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Examination of the Lawmaking Power of the Executive Arm of Government, Separation of Powers, Checks and Balances under the Nigerian Constitutional Democracy

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Abstract

Modern day government is designed to reduce concentration of power, promote personal liberty and prevent abuse of power. Many Constitutions are therefore crafted to provide for distribution of governmental powers, separation of powers, checks and balances. This is a notable feature of the 1999 Constitution of Nigeria which has prescribed the scope and limits for each arm of government, and areas to integrate the dispersed power into a workable government. Recently, the Supreme Court of Nigeria in Attorney-General of Abia State & 35 ors v. Attorney General of the Federation nullified Executive Order 10 issued by the President of the Federal Republic of Nigeria which sought to grant financial autonomy to the state judiciary and legislature. The judgment of the apex Court has raised a number of constitutional issues which are germane to our constitutional democracy. It has brought to the fore the need for each organ to be independent within its own domain and no one organ of government has supervisory power or control over other arms. It espoused the sanctity of the doctrine of separation of powers, checks and balances as desirable under the Nigerian Presidential Constitution. The confusion associated with the advent of executive orders requires urgent clarification not only for the citizens but the operators of the constitution. This paper adopts the doctrinal research methodology and critically analyzes the constitutional provisions on the law-making power of the executive arm, separation of powers, and draws experiences from advanced constitutional democracies. It concludes that the 1999 constitution recognizes some level of integration and interaction amongst the different arms of government, and maintains a delicate balance to avoid concentration of power. It is therefore the responsibility of each arm of government to operate within its area of competence and respect the limit prescribed by the constitution.

Key words: *Lawmaking, Separation of powers, Checks and balances, Rule of law, Constitutional Democracy.*

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1.0 INTRODUCTION

Modern day government is designed to reduce concentration of powers in one organ and avoid abuse of power. Therefore, modern constitutions provide for separation of powers, checks and balances. More importantly, the constitutions in states practicing constitutional democracy provide limited power for persons or institutions in authority. The concept of separation of powers ensures that governmental powers are shared among distinct institutions- mostly the Executive, the Judiciary, and the Legislature. While the executive is responsible for carrying out the daily governmental administration and executing laws, the legislature deals with making laws and the judiciary is charged with interpreting laws. Generally, these organs of government are meant to exercise the traditional roles given to them and leave other functions to the other organs. However, the executive organ of government has been described as the “most influential organ”¹. It is said to be “the most important organ due to the indispensable role it plays in the lives of citizens”².

In Nigeria, the law-making function is clearly defined as the responsibility of the legislature. Section 58 of the Constitution states clearly the law-making process in Nigeria. It is the National Assembly that has the power to make law. This power must be exercised by concurrent votes of both houses and signed by the President. Where this process is not strictly followed, the Supreme Court has held such exercise as unconstitutional. This was the case in *Attorney General of Bendel State Vs. Attorney General of the Federation & Ors*³, where the Supreme

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¹ See Walybenblogpost ‘Three Arms of Government in Nigeria & Their Functions’ accessed on January 24 2022 from <https://www.walyben.com/three-arms-of-government-in-nigeria-their-functions/#:~:text=The%20principle%20role%20of%20the,general%20administration%20of%20the%20country.&text=The%20executive%20arm%20of%20government,plays%20in%20life%20of%20citizens.>

² See Walybenblogpost ‘Three Arms of Government in Nigeria & Their Functions’ accessed on January 24 2022 from <https://www.walyben.com/three-arms-of-government-in-nigeria-their-functions/#:~:text=The%20principle%20role%20of%20the,general%20administration%20of%20the%20country.&text=The%20executive%20arm%20of%20government,plays%20in%20life%20of%20citizens.>

³(1983) ANLR 208

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Court nullified a purported passage of Appropriation Act by a committee of the National Assembly without a concurrent vote of two-third of members of both houses. The perception of the executive as the 'most important organ' has in some cases expanded the powers of the executive in Nigeria. The President and other members of the executive arm of government have in some cases abused their powers and arrogated to themselves some of the roles of the other arms of government.

The Nigerian President's reluctance and delay in assenting to an all-important law – the Electoral Act Amendment Bill 2021 even after the two chambers of the National Assembly passed the Bill and until 2022 has raised several arguments on the law-making powers of the executive. Litigations and counter arguments have also trailed the decision of the current administration to govern through executive orders as is obtainable in the United States of America and some other states operating the presidential system of government.

This paper examines the powers of the executive arm of government and its law-making function as allowed by the constitution. On the whole, executive powers treated in this paper are limited to those issued by the President, nevertheless, the generality of issues discussed, for the most part, may be applicable to States of the Federation since Nigeria operates a single constitution and states have no peculiar constitution.

2.0 SEPERATION OF POWER AND CHECKS AND BALANCES

The rationale for division of governmental powers among various branches of government developed from deep philosophical thinking and not just constitutional development. While analysing the government and people of Rome during his time, the Greek Statesman Polybius⁴ explained that the great Roman Empire grew to become successful and sustainable because powers in the government were not concentrated in a person or a group of persons. He postulated that the Roman City evolved into the empire and in its evolution tried several systems of government until it accepted the combination of three systems identified in three branches.: monarchy (the consul, or chief magistrate),

⁴ Paton, W. R. [tr.], Polybius. The histories, 6 vols, vol. 3, Loeb Classical Library 138, 1st ed., London: Heinemann, 1923 accessed from <https://archive.org/details/historieswitheng06poly/page/n3/mode/2up>

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aristocracy (the Senate) and democracy (the people)⁵. He explained that the fear of losing its power was the main reason each group jealously guarded its functions against encroachment by another branch of government. These concepts greatly influenced later ideas about separation of powers being crucial to a well-functioning government.⁶

Influenced by the work of Polybius, Charles-Louis de Secondat, baron de La Brède et de Montesquieu identified despotism as the primary threat in any government. The term "triaspolitica" or "separation of powers" was coined by Montesquieu. In his famous work "The Spirit of the Laws,"⁷ Montesquieu argued that the best way to prevent abuse of government powers and promote political liberty was through a separation of powers, in which different bodies of government exercised legislative, executive, and judicial powers, with all these bodies subject to the rule of law. He postulated that separation of powers under the law would guarantee checks and balance by all the arms of government. In expounding the principles of separation of powers, Montesquieu explained that the English Constitution was the only constitution at that time that had political liberty as its direct object and that the English Constitution established a functional separation of powers⁸.

This theory and the work of Montesquieu were said to have inspired the Declaration of the Rights of Man and the Constitution of the United States⁹. Building on the ideas of Polybius, Montesquieu, William Blackstone, John Locke and other philosophers and political scientists over the centuries, the framers of the U.S. Constitution divided the powers and responsibilities of the new federal

⁵ Hansen, Mogens Herman. "The Mixed Constitution Versus the Separation of Powers: Monarchical and Aristocratic Aspects of Modern Democracy." *History of Political Thought*, vol. 31, no. 3, Imprint Academic Ltd., 2010, pp. 509–31, <http://www.jstor.org/stable/26224146>.

⁶ See Paul Meany "Polybius and The Origins of The Separation Of Powers" Nov 28 2018 accessed on <https://www.libertarianism.org/columns/polybius-origins-separation-powers>

⁷ De Second at Baron de, Montesquieu Charles. 'The Spirit of Laws'. translated by Thomas Nugent, Hafner Publishing Company New York 1949

⁸ Krause, Sharon. "The Spirit of Separate Powers in Montesquieu." *The Review of Politics*, vol. 62, no. 2, [University of Notre Dame du lac on behalf of Review of Politics, Cambridge University Press], 2000, pp. 231–65, <http://www.jstor.org/stable/1408037>.

⁹ Janis, Mark W. "The Declaration of Independence, the Declaration of the Rights of Man and Citizen, and the Bill of Rights." *Human Rights Quarterly*, vol. 14, no. 4, Johns Hopkins University Press, 1992, pp. 478–84, <https://doi.org/10.2307/762314>.

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government among three branches: the legislative branch, the executive branch and the judicial branch.¹⁰In addition to this separation of powers, the framers built a system of checks and balances designed to guard against tyranny by ensuring that no branch would grab too much power. Separation of powers, therefore, refers to the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances.

According to the American National Conference of State Legislators' website¹¹, the traditional characterizations of the powers of the branches of American government are:

- The legislative branch is responsible for enacting the laws of the state and appropriating the money necessary to operate the government.
- The executive branch is responsible for implementing and administering the public policy enacted and funded by the legislative branch.
- The judicial branch is responsible for interpreting the constitution and laws and applying their interpretations to controversies brought before it.

It is said of the American system that "While separation of powers is key to the workings of American government, no democratic system exists with an absolute separation of powers or an absolute lack of separation of powers. Governmental powers and responsibilities intentionally overlap; they are too complex and interrelated to be neatly compartmentalized. As a result, there is an inherent measure of competition and conflict among the branches of government. Throughout American history, there also has been an absence and flow of pre-

¹⁰See 'Separation of Powers--An Overview' published on 5/1/2021 on The American National Conference of State Legislators' website <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx> See Constitution of the United States of America Articles 1, 2 and 3.

¹¹'Separation of Powers--An Overview' published on 5/1/2021 on The American National Conference of State Legislators' website <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx>

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eminence among the governmental branches. Such experiences suggest that where power resides is part of an evolutionary process.”¹²

3.0 THE NIGERIAN CONSTITUTION

In many ways, there is nothing peculiar to the Nigerian Constitution as it simply restates the universal principle of supremacy of the Constitution, rule of law and constitutionalism, separation of powers among others. The idea of separation of powers, checks and balances are incorporated into the Nigerian constitution.

According to the Supreme Court in *Abacha & Ors. V. Fawehinmi*¹³:

The Constitution is the supreme law of the land; it is the grundnorm. Its supremacy has never been called to question in ordinary circumstances. For avoidance of doubt, the 1979 Constitution stated categorically in its chapter 1, Section 1(1) as follows: 1(1) "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria." For purposes of clarity, its Section 1(3) goes further to state: 1(3) "If any other law is inconsistent with the provision of this Constitution this Constitution shall prevail, and other law shall to the extent of the inconsistency be void.

This presupposes that all laws made in Nigeria must have their authority traced back to the Constitution to be valid otherwise such laws shall be void. Nnaemeka-Agu JSC, made this clear when he stated in *Kalu V. Odili*¹⁴ thus:

What I am constructing is the Constitution, an instrument of government under which laws are made and which will form the acid test for legislators and other functionaries of government

On the test to determine the validity of a law, the Supreme Court further stated in *Inec V. Musa*¹⁵ that:

¹² See ‘Separation of Powers--An Overview’ published on 5/1/2021 on The American National Conference of State Legislators’ website <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx>

¹³ (2000) LPELR-14(SC) Per ACHIKE, J.S.C (P. 90, paras. C-G)

¹⁴ (1992) LPELR-1653(SC) at 104

¹⁵ (2003) LPELR-1515(SC) Per Ayoola, J.S.C. (Pp.35-36, Paras.C-A)

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The acknowledged supremacy of the Constitution and by which the validity of the impugned provisions will be tested. First, all powers, legislative, executive and judicial must ultimately be traced to the Constitution. Secondly, the legislative powers of the legislature cannot be exercised inconsistently with the Constitution. Where it is so exercised it is invalid to the extent of such inconsistency. Thirdly, where the Constitution has enacted exhaustively in respect of any situation, conduct, or subject, a body that claims to legislate in addition to what the Constitution had enacted must show that it has derived the legislative authority to do so from the Constitution. Fourthly, where the Constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly can alter the Constitution in any way, directly or indirectly, unless, of course the Constitution itself has an attribute of its supremacy expressly so authorized.

Just like the American Constitution, the Nigerian Constitution fully provides for the constitutional separation of powers among the judiciary, the legislature and the executive. Section 4 of the Constitution provides for legislative powers, section 5 provides for the executive powers, while section 6 provides for the judicial power of the federation respectively. Even during military government in Nigeria, and the attendant attack on the Constitution, the principle of separation of powers was practiced. In *The Attorney-General of the Federation V. Guardian Newspapers Limited & Ors*¹⁶ the Supreme Court explained that even though the military government has given itself the executive and legislative powers of the federation, the judicial powers of the federation was not tampered with and the military government cannot exercise any power outside the legislative and executive powers given to it.

Section 4 of the Nigerian Constitution provides for the legislative powers of Nigeria as follows:

¹⁶ (1999) LPELR-3162(SC)

4. --(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 Houses 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 matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.
- (5) If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency, be void.
- (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 Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution;
 - b) 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

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- c) Any matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.
- (8) Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.
- (9) Notwithstanding the foregoing provisions of this section, the National Assembly or a House of Assembly shall not, in relation to any criminal offence whatsoever, have power to make any law which shall have retrospective effect.

By virtue of section 4(7) of CFRN, the House of Assembly of a State has power to make laws for the peace, order, and good government of the state or any part of the state with respect to

- a. Any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule of 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 this constitution.

The Executive powers of the Federation is given to the executive arm as follows:

5.—(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 or Ministers of the Government of the Federation or other officers in the public service of the Federation; and

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- (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.
- (2) Subject to the provisions of this Constitution, the executive powers of a State—
 - (a) shall be vested in the Governor of that State and may, subject as aforesaid and to the provisions of any law made by a House of Assembly, be exercised by him either directly or through the Deputy Governor or Commissioners of the Government of that State or officers in the public service of the State; and
 - (b) shall extend to the execution and maintenance of this Constitution, all Laws made by the House of Assembly of that State and to all matters with respect to which the House of Assembly has for the time being power to make laws.
- (3) The executive powers vested in a State under subsection (2) of this section, shall be exercised as not to—
 - (a) impede or prejudice the exercise of the executive powers of the Federation;
 - (b) endanger any asset or investment of the Government of the Federation in that State; or
 - (c) endanger the continuance of a federal government in Nigeria.
- (4) Notwithstanding the foregoing provisions of this section—
 - (a) the President shall not declare a state of war between the Federation and another country except with the sanction of a resolution of both Houses of the National Assembly sitting in a joint session; and
 - (b) except with the prior approval of the Senate, no member of the armed forces of the Federation shall be deployed on combat duty outside Nigeria.
- (5) Notwithstanding the provisions of subsection (4) of this section, the President, in consultation with the National Defence Council, may deploy members of the armed forces of the Federation on a limited combat duty outside Nigeria if he is satisfied that the national security is under imminent threat or danger.

Provided that the President shall within seven days of actual combat engagement, seek the consent of the Senate and the Senate shall thereafter give or refuse the said consent within fourteen days.

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Therefore, the executive power of the Nigerian president and the governors is primarily the execution and maintenance of the Constitution, all laws competently made by the legislature and to all matters with respect to which the legislature has power to make laws.

4.0 THE EXECUTIVE INVOLVEMENT IN LEGISLATIVE ROLE.

There are about 6 instances where the president in Nigeria participates in legislative work. They include the following:

a. Power to Assent to and Approve Bills

The Nigerian Constitution retains the constitutional power of the President or Governor in Nigeria to assent or give his approval before a bill approved by the legislature can become a law.

Section 58 of the 1999 Nigerian Constitution provides that:

- (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 as otherwise provided by subsection (5) of this section, assented to by the President.
- (2) A bill may originate in either the Senate or the House of Representatives and shall not become law unless it has been passed and, except as otherwise provided by this section and section 59 of this Constitution, assented to in accordance with the provisions of this section.
- (3) 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 any amendment made on it.
- (4) Where a bill is presented to the President for assent, he shall within thirty days thereof signify that he assents or that he withholds assent.
- (5) Where the President withholds his assent and the bill is again passed by each House by two-thirds majority, the bill shall become law and the assent of the President shall not be required.

This section gives the President the ultimate law-making power subject only to the power of the National Assembly to override the requirement of the assent of

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the President by two-thirds majority of the Senate and House of Representatives.¹⁷

From the above provision, the President has the power to veto a bill by withholding his assent, if he does not approve its content. He therefore has the power to prevent a bill from becoming a law. The President can also withhold assent for a good reason, for a bad reason or for no reason. The delay of the President to assent to the Electoral Act Amendment Bill attracted objections from several Nigerians including members of the National Assembly¹⁸, political parties and several stakeholders so much so that the National Assembly where the President's party the All-Progressive Party (APC) has the majority seats considered overriding the President's veto by activating section 58(5) of the Constitution¹⁹.

There are no restrictions on the grounds for which the President may veto a bill passed by the Nigerian National Assembly. For example, the veto power is not only to be used in blocking legislation which the President considers unconstitutional; it may also be exercised whenever the President thinks the bill is objectionable for any reason. If the President withholds assent, the National Assembly, if it so wishes can invoke its constitutional power to override the presidential veto; by further enacting the bill into law without the President's assent. Under section 58(5) of the Constitution, this would occur when, after the President's veto, the bill is again passed by each House of the National Assembly, provided that this second passage is sanctioned by at least two-thirds majority of each House.

¹⁷ Note that the House Standing Rules and Orders, and Concurrent Resolutions taken jointly to correct errors in bills of the National Assembly yet to receive presidential assent do not require the assent of the President.

¹⁸ 'Electoral bill: Senators move to override Buhari, gather 73 signatures' *Punch* of 21/12/2021 accessed on January 29, 2021 from <https://punchng.com/electoral-bill-senators-move-to-override-buhari-gather-73-signatures/>

¹⁹ 'Electoral Act amendment bill: Senate backs down on overriding Buhari, refers bill to constituents' *Punch* of 23/12/2021 accessed on January 29, 2021 from <https://punchng.com/electoral-act-amendment-bill-senate-backs-down-on-overriding-buhari-refers-bill-to-constituents/>. *The President eventually signed the Electoral Bill into law on 25th February 2022.*

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The court in *The National Assembly V. The President of The Federal Republic of Nigeria & Ors*²⁰ had explained that in line with the constitutional provisions of section 58(5) of the Constitution, for the National Assembly to override the veto power of the President, the National Assembly has to go through all the processes of the legislation already carried out. The National Legislature must go through all the processes of legislation again culminating in the approval of the law by two-thirds of the members of the National Assembly.

The President's power to veto bills is an important and effective part of the executive power. This constitutes an important element of checks and balances under the Nigerian Constitution. The National Assembly will be careful and will not abuse its power of law making by making laws that will be objected to by the President. The necessity of producing bills, which the President would willingly assent to, would be a constant factor in the legislative process. A President's timely suggestion that he may veto a particular bill under consideration could result in changes to the bill before its passage. For example, the long process that followed the passage of the Petroleum Industry Act 2021 encountered the refusal by the President to assent to harmonised bills presented to him in July 2018 and in May 2019²¹. In rejecting the Bills, the President made suggestions which were taken into consideration in passing the Petroleum Industry Act 2021 which was eventually assented to by the President.

When the President exercises the veto power, his veto is usually not likely to be overridden by the National Assembly; because, as already noted, such an exercise requires at least two-thirds of the members voting to override and requires the whole process of introducing and amending a bill again. The President would count on the support of his party members and other supporters to prevent the National Assembly from overriding his veto. Overriding the President is a very difficult task²². It is reported that in America, out of 1,484 regular vetoes since

²⁰ (2003) LPELR-10151(CA)

²¹ 'Timeline of the Petroleum Industry Act - Spaces for Change' accessed on January 29, 2022 from <https://spacesforchange.org/wp-content/uploads/2021/11/PIB-Timeline.pdf>

²² 'Electoral Act Amendment Bill: Why NASS can't override Buhari's veto – SANs' in *Blueprint* of December 8, 2018 accessed on January 29, 2022 from <https://www.blueprint.ng/electoral-act-amendment-bill-why-nass-cant-override-buharis-veto-sans/>

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1789, only 7.1% or 106, have been overridden.²³ There is no constitutional or statutory authorization of line – item veto in Nigeria. Thus, the President must assent to the entire bill or veto the entire bill. He is not authorized to assent to certain items in the bill and veto the others.

There were arguments on whether the presidential assent is required for a constitutional amendment in line with section 9 of the Constitution. While it was argued in line with the American system, that the President has no role in the amendment of the Constitution²⁴, the Federal High Court in *Agbakoba v The National Assembly*,²⁵ per Okeke J., held that: “constitutional amendment without presidential assent is null and void”. The court explained that since amendments to the Constitution are done through Acts of the National Assembly, the Acts must comply with the requirements of presidential assent in section 58 of the Constitution. This decision has received condemnation as giving the President too much power to make constitutional provisions²⁶. The decision suggests that the lawmakers who make constitutional provisions cannot override the President on a constitutional provisions issue. As has already been established, the Nigerian Constitution derives most of its principles from the American Constitution. By article 1, section 7 clause 2 of the American Constitution, the President’s power to veto a bill duly passed by Congress is clearly outlined in terms as follows:

Every Bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States: If he approves he shall sign it, but if not he shall return it, with his objections to that House in which it

²³Udofa I. J. ‘Presidential Law-Making Power In Nigeria And America: Turning Presidents Into Supermen?’ *Global Journal of Politics and Law Research* Vol.5, No.3, pp.1-16, May 2017 Published by European Centre for Research Training and Development UK (www.eajournals.org) citing M.A. Sollenberger, “The Presidential Veto and Congressional Procedure”, Congressional Research Service, (RS 21750; February 27, 2004) p. 2.

²⁴Omoregie, Osahon ‘Constitutional Amendment and Presidential Assent: The Nigeria Perspectives’. *International Journal of Governance and Development* Vol4, Number 1, January 2015

²⁵(2010) 4LLRN 2078

²⁶Majek A ‘Can The President Override a 2/3 Majority Vote’ *Sahara Reporters* of Nov 13, 2010 accessed on January 29, 2022 from <http://saharareporters.com/2010/11/13/can-president-override-23-majority-vote>

shall have originated who shall enter the objections at large on their journal and proceed to reconsider it.

The American president, like his Nigerian counterpart, can therefore participate in law making and control significantly, the content of legislation, through proposing changes in statutory terms, by letting it be known that a particular bill, passed by the Legislature will be vetoed unless altered. By threatening a veto, the President can persuade legislators to alter the content of the bill to make it more acceptable to the President.²⁷ It is important to note that the American President, just like his Nigerian counterpart cannot veto a single item in the bill, he can either reject the whole bill or accept the whole bill.²⁸

In the United States of America, apart from approving or vetoing the bill, the President also has the option of taking no action on the bill. The effect of adopting this option depends largely on whether Congress is in session or not. If Congress is in session at any point within a period of 10 business days after the President receives the bill; it automatically becomes law. However, if Congress does not convene within 10 days, the bill dies, in which case it shall not be a law. The power to obstruct a bill by doing nothing, so that it dies and does not become law is called pocket veto; and it is valid as one affirmatively disapproving a bill. It is also noteworthy that as Congress cannot vote while in adjournment, a pocket veto cannot be overridden. Statistics show that 42% of all presidential vetoes from 1789 – 2004 were pocket vetoes²⁹. In Nigeria, if the President fails to sign a

²⁷Udofa I. J. 'Presidential Law-Making Power In Nigeria And America: Turning Presidents Into Supermen?' Global Journal of Politics and Law Research Vol.5, No.3, pp.1-16, May 2017 Published by European Centre for Research Training and Development UK (www.eajournals.org)

²⁸In 1996 the Line Item Veto Act 2U.S.Cass691&692 was enacted to give the American President the power to select particular items from the Appropriation Bill and individually veto them. The President was also enabled to impose cuts on the federal budget without vetoing the bill in its entirety. The United States of America Supreme Court in *Clinton v City of New York* 524 U.S. 417 (<https://supreme.justia.com/cases/federal/us/524/417/#tab-opinion-1960375>) invalidated the Line Item Veto Act. The Supreme Court explained that if by the Line-Item Act the president is allowed to pick particular sections of the bill to assent to, it means that the president has been given the power to amend the laws presented to him. This, the court said, is against the constitutional provision in Article 1 of the Constitution on powers of the legislature.

²⁹Udofa I. J. 'Presidential Law-Making Power In Nigeria And America: Turning Presidents Into Supermen?' Global Journal of Politics and Law Research Vol.5, No.3, pp.1-16, May 2017 Published by European Centre for Research Training and Development UK (www.eajournals.org)

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bill within 30 days after its presentation as prescribed by the Constitution, the bill is said to have lapsed.

b. Executive Orders³⁰

There are no statutory definitions of executive orders. Few literatures have been written on the subject and they offer guidance on the meaning of the concept. Kenneth Mayer defines an executive order as “a presidential directive that requires or authorizes some action within the executive branch.”³¹ Raven-Hansensays, “executive orders are presidential policy directives to the federal bureaucracy.”³². It has also been defined as “A rule or order issued by the President to an executive branch of the government having the force of law”³³. Within the Nigerian context, executive orders have been described as, “an instrument of governance written, signed, gazetted and published by the President for the purpose of managing operations of a Federal Government.”³⁴.

The Nigerian courts have in two instances tried to define the term Executive Orders. The Federal High Court in *Ugochinyere & Anor V. The President of the*

³⁰Okebukola and Kana, A. “Executive Orders in Nigeria as Valid Legislative Instruments and Administrative Tools” (2012), *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* vol. 3, 59-68 at 62

³¹K R Mayer 'Executive Orders and Presidential Power' (1999) 61 *The Journal of Politics* 445-466, at p. 445 Cited in Odoeme, Chukwudi. (2021). *Executive Orders In Constitutional Democracies: A Critique*. 1. 117. Accessed on January 27 2022 from https://www.researchgate.net/publication/356789114_EXECUTIVE_ORDERS_IN_CONSTITUTIONAL_DEMOCRACIES_A_CRITIQUE/download

³²P Raven-Hansen 'Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291' (1983) 1983 *Duke Law Journal* 285-353 at 286 in Okebukola and Kana, A. “Executive Orders in Nigeria as Valid Legislative Instruments and Administrative Tools” (2012), *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* vol. 3, 59-68 at 62

³³Anderson, S (not dated) “ Consolidation of Power: The use of executive orders, proclamations and signing statements during the George W. Bush Presidency” *EIU Political Science Review* Odoeme, Chukwudi. (2021). *Executive Orders In Constitutional Democracies: A Critique*. 1. 117. Accessed on January 27 2022 from https://www.researchgate.net/publication/356789114_EXECUTIVE_ORDERS_IN_CONSTITUTIONAL_DEMOCRACIES_A_CRITIQUE/download

³⁴Odoeme, Chukwudi. (2021). *Executive Orders In Constitutional Democracies: A Critique*. 1. 117. Accessed on January 27 2022 from https://www.researchgate.net/publication/356789114_EXECUTIVE_ORDERS_IN_CONSTITUTIONAL_DEMOCRACIES_A_CRITIQUE/download

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*Federal Republic of Nigeria & Anor*³⁵ stated thus: “An Executive Order in effect may be seen as a Presidential Policy directive issued to effectuate or implement an Act of the National Assembly or an existing law. Within the setting of courts, it is akin to a practice direction issued by heads of Courts by the powers conferred on them under the Constitution to make rules for the effective administration of the law and justice”. Comparing Executive Orders with the Practice directions issued by heads of courts may be akin to comparing two unlike terms. This is because, while the Constitution or legislation setting up a court specifically gives the power to make practice directions to the heads of court, no constitutional or statutory provision specifically gives the President the power to issue executive orders in Nigeria.

Also, the Court of Appeal in *Elephant Group Plc V. National Security Adviser & Anor*³⁶ explained Executive Orders thus “In law, an Executive Order such as Exhibit NSA 7 is an order or regulation issued by the President or some administrative authority under his direction for the purpose of interpreting, implementing, or giving administrative effect to a provision of the constitution or of some or treaty. It is indeed an effective instrument or tool for good governance and administration by the Government.”.³⁷ The court in the case decided that the directive issued by the Hon Minister of Agriculture and Rural Development of the Federal Republic of Nigeria, Chief AuduOgbeh being the responsible Minister, titled “Re: Control of Fertilizer and other IED precursor Chemicals in Nigeria” in which importation of Urea was restricted to only two companies in Nigeria, namely; Notore and Indorama was an executive order and has the force of law. The court in the judgment upheld its enforceability as a binding legislation.

As stated earlier the term, executive order, is neither defined, nor its meaning provided in the 1999 Constitution³⁸ or any legislation of the National Assembly or House of Assembly of any State. However, there has been in our body of laws and

³⁵ Unreported suit No. FHC/ABJ/740/2018 delivered on October 11 2018 by Hon. Justice Ijeoma L. Ojukwu

³⁶ (2018) LPELR-45528(CA)

³⁷ Per Biobele Abraham Georgewill, JCA (Pp. 85-86, paras. F-B)

³⁸ In 1960 Constitution section 35, the president can by order published in a Gazette fix a time for electing a president

official gazettes some forms of presidential orders termed executive council orders, executive orders etc. The peculiar thing about these orders is that they emanate from the President's office or the executive council of the federation. They give directive on several issues. No legislation or constitutional provision defines the term. The Interpretation Act also does not contain any definition of the expression.³⁹

It is important in exploring this issue to consider the constitutional development of Nigeria from 1960 till date. Perhaps, this will give an idea of the trajectory of constitutional powers of the President to issue orders under the different dispensations of Nigerian government. The 1960 and 1963 Constitution have similar provisions and, in several instances, provided for the power the president to issue 'orders.'

- Section 35(2)(b) of the 1963 Constitution provides that the "President shall specify by order published in the Gazette of the Federation." the place and time for the election meeting to elect a President.
- Section 165 of the 1963 Constitution provides that the President can by order, with the consent of the Governments of the Regions, designate things termed 'produce' under the Constitution.
- Item 8 of the Concurrent Legislative List of the 1963 Constitution⁴⁰ states that the President can by order, with the consent of the Governments of the Regions, designate things termed 'drugs and poison' under the concurrent legislative list of the Constitution
- Item 13 of the Concurrent Legislative List of the 1963 Constitution⁴¹ states that the President can by order, with the consent of the Governments of the Regions, designate 'regulated professionals' under the concurrent legislative list of the Constitution.
- Item 14 of the Concurrent Legislative List of the 1963 Constitution⁴² states that the President can by order, with the consent of the Governments of the Regions, designate 'National monuments' under the concurrent legislative list of the Constitution.

³⁹Interpretation Act CAP I23 LFN 2004.

⁴⁰ Item 8, Part II of the 1963 Constitution.

⁴¹ Item 13, Part II of the 1963 Constitution.

⁴² Item 14, Part II of the 1963 Constitution.

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- Item 15 of the Concurrent Legislative List of the 1963 Constitution⁴³ states that the President can by order, with the consent of the Governments of the Regions, designate National parks under the concurrent legislative list of the Constitution.
- Item 18 of the Concurrent Legislative List of the 1963 Constitution⁴⁴ state that the President can by order, with the consent of the Governments of the Regions, designate ‘essential supplies and services’ under the concurrent legislative list of the Constitution.

In exercise of these powers, the President during the First Republic published several orders pursuant to powers derived from the Constitution and powers derived from other legislation by parliament. For example, the following orders were issued in the First Republic:

- West African Examinations Council (Declaration of Pensionable Offices) Order, 1961⁴⁵
- The Rent Restriction (Lagos Central Planning Scheme Area) (Premises Decontrol) Order, 1964⁴⁶
- The Road Traffic (Control of Traffic) (Lagos) Order, 1963⁴⁷

Between 1966 and 1983 when the military truncated the first two attempts at constitutional democracy in Nigeria, they enacted constitutions by suspending and modifying some provisions of the existing constitution. The military governments in Nigeria also issued Orders in Gazettes. Section 5(5) of the Constitution (Suspension and Modification) Decree 1966⁴⁸ defined ‘subsidiary instrument’ as “any **order**, rules, regulations, rules of court or byelaws made in the exercise of powers conferred by a Decree or Edict.” (Emphasis supplied). Section 4(5) of the Constitution (Suspension and Modification) Decree 1984 incidentally decreed by Major General Muhammadu Buhari as Military head of

⁴³ Item 15, Part II of the 1963 Constitution.

⁴⁴ Item 18, Part II of the 1963 Constitution.

⁴⁵ Supplement to Official Gazette No. 44, Vol. 48, 22nd June, 1961 Part B L.N. 85 of 1961 made pursuant to West African Examinations Council (Nigeria Status) Ordinance (Cap.217)

⁴⁶ Supplement to Official Gazette. No. 52, Vol. 51, 11th June, 1964 Part BLN.60 of 1964 made pursuant to The Rent Restriction Act CAP. 183 Laws of Nigeria.

⁴⁷ Supplement to Official Gazette No. 75, Vol. 50, 26th September 1963 Part B 425 L.N. 117 of 1963 made pursuant to the Road Traffic Act (Cap 184 of the Laws of Nigeria).

⁴⁸ Supplement to Official Gazette Extraordinary No. 20, Vol. 53, 4th March, 1966—Part A

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State contains similar provisions and categorises ‘orders’ from the Head of State as subsidiary legislation under the military dictatorship.

Below are some of the orders issues under the hand of the military pursuant to the abovementioned powers.

1. the Delegation of Functions (Federal Executive Council) Order 1967⁴⁹
2. The State Security (Detention of Persons) No. 3 Order 1967⁵⁰
3. Insurance Companies Act 1961 (Commencement) Order 1967⁵¹
4. Federal Highways (Declaration) Order 1977⁵²
5. The Nigerian Council for Scientific and Industrial Research Decree 1966 (Commencement) Order 1967⁵³

The 1979 and the 1999 Presidential Constitutions did not lay any emphasis on presidential or executive orders like the previous legal regimes. The 1979 and 1999 Constitutions in only one instance give the President the power to make an Order. Paragraph 11(2) of the 3rd Schedule to the 1999 Constitution gives the President the power to, by an order, designate the offices that are not within the Control of the Federal Civil Service Commission to hire and fire. Similar provisions were stated in the 1979 Constitution.⁵⁴ Section 279 of the 1979 Constitution also provided that the President shall by Order confirmed by the resolution of the two houses of the National Assembly state when the provision making the Federal Capital Territory the capital of the federation and the seat of government of the Federation.

Before the issuance of orders by the Buhari Presidency, no Civilian President has ever exercised that power to issue any executive or presidential order under the

⁴⁹ Supplement to Official Gazette Extraordinary No.28, Vol. 54 L.N.42 of 1967 Constitution (Suspension and Modification) Decree 1967 (No.8 of 1967)

⁵⁰ Supplement to Official Gazette Extraordinary No. 30, Vol. 54, 4th May, 1967" LN 43 of 1967 made pursuant to the State Security (Detention of Persons) Decree 1966.

⁵¹ LN: 44 of 1967 made pursuant to The Insurance Companies Act 1961 - (1961 No. 53)

⁵² Supplement to Official Gazette No. 58, Vol. 64, 15th December 1977—Part B

Ln.60 of 1977 Made Pursuant to Federal Highways Decree 1971 (1971 No. 4)

⁵³ Supplement to Official Gazette No.4 Vol.54 1st June 1967—Part B LN.53 of 1967 made pursuant to The Nigerian Council for Scientific and Industrial Research Decree 1966 (1966 No; 83)

⁵⁴ This provision talks about designation of the offices under the Federal Civil Service Commission. Paragraph 2(2) part 11 of the 3rd Schedule to the 1999 Constitution provides for similar powers by the Governors of states with respect to the State Civil Service Commission.

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1999 and 1979 Constitutions.⁵⁵The parliamentary and military governments however had examples of issuance of presidential or executive orders. It is important to note that the military government in Nigeria possessed ultimate legislative and executive powers and they could therefore issue any orders or commands without being challenged in anyway. Also due to the principle of Parliamentary Sovereignty⁵⁶the parliamentary system operated by Nigeria in the first republic had the power to issue any law through the government nominated from parliament. The parliament could also make any kind of law giving the chief executive or the President the power to issue orders. This is like the order in council⁵⁷ issued by the British sovereign.

The 1999 presidential constitution is however like the American Constitution, and it may be relevant to interrogate the American system in relation to Executive Orders to understand the Nigerian system. The issuance of Executive orders is a part of the American system. Several executive orders have been issued in America by the American President. Former President Trump of America is said to have issued 220 Executive Orders in his four years presidency.⁵⁸It can therefore be concluded that the Nigerian President in using executive orders as an executive instrument is either influenced by the American System, the erstwhile Military Government or the parliamentary government of the past. The Governor of Benue State believes that the issuance of Executive Orders by the current administration shows a President who is so used to the military government. He was quoted to have stated thus “the government behaves as if Nigeria is under military rule with President Buhari churning out executive orders as he did decrees in the past. Throughout the period of former President Shehu

⁵⁵Amadi, S. (2018) “Executive Order and presidential power in the Nigerian constitutional democracy.” *The Guardian Newspaper* (17 October) accessed on January 27 from <https://guardian.ng/features/executive-order-and-presidential-power-in-the-nigerian-constitutional-democracy/>

⁵⁶Walters, M. (2020). The Law of Parliamentary Sovereignty. In *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge Studies in Constitutional Law, pp. 162-225). Cambridge: Cambridge University Press. doi:10.1017/9781139236249.010

⁵⁷Order in council, in Great Britain, a regulation issued by the sovereign on the advice of the Privy Council; in modern practice, however, an order is issued only upon the advice of ministers, the minister in charge of the department concerned with the subject matter of the order being responsible to Parliament for its contents.

⁵⁸See ‘Executive Orders’ The American Presidency Project website accessed on January 27 2022 from <https://www.presidency.ucsb.edu/statistics/data/executive-orders>

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Shagari did you ever hear of executive orders. So, they want to go back to military rule. They are addicted to military rule.”⁵⁹

In *Ugochinyere & Anor V. The President of the Federal Republic of Nigeria & Anor*⁶⁰ which challenged Executive Order 6 issued by Nigerian President, the Court held that there is nothing inherently wrong with the issuance of executive orders by the President. The court held thus: “the President can issue an Executive Order under section 5 of the Constitution in so far as the Order relate to routine administrative matters and internal operations of Federal Agencies, policies and programs, and so long as it does not encroach on the powers of the Legislature or the Judiciary as delineated under the Constitution of the Federal Republic of Nigeria 1999.” The court then reviewed Executive Order 6 and came to the conclusion that there is nothing in the executive order that is ultravires the President’s powers under section 5 of the Constitution.

From the above decision, it can be said that the question of the validity of executive orders is now settled. As long as the President does not exceed his constitutional powers in making the order, the order will be valid. As was decided by the United States Supreme Court in *Marbury v. Madison*⁶¹ any action by the President that does not pass the constitutional muster will be declared null and void by the courts.

In line with its constitutional role, the Nigerian Supreme Court in *Attorney General of Abia State & 35 Ors v Attorney General of the Federation*⁶² held Executive Order 10⁶³ issued by the President as illegal because it is ultravires the President’s powers under the Constitution. The court is reported to have stated that “The President has overstepped the limit of his constitutional powers by

⁵⁹ ‘Nigerians Unhappy with Buhari, Regret Voting for Him, Says Ortom’ *This Day* of January 22, 2022 accessed on January 27, 2022 from <https://www.thisdaylive.com/index.php/2022/01/22/nigerians-unhappy-with-buhari-regret-voting-for-him-says-ortom/>

⁶⁰ Unreported suit No. FHC/ABJ/740/2018 delivered on October 11 2018 by Hon. Justice Ijeoma L. Ojukwu

⁶¹ US 137 (1803) accessed on February 12, 2022, from <https://www.oyez.org/cases/1789-1850/5us137>

⁶² Unreported suit no. SC/655/2020 delivered on February 11, 2022.

⁶³ In the suit, the 36 state governors in Nigeria had based a claim on Executive Order 10 granting states judiciary & legislature autonomy. This issue on judicial or legislative autonomy has however been settled under the Constitution.

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issuing the Executive Order 10...The country is run on the basis of the rule of law,”⁶⁴

c. Initiation of Appropriation Bill and other Executive Bills

Most bills considered by the Legislature in the process of law-making are initiated by the Executive branch, by way of executive bills. Specifically, the Constitution expressly vests in the President the power to prepare and submit the Annual Appropriation Bill to the Legislature. Thus, section 81 of the Nigerian Constitution provides that:

The President shall cause to be prepared and laid before each House of the National Assembly at any time in each financial year estimates of the revenues and expenditure of the Federation for the next following financial year.

The heads of expenditure contained in the estimates (other than expenditure charged upon the Consolidated Revenue Fund of the Federation by this Constitution) shall be included in a bill to be known as an Appropriation Bill, providing for the issue from the Consolidated Revenue Fund of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified therein.

Basically, the Appropriation Bill therefore serves as an application by the President to the National Assembly for approval to withdraw the specified amounts of money from the Consolidated Revenue Fund, for governmental programmes for a year. This position also finds support from the provision of section 80(2) and 80(3) of the Constitution, which provides that:

S. 80(2)

No moneys shall be withdrawn from the Consolidated Revenue Fund of the Federation, except to meet expenditure that is charged upon the fund by this Constitution or where the issue of those moneys has been authorized by an Appropriation Act, Supplementary Appropriation Act or an Act passed in pursuance of section 81 of this Constitution.

S. 80(3)

⁶⁴,S’Court voids Buhari’s Executive Order 10, declares it illegal’ *Vanguard* of February 12, 2022 accessed on February 12, 2022 from <https://www.vanguardngr.com/2022/02/scourt-voids-buharis-executive-order-10-declares-it-illegal/>

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No moneys shall be withdrawn from any public fund of the Federation, other than the Consolidated Revenue Fund of the Federation, unless the issue of those moneys has been authorized by an Act of the National Assembly.

During the passage of the Appropriation or Supplementary Appropriation Bills, amendments can be made by either House of the National Assembly concerning the amounts to be spent on specific heads. An important but controversial issue relates to the power of the National Assembly to increase the total amount that will be spent in the budget beyond the amount proposed in the President's Appropriation Bill. The Nigerian National Assembly, over the years, has consistently claimed that their constitutional power to examine the Appropriation bill, appropriate funds for the purposes provided therein and ultimately pass the bill; would necessarily include the power to increase the total amount proposed by the President⁶⁵. Indeed, the National Assembly has been accused of having the penchant for increasing budget estimates sent to it by the President, even to the point of being unrealistic.⁶⁶ In 2016 a new term, "padding the budget", entered the Nigerian political lexicon. This term was used to describe the National Assembly's action of increasing the budget estimates in the Appropriation bill sent in by the President and indiscriminately inserting new projects. In 2018, a Federal High Court ordered the President and the Attorney General of the Federation to prosecute the persons involved in the 2016 budget padding.⁶⁷

Professor Nwabueze, maintains that the National Assembly lacks the power to increase the total amount in the Appropriation Bill beyond the amount proposed by the President. Amounts can, however, be reduced in relation to a particular

⁶⁵"Budget Padding Is A 'Misrepresentation Of Facts' – Deputy Speaker" Channels Television Updated January 31, 2017 accessed on January 25 2022 from <https://www.channelstv.com/2017/01/31/budget-padding-is-a-misrepresentation-of-facts-deputy-speaker/>

⁶⁶D. Ojetunde "Budget padding: Buhari fumes as National Assembly alters 2022 budget" Data Stories of December 31, 2021 accessed on February 12 2022 from <https://www.icirnigeria.org/budget-padding-buhari-fumes-as-national-assembly-alters-2022-budget/>

⁶⁷"Budget padding: Court orders Buhari to prosecute indicted lawmakers" Vanguard of May 30, 2018 accessed on February 12, 2022 from <https://www.vanguardngr.com/2018/05/budget-padding-court-orders-buhari-prosecute-indicted-lawmakers/>

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head and added to another.⁶⁸ Commenting further on the unconstitutionality of the National Assembly's exercise of power to increase the total amount in the Appropriation bill submitted by the President, Nwabueze states as follows:

An increase in the total Amount of the budget by the National Assembly amounts to an initiation of financial bill, which is an exclusive preserve of the executive. The excess amount over and above the total figure in the appropriation bill must be regarded as having been initiated by the National Assembly not by the President, and is, therefore, unconstitutional.

In the event of a delay in the passage of the Appropriation Bill into law, the Constitution authorizes the President of the Federation to withdraw moneys from the Consolidated Revenue Fund to meet the expenditure and services of the Federation for six months or until the Appropriation Act comes into operation, whichever is earlier.⁶⁹ The withdrawal for any such period must not exceed the amount authorised under the Appropriation Act passed by the National Assembly to be withdrawn from the Consolidated Revenue Fund in the corresponding period of the previous year.⁷⁰ This is a laudable provision which ensures that government programmes are not grounded as a result of the delay in passing the Appropriation bill into law.

d. Changes to Existing Laws

Another constitutional provision which, in effect, gives the Nigerian President power to legislate without the participation of the National Assembly is section 315 of 1999 Nigerian Constitution. This section applies to all existing laws, which means; "any law which was in force immediately before May 29, 1999, or which having been made before that date came into force after that date". Under section 315(2) of the Nigerian Constitution, the appropriate authority may at any time, by order, make such changes in the text of any existing law as the

⁶⁸ See B.O. Nwabueze, *Constitutional Democracy in Nigeria Vol.1* (Ibadan: Spectrum Books Ltd., 2004) p. 264.

⁶⁹ See Section 82 of the 1999 Constitution

⁷⁰ Ibid

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appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of the Constitution. The appropriate authority in relation to any law of the federation is specifically designated to be the President. Accordingly, this provision empowers the President, acting without the National Assembly, to alter any law made before the 1999 Constitution took effect. In doing so, the President in effect, exercises an independent power to legislate without recourse to the National Assembly. It is clear that this provision limits the President to making only such changes in existing laws as are needed to bring them into conformity with the Constitution. However, the determination of whether an existing law is in conflict with the Constitution or not could become problematic and contentious.

With regard to the power to modify existing laws made by the State, the Court in *Mohammed v Attorney General of Kaduna State*,⁷¹ held that the power to modify existing law to bring it into conformity with the Constitution is not vested in the Governor alone; and that, where the Governor's modification is at variance with that of the State House of Assembly, whose legislative power is contained in section 4(6) of the Nigerian Constitution, the modification by the House of Assembly would override that of the Governor. Thus, only minor modifications, like names, dates and titles, which do not go to the substance of the law can be made by the Governor or President. Any modification which would affect vested rights must be left to the constitutionally ordained law-making body.⁷²

The exact extent of the powers of the President to modify existing laws under section 315 of the Constitution in relation to the doctrine of separation of powers which precludes him from encroaching into the area reserved for the Legislature came up in the Supreme Court for consideration in *A.G. Abia State and 35 Orsv. A.G. Federation*.⁷³ In that case, President Obasanjo, by statutory instrument NO 9 of 2002 made an order modifying the Allocation of Revenue (Federal Account etc) Act 1990 as amended by Allocation of Revenue (Federation Account etc) Act, 1992. In so doing, the President relied on section 315 of the Constitution and purported to bring Decree 106 of 1992 in conformity with section 162(3) of the 1999 Constitution. The plaintiffs, in their suit before the

⁷¹ (1981) N.C.L.R. 117.

⁷² Samuel Igbe v Governor, Bendel State, (1981) S.C. 53.

⁷³ (2003) 1 SCNJ 131.

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Supreme Court formulated only one issue for determination as follows; Whether section 315 of the Constitution of the Federal Republic of Nigeria 1999 authorises the President to amend the Allocation of Revenue (Federation Account, etc) Act Cap 16 laws of the Federation 1990 as amended by the Allocation of Revenue (Federation Account, etc) (Amendment) Act, 1992 in the manner and to the extent contained in paragraphs 2(1)(a) and 3 of the Allocation of Revenue (Federation Account, etc (Modification) Order 2002.

In its judgment, the Supreme Court of Nigeria, per Belgore, JSC, in holding that the President's exercise of power, pursuant to section 315 of the 1999 Constitution was constitutional, stated as follows:

The President has wide powers when modifying any existing law to bring it in conformity with the Constitution. It is true that separation of powers is essential to a healthy democracy the powers given the President...in existing law... is not an abuse of the principle or doctrine of separation of powers.³

Iguh, JSC, on his part, held as follows:

The Constitution being an organic law, the grundnorm and the Supreme law of the land may restrict the operation of this principle of separation of powers. Accordingly, the power of the legislature may be restricted by the express provision of the Constitution... In other words, the Constitution may permit the breach of the principle of separation of powers. This would appear to be what the 1999 Constitution did in section 315 therefore which allows the President to modify an existing law... whereas the 1999 Constitution provided for the principle of separation of powers, the same Constitution conferred the President with power under section 315... In my view, the doctrine of separation of powers may not be involved in the present case to defeat the express provision of section 315 of the Constitution.

e. Ordinary Regulations

Regulations constitute the bulk of subsidiary legislation made by the executive branch through express delegation of power in that regard by the Legislature. It is sometimes argued that in exercising the power to make regulations or subsidiary

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legislation, the Executive acts as agent of the Legislature and to that extent neither the Legislature abdicated its legislative power nor did the executive usurp same.

f. Regulations on Citizenship

Section 32 of the 1999 Nigerian Constitution empowers the President, on his own, to make whatever regulations he considers necessary for carrying into effect the provisions of Chapter 3 of the Constitution, which deals with citizenship. The President does not have to wait for the passage of a bill by the National Assembly authorizing him to make regulations. Indeed, the President is not required to obtain the approval of the National Assembly before making the regulations⁷⁴ even though he is required to lay the regulations made by him before the National Assembly.

5.0 RECOMMENDATIONS:

1. Civil rights litigations that checkmate the procedure of legislation and insist that the National Assembly and the Executive comply with laid down constitutional rules should be encouraged. This kind of litigation include the one commenced by OlisaAgbakoba in In Agbakoba(SAN) v. National Assembly &Ors,⁷⁵ where Hon. Justice O.J. Okeke of the Federal High Court Lagos giving the interpretation of section 2 of the interpretation Act held that the Constitution came into force through an Act, and can only be amended through an Act and an Act cannot become Law without the assent of the President.
2. Professional bodies of influence like the Nigerian Bar Association must be alive to its responsibility of advising and cautioning the Executive and Legislature. Ike Ekweremadu, the Deputy Senate President recently called on the NBA to be a strong and firm voice in cautioning against governmental abuses.⁷⁶

⁷⁴ Section 32 of the 1999 Constitution

⁷⁵ Unreported suit no FHS/L/1940/2010 cited in Bright Iteshi ‘Does Constitutional Amendment Require Presidential Assent?’ Lawyard of Oct 17, 2017 accessed on 18/06/18 from <https://www.lawyard.ng/does-constitutional-amendment-require-presidential-assent-by-bright-iteshi/>

⁷⁶ ‘NBA Abuja Unity Bar Law Week 2018 day 1- Ekweremadu Challenges Lawyers to be Catalysts for National Unity and Development’ The Metro Lawyer accessed on 18/06/18 from

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The mission of the Nigerian Bar Association is ‘To use the law as an instrument for social change in Nigeria’⁷⁷. Its motto is ‘Promoting the Rule of Law’⁷⁸. Institutional core objectives of the NBA includes amongst others

- a. Promote and support law reform initiatives
- b. Promote and protect the principles of the Rule of Law and respect for Human Rights

NBA and other similar organisations must therefore rise to the occasion and take up its role and protect the constitution from unscrupulous politicians.

3. The lawyers in Government, namely, lawmakers, political parties executives, Attorney-Generals, law officers, legal advisors to the public officials must have the interest of the nation at heart and work to entrench the rule of law in the business of government.

CONCLUSION

Members of the bar and the bench have the primary responsibility of safeguarding and advancing the cause of the rule of law. Towards this end, civil and public interest litigations should be encouraged to ensure that laid down constitutional provisions are duly expounded and enforced. The Nigerian Bar Association must be alive to its constitutional mandate by promoting and preserving the principles of the rule of law and respect for human rights. The Bar must therefore translate its mission statement of using law as an instrument for social change into achievable realistic goals by promoting and supporting law reform initiatives in the overall interest of the nation’s democracy. The bench must brace up to the challenge and display an uncommon courage in upholding the constitutional supremacy without fear or favour. All superior courts must act in accordance with the dictates of the constitution and the law in order to boost confidence in the rule of law. The recent decision of the Supreme Court in

<http://themetrolawyer.com/nba-abuja-unity-bar-law-week-2018-day-1-ekweremadu-challenges-lawyers-to-be-catalysts-for-national-unity-and-development/>

⁷⁷ See NBA Website accessed on 18/06/18 from <http://www.nigerianbar.org.ng/index.php/aboutus#Constitution>

⁷⁸ See NBA Website accessed on 18/06/18 from <http://www.nigerianbar.org.ng/index.php/aboutus#Constitution>

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declaring Executive Order 10 unconstitutional, null and void is a sure signal and must be applauded by all. Political leaders must rededicate themselves to upholding the ideals of the rule of law and be fully committed to respecting the Constitution which they derive their powers from. There must be a deliberate effort to create more awareness and educate Nigerians on the need to promote and defend the rule of law as the only means of realising the dividends of democracy and actualising their legitimate aspirations and human dignity. The three arms of government at all levels must keep to their individual boundaries and the work within their constitutional limits in the interest of the nation. It is in the atmosphere where rule of law reigns supreme, separation of powers duly observed, checks and balances thrive that our democracy will be deepened and sustained.