# AN APPRAISAL OF THE CONSTITUTIONAL FRAMEWORK FOR LAWMAKING INSTITUTIONS IN SELECTED FEDERAL STATES*

**Abstract**
*This study did an appraisal of the Constitutional frameworks for lawmaking institutions in selected federal jurisdictions, namely, Nigeria, United States of America and India. It examines the operations of the lawmaking institutions like the legislature, the executive and the judiciary with an emphasis on their constitutional powers to make laws. It was discovered that based on the practice of separation of governmental powers, the constitutional provisions have erroneously been interpreted that it is the legislature as a lawmaking institution that has the vires to make law. As such, the executive and the judiciary in the selected federal states under study do not enjoy constitutional authorisation to make laws. This study attempted to respond to the issue drawing from the constitution, judicial opinions and scholarly articles from these selected federal jurisdictions.*

**Keywords:** Constitutional Framework, Lawmaking Institutions, Federal States, Appraisal

## 1. Introduction

In this appraisal we intend to discuss constitutional framework for lawmaking institutions in selected federal jurisdictions of Nigeria, the United States of America and India. However, there is this aphorism that the executive and the judiciary in the selected federal states do not have Constitutional framework to make laws as institutions. This is based on the concept of separation of powers contained in sections 4, 5, and 6 of the Nigerian Constitution[1] which creates the legislature, the executive and the judiciary. The Constitution of the United State of America[2] in articles I, II, and III also creates the three arms of government, the legislature, the executive and the judiciary. The Constitution of India[3] on the other hand, in Part V, chapter 1 article 52 provides for the executive, part V chapter II article 79 provides for the parliament while part VI article 124 provides for the judiciary. This opinion is not the same of the legislature. In this appraisal, we want to dispel the above erroneous understanding by stating that the Constitutions in the selected jurisdictions guarantee lawmaking authority to the executive and the judiciary.

## 2. Lawmaking Authority of the Legislature in Nigeria, the United States of America and India

The legislatures in the federations of Nigeria, the United States of America and India operate a bicameral legislature called the National Assembly comprising the Senate and the House of Representatives in Nigeria[4], the Congress in the United States of America comprising the Senate and the House of Representatives[5] and the Parliament in India comprising the Council of States and the House of the people[6]. In the federation of Nigeria, the Constitution in section 4 provides the lawmaking authority of the legislature thus:

1. The Legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation, which shall consist of a Senate and a House of Representatives.
2. The National Assembly shall have power to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the exclusive legislative list set out in part I of the second schedule to this Constitution.
3. The Power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the exclusive legislative List shall, save as otherwise, provided in this Constitution, be to the exclusion of the House of Assembly of States.
4. In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say:
    a. Any matter in the concurrent Legislative List set out in the first column of part II of the second schedule to this Constitution to the extent prescribed in the second column opposite thereto; and
    b. Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution[7].

*By UC KALU, PhD, Professor of Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State:
*Angela E. OBIDIMMA, PhD, Professor of Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State. Email: aeobidimma@gmail.com: and
*Oscar Primus Chiduziem MBAERI, LLM Candidate, Nnamdi Azikiwe University, Awka, Anambra State Email: opcmbaeri@gmail.com

[1] Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) sections 4, 5, 6
[2] The Constitution of the United States of America article I, II, III
[3] India's Constitution articles 52, 79, 124
[4] CFRN 1999 (as amended) section 4(1)
[5] The Constitution of the USA, Article 1 Section 8
[6] India's Constitution, 1950 article 79
[7] CFRN 1999 (as amended) section 4(1)(2)(3)(4); *Attorney General of Abia State v Attorney General of the Federation* (2002) 16 NWLR (pt. 1005) p. 265

Under section 4(2) (3) of the Constitution, the National Assembly in Nigeria enjoys exclusive lawmaking power over 68 Legislative Lists contained in part I second schedule to the Constitution while under section 4(4) of the same Constitution the National Assembly share concurrent lawmaking powers with the House of Assembly of the State over 30 legislative items as contained in the column of part II second schedule to the Constitution[8]. The Supreme Court in *Attorney General of Lagos State v Attorney General of the Federation*,[9] acknowledged the powers of the National Assembly and the House of Assembly to make laws in the above list for the Federation or any part thereof thus:

> Federal Republic of Nigeria 1999 Constitution (as amended) expressly created two Legislative Lists; (a) the exclusive Legislative List set out in part I of the second schedule to the Constitution, (b) the concurrent Legislative List set out in the first column of part II of the second schedule to the Constitution. There is also a third list which is not stated in the Constitution; that is residual matter. These are matters which are neither in the exclusive list nor in the concurrent list.

The Constitution in s section 4 subsection 6 thereof created a House of Assembly for the subnational governments called the State governments and vests same with lawmaking powers in subsection 7(a) (b) (c) thus:

(6) The legislative powers of a state of the federation shall be vested in the House of Assembly of the State.
(7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say:
  (a) any matter not included in the concurrent legislative list set out in the first column of part II of the second schedule to this Constitution to the extent prescribed in this Constitution.
  (b) any matter included in the concurrent legislative list set out in the first column of part II of the second schedule to this Constitution to the extent prescribed in the second column opposite thereto; and
  (c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of the Constitution[10].

In the distribution of lawmaking powers in the Constitution between the federal government and the sub-national governments, the Constitution created residual legislative powers in section 4(7) (c) and reserved same for the States[11]. Ironically, the Constitution does not provide for a corresponding residual legislative list. Rather the judiciary in Nigeria in their wisdom coined the expression residual. According to Tobi JSC:

> The Constitution of the Federal Republic of Nigeria 1999 does not provide for a residual list. The expression is a phraseology of the judiciary, that is, it is a coinage of the judiciary in the exercise of its interpretative jurisdiction. Etymologically, residual merely means that which remains. In legislative or parliamentary language, residual matters are those that are neither on the exclusive list nor on the concurrent legislative list, that is covered by the exclusive and concurrent legislative list.[12]

Kalu is of the firm view that, the Constitution in section 4(7) (c) clearly and unequivocally provides for residual list and reserved same to the States exclusively. According to the scholar:

> This is the Residual Legislative List, in practice, the only legislative item that is exclusively residual is for the states in Nigeria as provided in section 4(7) (c) thus: The House of Assembly of a Stat shall have power to make laws for the peace, order and good governance of the State or any part thereof with respect to the following matter, that is to say: (c) any matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitutions[13].

In the Federation of the United States of America, the Constitution in article 1 section 8 clearly stipulates lawmaking competence of the Congress thus:

> The Congress shall have power to lay and collect taxes, duties, imports and excise, to pay the debts of and provide for common defence and general welfare of the United States, but all duties, imports and excise shall be uniform throughout the United States. To borrow money on the credit of the United States; to regulate commerce with foreign nations and among the several states and with the Indian Tribes, to establish an uniform Rule of Nationalisation and uniform laws on the subject of bankruptcies throughout the United States; to coin money, regulate the value thereof, and of foreign coin and fix the standard of weight and

[8]N Tobi, *The Exercise of Legislative Powers in Nigeria,* (Lagos: Nails, 2022) P. 9; UC Kalu, 'The Imperative for a Reappraisal of Nigeria's Legislative Competencies or Lists in the Light of Practical Federalism', (2014) Vol. *10 Unizik Law Journal*, 174 – 204; *AG Abia State v AGF* (2002) 6 NWLR (pt. 763) p. 264

[9](2003) 12 NWLR (pt. 833) P.. 1, *Attorney General of Lagos State v Eko Hotels Ltd* (2006) 18 NWLR (Pt. 1011) p. 378; *Fawhenmi v Babangida* (2003) 3 NWLR (pt. 808) p. 04

[10] CFRN 1999 (as amended) section 4 (6) (7) (a) (b) (c)

[11]*Attorney General of Ogun State v Aberuagba* (1985) 1 NWLR (pt. 3) p. 395; *AG Abia State v AGF* (2006) 6 NWLR (pt. 763) p. 246, *Fawhenmi v Babangida* (2003)3 NWLR (pt. 808) p. 604; *AG Lagos State v AGF* (2003) 12 NWLR (pt. 833) p. 1

[12] N Tobi, *The Exercise of Legislative Powers in Nigeria, Supra,* P. 27

[13] UC Kalu, 'The Imperative for a Reappraisal of Nigeria's Legislative Competencies or List in the light of Practical Federalism', *Supra*

> measures to provide for the punishment of counterfeiting the securities and current coin of the United States.[14]

The Congress in all enjoys 17 exclusive lawmaking powers in accordance with article 1 section 8 as well as an elaborate authority called the Omnibus clause which entitles Congress to enact all laws that are necessary and proper for the purpose of carrying into execution all the powers conferred on Congress and to exercise all other powers vested in the Constitution in the central government, or in any department or officer of the Central Government.[15] The power of Congress to legislate on commerce clause as contained in article 1 section 8 was an issue before the Supreme Court in *Gibbons v Odgen*,[16] and expectedly the Court upheld the authority of Congress to enact a legislation on interstate Commerce. Similarly, the court in *McCullock v Maryland*[17] upheld the authority of Congress to establish a national bank and also denied the States the power to enact any legislation to tax any federal government property located within the domain of the States. The court John Marshall holds the opinion that it is implied in article 1 section 8 that Congress possesses legislative power acting under the necessary and proper clause in the Constitution to seek an objective that is within its enumerated powers so long as it is rationally related to the objective and not expressly forbidden by the Constitution.

Furthermore, the United States of America Constitution in the 10th amendment created a legislative authority for the States thus; 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or the people'.[18] By the 10th amendment as observed by the Supreme Court in *United States v New York*,[19] created a dual federal system. According to the court per O' Connor held *inter alia*:

> States are not mere political subdivisions of the United States. State governments are neither regional officers nor administrative agencies of the Federal Government. The position occupied by the State officials appear nowhere on the federal government most detailed organizational chat. The Constitution instead leaves to the several states a residuary and inviolable sovereignty.

The court again in *United States v Lopez*,[20] struck down parts of Gun-Free School Zone Act of 1990 which prohibits possession of firearm at a school zone. The court coram Relinguist CJ (delivered the opinion of the court), O' Connor, Scalia Kennedy, Thomas, Stevens, Souter, Grinsburg JJ held *inter alia*;

> … The possession of a gun in a local school zone is in no sense an economic activity that might through repetition elsewhere substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

The Constitution of the Federation of India part V, chapter II article 79 provides for the parliament thus; 'There shall be a parliament for the union which shall consist of the President and the two Houses to be known respectively as the Council of states and the House of the people'[21]. Article 245 thereof vests in parliament lawmaking powers thus:

1. Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of the State may make laws for the whole or any part of the State.
2. No law made by the parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.[22]

The Constitution further sets out the subject matter of legislative powers of Parliament in article 246 and in the seventh schedule to the Constitution created three different legislative lists styled list I – Union List; List II – State List and List III – Concurrent List. The Union List I contains 92 legislative items that are exclusive to the federal parliament. List II or state list contains 66 legislative list that are exclusive to the subnational government while list III or the concurrent list contains 47 legislative items shared between the federal Parliament and the State government.[23] The Constitution in article 246 (2) (3) provides for legislative powers of the subnational government thus:

1. …
2. Notwithstanding anything in clause (3) parliament and, subject to clause (a), the legislature of any state also, have power to make laws with respect to any of the matters enumerated in list III in the seventh schedule (in this Constitution referred to as concurrent list).

[14] Constitution of the USA, Article 1 Section 8
[15] *Ibid*
[16] 22 U.S.I (1824)
[17] 17 U.S. 316 (1819)
[18] *Ibid*
[19] 505 U.S. 144 (1992)
[20] 514 U.S. 549 (1995)
[21] India's Constitution article 79
[22] India's Constitution article 246
[23] *Ibid*

3. Subject to clause (1) and (2), the legislature of any state has exclusive power to make laws for such state or any part thereof with respect to any of the matter enumerated in list II in the seventh schedule (in the Constitution referred in this Constitution).[24]

The Federation of India's Constitution vests residual legislative power on the Federal government rather than the subnational government that is the case in Nigeria and the United States. The India's Constitution in article 248 provides thus; 'Parliament has exclusive power to make laws with respect to any matter not enumerated in the concurrent list or state list'. The Supreme Court of India has acknowledged the Constitutional division of governmental legislative powers in *Milthan Lah v State of Delhi*,[25] the Supreme Court Coram Viyyar (who authored the judgment), Das, Sudhi Rarya (CJ), Vankatarama, Das, Sarkar, Bose and Virian rejected a narrow interpretation of the residuary legislative authority conferred on the union parliament under article 248 of the Constitution. The Court held *inter alia*;

> This argument proceeds on the misapprehension of the true scope of section 248. That article has reference to the distribution of legislative powers between the centre and the states mentioned in part A and B under the three lists in schedule VII, and it provides that in respect of matters not enumerated in the list including taxation, it is the parliament that has power to enact laws.[26]

**3. Lawmaking Authority of the Executive in Nigeria, United States of America and India**

It is an acknowledged notion that the executive branch of government has non lawmaking *vires* because of the concept of separation of powers between the executive, legislature and the judiciary. The concept presupposes independence and separateness of the three arms of government[27]. However, studies have shown that the executive makes laws in practice including in the federations of Nigeria, United States of America and India.

The executive powers of the federation of Nigeria are provided for in Section 5 of the Constitution thus;

(1) Subject to the provisions of this Constitution, the executive powers of the federation;

(a) Shall be vested in the president and may subject as aforesaid and to the provisions of any law made by the 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

(b) Shall extend to the execution and maintenance of this Constitution, 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.[28]

The Constitution having established the Executive in section 5 thereof, says that any law passed by the legislature in exercise of its lawmaking authority in accordance with section 4 thereof cannot become law except such a bill is assented to by the President as mandated by section 58 (1) of the Constitution. It is submitted that, a community reading of sections 4, 5 and 58 of the Constitution reveals that the legislature can only successfully execute the mandate of section 4 and 58(1) of the Constitution upon the assent of such mandate in accordance with section 5 and 58(3) of the Constitution. The Constitution in section 58(1) and (3) provider *inter alia*:

> (1) The power of the National Assembly to make laws shall be exercised by bills passed by both the Senate and the House of Representatives and, except otherwise provided by subsection (5) of this section, assented to by the President.
> (2) Where a bill has been passed by the House in which it originated, it shall be sent to the other House, and it shall be presented to the President for assent when it has been passed by that other House and agreement has been reached between the two Houses on an amendment made on it.[29]

In view of the foregoing, Tobi argues that the executive in deserving situations also involve itself in lawmaking. According to the jurist;

> Although the 1999 Constitution provides for separation of powers and the executive is not empowered under the Constitution to make laws, the Executive is involved in certain areas of lawmaking. Two of these are examined briefly. The first one is in section 58 of the Constitution. It involves the assent of the President to a bill. By section 58(3) assent of the President to a bill is necessary after the bill has been passed by both Houses of the National Assembly.[30]

Furthermore, the executive is also involved in lawmaking in the form of issuance of Executive Orders in the exercise of the Executive powers of the State. The Constitution in section 315 (1) provides thus;

---

[24] *Ibid*
[25] (1958) AIR 682
[26] *Ibid; State of Karanataka v Union of India (1978) AIR 68*
[27]CL de Montesquieu, Spirit of the Law, (1748) http:loll.liberty fund.org/title/moutesguieu &-complete-works Vol. 1 – the – spirit – of – Laws, accessed September 30, 2021
[28] CFRN 1995 (as amended).
[29] *Ibid*
[30] N Tobi, *Exercise of Legislative Powers in Nigeria*, (Lagos; Nails, 2002) P. 44

(1) Subject to the provisions of this Constitution an existing law shall have effect with such modification as may be necessary to bring it into conformity with the provision s of this Constitution and shall be deemed to be –

(a) An act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and

(b) A law made by the House of Assembly to the explicit that it is a law with respect to any matter on which a House of Assembly is empowered to make laws.

(c) The appropriate authority may at any time by order made such modification in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of this Constitution.[31]

The Constitution in subsection 3(a)(i)(ii) of section 315 defines appropriate authority for the purposes of subsection 2 thereof to include the President in relation to the provisions of any existing law of the Federation or the Governor of the State in relation to the provisions of any existing law deemed to be a law made by the House of Assembly of that State and finally to include any person other than the President or State Governor appointed by law to revise or rewrite the laws of the Federation or of a State.[32] The above Constitutional provisions has been validated by the Court in two separate cases of *Attorney General of Ogun State v Attorney General of the Federation* and *Attorney General of Abia State v Attorney General of the Federation*[33]. In *Attorney General of Abia State v Attorney General of the Federation*[34], the Supreme Court in the exercise of its original jurisdiction validated the promulgation of the Revenue Allocation (Federation Account) (Modification Order) Statutory Instrument No. 9 of 2002. The court upheld the authority of the President to issue such an executive order pursuant to section 315 of the Constitution. Okebukala and Kana are of firm view that, issuance of executive order by the President is an exercised of lawmaking power. According to the scholars:

> Where executive orders creates rules, modify existing acts, or set out the parameters for their implementation, the President carries out manifestly legislative functions, this is perfectly so long as any executive order in issue is consistent with its enabling Constitutional and statutory authority. In addition to their lawmaking powers, executive orders can serve as a administrative tools where the enabling authority so requires. In essence, executive orders being legislative instruments and administrative tools demonstrate that separation of powers does not mean that powers may not be shared.[35]

Similarly, in the Federation of the United States of America, executive power is vested in the President pursuant to article II section 1 and 3 of the Constitution thus:

1. The executive power shall be vested in a President of the United States of America.
2. He shall from time to time give to the congress information on the State of the Union, and recommend to their consideration such measures as he may judge necessary and expedient; he may on extra ordinary occasions, converge both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such a time as he may think proper, he may receive ambassadors and other public ministers, he shall take care of that laws be faithfully executed, and shall commission all officers of the United States.[36]

Hearts believes that, subsection 3 of article 11 of the United States of America affords the President an opportunity to propose or recommend bills, the sub-section also according to the scholar, rare privilege for the President to influence the general tone and direction of public debate. According to Hearts:

> In the sphere of legislation, the President though not a member of Congress plays a very important role in legislation. He does this by summoning extraordinary session of Congress, or he may send special message whether in writing or in person giving information on the State of the Union recommending for consideration measures which he deems necessary and expedient for the nation's best interest. Besides, the President may use his influence to get some members(s) of Congress to embody his ideas on certain subject in form of bills for consideration and passage into law.[37]

Furthermore, the executive in the Federation of the United States of America participates in lawmaking in the form of issuance of executive orders. According to Cash:

> Beginning with George Washington, Presidents have issued documents which may be described as Executive Orders. The earlier executive orders were used for such purposes as the withdrawal of public

[31] *Ibid*
[32] (1982) 3 NCLR P 166, *Ado v Deji* (1985) 5 NCLR P. 260
[33] (2003) 4 NWLR (Pt 809) p. 124
[34] CFRN 1999 (as amended) section 215 (3) (a) (i) (ii) (iii) I see also N Tobi, *Exercise of Legislative Powers in Nigeria*, *Supra.*
[35] EO Okebukola & AA Kana, 'Executive Orders in Nigeria as Valid Legislative Instruments and Administrative Tools' https:www.ajol.infolindex/php/naujij/article/view/136320/125810, September 21, 2021
[36] *Ibid*
[37] GA – O Hearts, *Federalism: A Comparative Perspective, (Enugu: John Jacobs Classics Publication Ltd, 1999) p. 78*

lands for Indian use, for the creation of lighthouse, the establishment transfer and abolition of land districts and land offices and for supplementing Acts of Congress.[38]

In addition to conveying policy goals or directives, executive orders or other written instrument issued by the President may have the force of law as long as it is issued pursuant to one of the enumerated powers of the President especially under article II of the Constitution of the United States of America. The Supreme Court of the United States of America in the famous case of *Marbury v Madison*[39] and *Youngstown Sheet and Tube v Sawyer*[40], upheld the validity of Executive Orders issued by the President in the exercise of his executive powers pursuant to the Constitution.

The federation of India operates a Parliamentary system of government which presupposes that the executive enjoys a Constitutional authority to participate in lawmaking as the parliament is made up of the President, the Council of States and the House of the people[41]. The executive is established by part V chapter I article 52[42]. In this wise, the Constitution in article III thereof provides that, for a bill to become a law, the President shall assent to such a bill. The section provides this: 'When a bill has been passed by the Houses of Parliament, it has to be presented to the President and the President shall declare either that he assents to the bill, or that he withholds assent therefrom'.[43] As noted by Verma, under article III of the Constitution, the President can give his assent or withhold his assent to a bill. The President can also return the bill except money bill) with recommendations to the Houses for reconsiderations, and if the Houses pass the bill again with or without amendment, the bill has to be assented to by the President.[44]

The President of India has the Constitutional authority to make laws by issuance executive of orders in the form ordinances in accordance with article 123 of the Constitution. The ordinance issued or promulgated by the President is only issued when the parliament is not in session and such ordinance shall have the force of law.[45] Furthermore, every such ordinance shall be laid before parliament as soon as House of parliament resumes session and such ordinances ceases to exist after six weeks of resumption of parliament.[46] However, if parliament disapproves the ordinance through resolution before the expiration of six weeks upon the resumption of the Houses of Parliament, the ordinance shall cease to exist.[47] The President enjoys the power to also withdraw the ordnance before the expiration of the six weeks period before a formal resolution of the Houses of Parliament disapproving it.[48] The Supreme Court in *A. K. Roy v Union of India*[49], and *Sat Pal. & Co. v Governor of Delhi* validated the lawmaking authority of the President of India to issue executive order in the form of ordinances.[50]

**4. Lawmaking Powers of the Judiciary in Nigeria, United States of America and India**

The judicial branch of government in the federations of Nigeria, United States of America and India has both Constitutional authority as well as inherent powers to make laws. For instance, in the Federation of Nigeria, the Constitution in section 6 (6) vests the judicial powers of the Federation on the Court established in the Constitution. The Constitution in section 6 (6) provides thus:

> The judicial powers vested in accordance with the following provisions of this section –
> (a) Shall extend not withstanding anything to the contrary in this Constitution, to all matters and sanctions of a Court of law;
> (b) Shall extend to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any questions as to the civil rights and obligations of that person;
> (c) Shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or nay judicial decision is in conformity with the fundamental objectives and directive principles of the state of this Constitution;
> (d) Shall not, as from the date when this section come into force, extend to any action or proceedings relating to any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person make any such law.[51]

---

[38]RB Cash, 'Presidential Power: Use and Enforcement of Executive Orders', (1963) Vol. 1, Issue *Notre Dame Law Review*, 44 - 55
[39] I Cranch 137 (1803)
[40] 343 US 579 (1951)
[41] India's Constitution article 79
[42] *Ibid,* part V chapter I article 52
[43] India's Constitution 1980, article III
[44] DD Verma, 'parliament of India: The Lawmaking process,' http://parliament of India.miding accessed September 30, 2011
[45] India's Constitution, Supra
[46] *Ibid*
[47] *Ibid* article 3 (2) (a)
[48] *Ibid* article 3 (2) (b)
[49] AIR 1982 SC 710
[50] AIR 1979 SC 1550
[51] CFRN 1999 (as amended) section 6 (6) (a) (b) (c) (d)

It is contended that, coalesced in section 6 of the Constitution is the power of the Court to make laws in the form of filling the gap or finding the intention of the lawmaker in the course of the performance of its judicial duty. In this connection, Oguntade JSC opines thus:

> But in practice, the duty of a Judge in the adjudicatory process is expansive and not always so narrow as judges themselves are want to proclaim. Being one of their members, I am familiar with the many ways by which Judges extend the frontiers of the law. Sometimes, judges would mold the law and occasionally change the law. But even when Judges change the law, they tell all of us that they are only interpreting it.[52]

In the same vein, Oputa JSC said *inter alia*;

> In a progressive world, the law and the administration of justice cannot afford to be static and retrogressive. The only option open to our jurisprudence is intelligent nature and progressive activism. We are not to fold our hands and do nothing. No. Our Judges have to so interpret the law such that it makes sense to our citizens in distress and assures them of equal protection of law, equal freedom under the law, and equal justice.[53]

The Court in *Obi v INEC*[54] and *Amaechi v INEC*[55] re-echoed the fact that the court is with the requisite jurisdiction to fill the gap by locating the intention of the legislature in the statute. According to the Supreme court in *Obi v INEC*:

> It is true that courts are always enjoined in the course of interpreting the provisions to find out the intention of the legislature, but there is no magic hand in this counseling. The intention of the legislature or put bluntly, the intention of the National Assembly at the Federal Level or the State House of Assembly at the State level, is not to be judged what is in the mind but its expression of the mind couched in the words of the statute.

In the Federation of the Unites States of America, the Constitution in article III section 1 vests the judicial powers in the court thus:

> The judicial power of the United States of America, shall be vested in the Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. The Judges both of the Supreme Court and inferior courts, shall hold their office during good behavior, and shall at stated times received for their services, a compensation, which shall not be diminished during their continuance in office.[56]

It is posited by Scholars and Jurists that, the judicial powers donated to the Supreme Court and other courts in the federation of the United States of America is wide enough to establish the court with requisite authority to make laws in the form of filling the gap, or finding to discover the intention of the legislature and as well as judicial review of either executive or legislative actions. A leading advocate of the above philosophy is an American Jurist, Holmes who posits thus:

> The confusion with which I am dealing besets confessedly legal conceptions, take the fundamental question, what constitutes the law? You will find some writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics, or admitted axioms or what not, which may or may not coincide with the decisions. But if e take the view of our friend the bad man we find that he does not, care two straws for the axioms or deductions, but that he does not want to know what the Massachusetts or England are likely to do within facts. I am much of this kind. The prophesies of what the courts will do in fact, and nothing more pretentious are what I mean by the law.[57]

An America Scholar, Friedman agrees with Holmes that the courts in practice are imbued with lawmaking powers thus:

> The Blackstonian doctrine of the declaratory function of the courts, holding that the duty of the courts is not to pronounce a new law but to maintain and expound the old one, had long been little more than a ghost. From Holmes and Geny to pound and Cardozo, contemporary Jurists have increasingly recognized and articulated the lawmaking functions of the courts. The radical transformations which, for example, contracts, torts or family law have undergone at the hands of the courts have made it increasingly difficult to maintain the times honoured fiction of the declaratory role of the Judge. It is not, perhaps, surprising that it should have been abandoned more wholeheartedly in the United States than in England.[58]

Beveridge believers that the decision of the Supreme court in *McCullock v Maryland* is judicial lawmaking in action. According to the Scholar:

[52] G Oguntade, 'Dissenting Judgment and Judicial Lawmaking', A Paper delivered at the Mainden AG Karibi Whyte Convocation Lecture at Nigerian Institute of Advanced Legal Studies, available www.nails.ed.org, accessed March 10, 2021

[53] CA Oputa,' Judicial Activism: A catalyst for Political Stability or Instability,' Guardian 16, 2003, P. 7; see also N. Alili & TS Shan Kyla, 'Construction of Constitutional provisions,' (2013) Vol. 1 *Nails Journal of Constitutional Law*, 146 – 171

[54] (2007) 11 NWLR (Pt. 1046) p. 560

[55] (2008) 5 NWLR (Pt. 1081) p. 227

[56] Constitution of the United States of America Supra, article III section I

[57]OW Holmes Jr, 'The Path of the Law', (1897) 10, 457 *Howard Law Review*, 1 – 20 available https:moglen.law.Columbia.edu.ics/pala.pdf accessed August 25, 2021

[58] W Friedmann, 'Limiits of Judical Lawmking and Prospective Overruling', (1966) Vol. 29, No 6, *The Modern Law Review* 98 – 607 also available https:heionline.org/HOL/Landing-page? Handle=hein. Journals/Modir29&div accessed August 24, 2021

> In effect John Marshal (in Mc Cullock) rewrote the fundamental law of the nation, or perhaps it may be more accurate to say that he made a written instrument a living thing, capable of growth, capable of keeping pace with the advancement of the American people and ministering to their changing necessities. This greatest of Marshall's treaties on government may well be entitled the validity of the Constitution.[59]

In the Federation of India, the judicial power is established in Chapter IV article 124 of the Constitution in article 124 thereof thus:

1. There shall be a Supreme Court of India consisting of a Chief Judge of India and, until parliament by law prescribes a larger number of not more than seven other Judges.
2. Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and the court in the states as the President may deem necessary for the purpose and shall hold office until e attains the age of sixty five years: provided that in case of such appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted: provided further that:

(a) A Judge may, by writing under his and addressed to the President, resign his officer;
(b) A Judge may be removed from his office in the manner provided in clause (4).[60]

India's Constitution specifically in article 13 thereof donated to the court powers of judicial review of executive and legislative actions. Article 13 provides thus:

1. All laws in force, in the territory of India immediately before the commencement of this constitution, in so far as they are inconsistent with the provisions of part this part shall to the extent of such inconsistency be void.
2. The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention be void.[61]

Jurists and Scholars are in agreement that the power of judicial review specifically provided for in the Constitution remains a significant feature of the constitution which empowers the court to declare void any legislation or action that contradicts the Constitution. An Indian jurist Chaudan holds the view that power of judicial review in India lies in article 13 of the Constitution. According to the Jurist:

> In the Constitution of India the principle, lies in under article 13. The article provides that the law to be made should be in line with the norms laid down in the Constitution of India. Guarantee of fundamental rights is insignificant and meaningless unless the court has power to protect same, from arbitrary violation. At this point, the power of judicial review became relevant. Through judicial review, the court has to check the actions, which threatens to take away the fundamental rights unreasonable.[62]

An Indian Scholar Sakar holds the same view as Justice Chauhan that the judiciary in India enjoys Constitutional mandate to review laws enacted that are inconsistent with the Constitution. According to the Scholar:

> Therefore, it is clear that India practices a strong form of judicial review as far as the enforcement of fundamental rights are concerned. In fact, article13 with its explicit provision prohibits a weak form of review as far as fundamental rights are concerned. According to the provisions of article 13(2), states shall not make any law which curtails or takes away any fundamental rights. Not only this, article 13 confers a power and duty on the judiciary to declare a law void. This power is not only a declaratory power. A law becomes void as soon as the Indian Judiciary declares it to be inconsistent with the provisions of the provisions of the constitution. To maintain organizational deference, neither of the courts easily declare a law unconstitutional nor does the legislature to re-enacts the law declared unconstitutional by the courts very easily. The strong form of review still exist and cannot be transformed into a weak form of review as far as fundamental rights are concerned.[63]

## 5. Conclusion

In conclusion, therefore, the Constitutions in the selected federations under review deliberately provide for lawmaking authority of the legislature, the executive and the judiciary.

---

[59] AJ Beveridge, The Life of John Marshall Vol. 4 (Boston: Houghton Mifflin 1919) p. 308 op cit in N Lund, 'The Destructive Legacy of Mc Cullock v Maryland,' https:www.gels.org/wp content/uploads/2020/06/Lund-chapter-final-Mc Cullock.pdf accessed August 27, 2021

[60] India's Constitution 1950 article 124

[61] Ibid article 13(1) (2)

[62] BS Chauhan, 'Judicial Review', https.www.nja.nic in/concluded programmes 2018 – 1110 PPTS/8.judicial, %20review.pdf, accessed August 30, 2021

[63] A Sakar, 'Standard of Judicial Review with respect to Socio-Economic Rights in India', (2010) Vol. 2 *Monsoon Journal of India Law and Society*, 293 – 312; see also Sp Sathe, 'Judicial Review in India: Limits and Policy', https://core.ac.uk.159604769 pdf accessed August 30, 2021; *Gopalan v State of Mandaras* (1951) All Indian Reporters, SC p. 27