar as it implements the Constitution or an Act of the National Assembly, but it cannot itself become an independent source of legislative authority.

6. Comparative Lessons

This study argues that the comparative analysis of Australia, the United States and Nigeria illustrates that while delegated legislation and Executive Orders are necessary for the effective and smooth functioning of modern governments, their legality must be derived from the law rather than executive convenience. The three jurisdictions vary in Constitutional structure, yet they coalesce on one essential principle: the executive may enforce the law, but it may not replace the parliament as the main lawmaker.

Delegated legislation is a necessity, and not an abdication of responsibilities: In *Baxter v Ah Way*, the court held that Parliament may vest limited law-making authority on the Executive because it cannot foresee every future contingency. This is to say that the essence of delegation is to ease technical regulation, provide for flexibility and emergency response, but not to surrender legislative sovereignty.

Executive Orders derive their validity from higher law: In Trump v. Barbara, the U.S. Supreme Court was explicit that an Executive Order cannot amend the meaning of a constitutional rule or guarantee. Likewise, in the Nigerian case of Attorney-General of Abia State and 35 others v. Attorney-General of the Federation, the court opined that executive power under section 5 of the Constitution is constitutionally derived and must remain within legal limits.

Judicial Review is the ultimate constitutional safeguard: It is pertinent that the U.S. and Nigerian highest courts acted as constitutional guardians by nullifying executive actions that exceeded legal authority. This suggests that judicial review preserves the balance between executive administrative acts and constitutional democracy.

7. Conclusion and Recommendations

This study demonstrates that the practical necessity of delegated legislation justifies the delegation of limited regulatory powers, but it does not justify the transfer of the legislature's essential law-making function. Executive Orders are constitutionally valid only insofar as they faithfully execute the Constitution and legislation; where they purport to create, amend, or displace primary law, they become susceptible to judicial invalidation.

The Nigerian National Assembly should pass a distinct Executive Orders Act. This is because currently the country relies solely on section 5 of the Constitution without an elaborate enough legislative framework regulating Executive Orders and their limitations. Enabling Acts must remain concise in their objectives, while key policy decisions should remain within the Enabling law. This is to suggest that every essential matter, especially those involving constitutional rights, federal revenue allocation, and taxation, must be elaborated enough rather than opined through Executive Orders or subsidiary legislation. Robust Judicial and Parliamentary Oversight. The courts must continue to apply the doctrine of ultra vires to administrative acts that are beyond legal authority, while the parliament must exercise its authority through rigorous lawmaking and legislative oversight of executive acts and public institutions. The National Assembly in Nigeria should also establish a specialised scrutiny committee to review Executive Orders and subsidiary legislation for consistency with the Constitution and enabling Acts, similar to parliamentary scrutiny mechanisms operating within Commonwealth jurisdictions.

[33] Ese Malemi, The Nigerian Constitutional Law (Princeton Publishing Co, 3rd ed, 2012).
[34] Ibid 33