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RE-EXAMINING THE PURPORT OF THE EXECUTIVE ORDER NO. 6 OF 2018



Without doubt, the key objective of the Executive Order No. 6 of 2018 (“**EO6**” or the “**Order**”), reflects a major thrust of the administration of President Muhammadu Buhari. The Order seeks to preserve suspicious assets connected with corruption and other relevant offences, by restricting dealings in them in any way until the final determination by a court of competent jurisdiction of any corruption related matter against the owners of such assets.

The Order particularly focuses on Nigerian citizens who are either past or current government officials, politicians and politically exposed persons. However, unlike the five EOs issued before it, the EO6 has attracted criticisms from many quarters. While some claim the President seeks to arrogate judicial powers to himself in violation of the Constitution, others believe there is no need for the EO6 as there are sufficient statutes specifically covering the issues the Order intends to address.

Does the EO6 actually grant to the President power which is ultra vires that granted by the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the “Constitution”)? Is the Order a necessary complement to existing legislation on corruption? Is the making of the Order as a whole unconstitutional? Of what importance is the Order to the development of the Nigerian economy? This article seeks to re-examine the general purport of the EO6 and assess its usefulness to good governance, equity and the rule of law.



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SYNOPSIS OF THE ORDER

The EO6, which was signed by the President on July 5, 2018, contains six (6) sections and two (2) schedules. Essentially, the legal basis and moral justification for the Order are stated in the recital, where the President made proclamation and declared as follows:

“By the powers vested in me under Section 5 of the 1999 Constitution as amended which extends to the execution and maintenance of the Constitution, all Laws made by the National Assembly (including but not limited to Section 15(5) of the Constitution) to, abolish all corrupt practices and abuse of power, it is the duty of any responsible government to restrict dealings in suspicious assets subject to corruption related investigation or inquiries in order to preserve same in accordance with the rule of law and to guarantee and safeguard the fundamental human rights”.

The gist of the EO6 is contained in sections 1 to 5 wherein provisions were made on the objectives, scope, framework for implementation and sanctions for contravention of the Order. Provisions were also made for means by which aggrieved persons may seek legal redress against actions taken pursuant to the Order while major terms used in the EO6 are also defined such as: asset; corruption or corrupt practices; enforcement authority; entity; other relevant offences; and person. Section 6 states the effective date of the EO6 (the date the Order was signed) and section 7 states its title as: *“Preservation of Suspicious Assets Connected with Corruption and Other Relevant Offences, 2018”*. The First and Second Schedules to the EO6 create respectively a list of pending cases (155 cases in total) to be immediately affected by the Order; and a list (subject to alteration from time to time by the Honourable Attorney General of the Federation **“HAGF”**) of agencies of the Federal Government of Nigeria (**“FGN”**) charged with the responsibility for implementing the Order.

Accordingly, without prejudice to any laws or existing suits as well as any rights arising therefrom, with the coming into effect of the Order:

- All assets within the territory of Nigeria belonging to any Nigerian citizen who is responsible for, complicit in, or directly or indirectly engaged in corrupt practices and other relevant offences are to be protected from dissipation forthwith. Where the person linked to corrupt practices is not the owner of the connected assets, it suffices that he exercises control over, or is in possession of the assets. This extends also to any person under investigation for having materially assisted, sponsored or provided financial or technological support for the person linked with suspicious assets. Particular reference is made to suspicious assets linked to a current or former government official and politically exposed person or any person acting on behalf of the official;
- The HAGF is to coordinate enforcement of the Order on behalf of the FGN by employing all available lawful or statutory means, including seeking appropriate orders of court where necessary. In preserving suspicious assets from dissipation, the FGN shall ensure that they are not withdrawn or transferred from the jurisdiction of Nigerian courts or dealt with in any way until the final determination of any associated case by a court of competent jurisdiction. Furthermore, the HAGF is empowered, subject to the powers granted under section 174 of the Constitution, to approach the court for an order blocking or freezing or confiscating any fund or asset within Nigeria, which he has reasonable cause to believe is connected with corruption, pending the conclusion of an investigation or legal action;



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- Enforcement Authorities (including but not limited to the 19 Agencies of the Government listed in the Second Schedule to the EO6) are directed to diligently and rigorously collaborate with the Federal Ministry of Justice in implementing the Order;
- Any person who contravenes the provisions of the Order by: (i) interfering with the free exercise of the authorities of the Office of the President (ii) destroying evidence (iii) corruptly inducing witnesses through cash/kind, and (iv) generally perverting the course of justice; shall be prosecuted in line with the provision of applicable extant laws; and
- In line with constitutional provisions, any person who alleges that his rights have been, are being or are likely to be contravened by any of the provisions of the EO6 may apply to a competent court in his jurisdiction for redress.

Under the EO6, a **“person”** means a natural or juristic person. An **“asset”** means all properties including funds, liquid assets (bank balances), receivables, stocks and bonds held in portfolios, insurance policies, shares in listed or unlisted companies, and all manners of fixed assets held directly or indirectly through corporate entities, trust structures and intermediaries. An **“entity”** means a partnership, association, trust, joint venture, corporation, subgroup, or other organization.

Furthermore, the meaning of **“corruption or corrupt practices”** under the EO6 is that ascribed to it under any enactment, and includes (i) any corrupt activity generally involving economic sabotage, human trafficking, drug trafficking and terrorism involving funds or assets in the sum or value in excess of Fifty Million Naira (₦50,000,000) or its equivalent in foreign currency; (ii) any misappropriation of government asset and corruption related to government contracts or bribery; or (iii) the transfer or the facilitation of the transfer of the proceeds of corruption. Similarly, **“other relevant offences”** is defined as any act, which may constitute an act of terrorism, financing of terrorism, kidnapping, sponsorship of ethnic or religious violence, economic sabotage, cases of economic and financial crimes, including acts contributing to the economic adversity of the Federal Republic of Nigeria as defined by relevant laws.

LEGAL ISSUES AROUND THE ORDER



Essentially, the legal issues arising from the EO6 have been whether or not it violates the provisions of the Constitution, particularly the fundamental right of citizens to own movable and immovable properties which shall not be subject to expropriation except in accordance with law, and the age-long principle of separation of powers among the executive, legislative and judicial arms of government.

Critics of the EO6 have outlined several concerns on its legality. By creating rights, obligations, powers and sanctions by executive fiat under which private properties of citizens can be confiscated, it has been argued that the Executive seeks to usurp the legislative powers of the Federation in violation of section 4 of the Constitution. In the same vein, strong opposing views have been advocated to the effect that the power granted to the HAGF in the EO6, to use all available “legal” means to place restriction on assets of persons where the HAGF has reasonable suspicion that such assets are corruption related, violates the constitutional presumption of innocence, smacks off arbitrariness and totalitarianism, imposes the subjective view of one government official on the general public and seeks to usurp the judicial powers of the Federation in contravention of section 6 of the Constitution.

As previously noted, there is another school of thought which opines that the EO6 is unnecessary as there are sufficient extant primary legislations dealing with what the Order seeks to achieve. Notably, agencies of the FGN such as the Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices and other Related Offences Commission (ICPC), National Agency for Food and Drug Administration and Control (NAFDAC), National Drug Law Enforcement Agency (NDLEA), and other similar statutory bodies are empowered under their Establishment Acts and some enabling laws to confiscate suspicious assets, albeit upon an order of a court of competent jurisdiction, pending investigation, enquiry or trial. In summary, critics believe that the EO6 is ultra vires the executive powers of the Federation vested in the President by section 5 of the Constitution.

From the Government’s pivotal position, the EO6 is adjudged legal and constitutional having laid its foundation upon sections 5 and 15(5) of the Constitution as stated in its previously quoted recitals. It is equally important to note that the fundamental right granted in section 42 of the Constitution to own private property and the guarantee provided against expropriation of property, are limited under certain circumstances. The exemptions to the general rule against expropriation of property include (i) contrary actions taken pursuant to the execution of judgements or orders of court; and (ii) the temporary taking of possession of property for the purpose of any examination, investigation or enquiry. The thrust of the EO6 could therefore be validly rooted in these two exemptions which are provided in sections 42(2)(e) & (k) of the Constitution. Interestingly, the courts in various judicial decisions have readily held that security and law enforcement agencies (like the EFCC), acting pursuant to the asset freezing/forfeiture provisions in their Establishment Acts or any other enabling law, have powers to confiscate suspicious assets subject to validly made court orders, without violating the provisions of section 42 of the Constitution. See the case of *Esai Dangabar v Federal Republic of Nigeria (2014) 12 NWLR (Pt. 1422) 575*.

Also, the powers of the President; to execute and maintain the Constitution and to execute all laws made by the National Assembly as well as all matters with respect to which the National Assembly has power to make laws (which is the primary objective for issuing the EO6 and addressing it to the Ministries, Departments and Agencies (“MDAs”) of Governments); have been vehemently advocated by the Executive as counter-argument against allegation of usurpation of the powers of the Judiciary.



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Advocates of the EO6 have maintained that the powers granted to the HAGF are not arbitrary as they are to be exercised subject to extant laws and constitutional provisions. They also argue that the “reproduction” of the provisions of section 46 of the Constitution in section 3 of the Order, whereby aggrieved citizens are enjoined to approach the court for redress, shows that the EO6 is not conceived to be an extrajudicial instrument by the Government.

CONCLUSION

Corruption is a social menace with crippling effects on economic growth. High incidence or perception of corrupt practices in a country erodes the confidence of foreign investors and development partners, thereby impeding inflow of needed capital for development. Available statistics indicates how much damage corruption (with associated vices including bribery, fraud, economic sabotage, poor corporate governance, conversion/looting of public assets by government officials etc.) has done to the nation. Transparency International, the global anti-corruption watchdog ranked Nigeria low in its *2017 Corruption Perception Index (CPI)*; placing the country in 148th position out of 180 countries ranked in order of perceived transparency in their public sectors. Similarly, the *2017 National Corruption Survey* released by the Nigeria Bureau of Statistics (NBS) indicted public and government officials with their private sector cronies for high level bribery and corruption. It is therefore axiomatic that any well-meaning Government (particularly the President Muhammadu Buhari administration which prides itself on its zero tolerance for corrupt practices) would be mindful of eradicating corrupt practices by all means possible.

However, care must be taken to ensure that anti-graft policies are executed through legal and constitutional means, as extrajudicial execution of well-intended policies may produce unintended consequences which may stifle both domestic and foreign investments. For instance, the right to own private property without the fear of possible confiscation in breach of extant laws is a corollary of an open economy. Incidentally, private capital follows open economies run on the basis of rule of law. Looking at the wide definitions given to the words “assets” and “entity”, it is also axiomatic that implementation of the Order would be of great interest to investors and development partners around the world and could either enhance or inhibit the progress already recorded under the Government’s Ease of Doing Business initiatives. Thus any attempt to restrict dealings in suspicious assets of persons in Nigeria must be unquestionably rooted in law.

We note, to the extent that the President issued the EO6 pursuant to his powers under the Constitution and directed MDAs under the purview of the Executive to implement same, the Order remains valid and applicable unless and until declared void by a court of competent jurisdiction. Whether critics will succeed in obtaining appropriate judicial pronouncements against the Order, and whether the Executive will implement the Order in a lawful and equitable manner to engender stability and confidence respectively in the Nigerian political and economic landscapes; are two things which remain to be seen.



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