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REFLECTING ON MILITARY MYTH AND JUDICIAL INTERVENTIONISM IN NIGERIA: JUDICIAL ACTIVISM OR PASSIVITY IN CONSTRUING MILITARY DECREES

By

Ibrahim Imam¹

Abstract

A most prominent debate on system of government around the world concerns the relationship between democracy and military rule. It has been argued that shared democracy allow citizens participation in governance, observance of rule of law and respect for fundamental right, whereas military system of government maintain the apparent authoritarian rule without respect for rule of law and fundamental rights and peace is spurious. Moreover, even among those who believe that democracy offers citizens participation in governance, observance of rule of law and respect for fundamental right, strong disagreement remains over the mechanisms for driving it. It is contended that that military style of government prevents judiciary the necessary independence for resolving inevitable controversies satisfactorily due to ouster of its jurisdiction usually inserted therein the decrees. The surgeon in this paper is the examination of the Myth of the Military and the role of the judiciary in disputes settlement and attitude to decrees in view of the ouster clauses. The paper examines whether the judiciary has been active or passive in its functions and protection against human rights violation in the Military era. The paper traces the history of Military rule in Nigeria and the system of government within these periods. Moreover; our case laws' experiments allow us to investigate the position of the judiciary as causal mechanisms against the threat and violation of human rights. Using landmark judgments in our analysis, this paper reveals stronger support for judicial activism perception and courageous attitude of the Nigerian courts against aberration of law. Our findings shed light on the need for the political actors to play by the rule and prevent Military incursion and truncation of democracy.

***Keywords,** Democracy, Military, judicial activism or passivity, decrees, ouster clause*

Introduction

The structure of power² and method of governance³ in Nigeria has often negated essential attributes of good governance. Most rulers, (under democratic or military government) that have ruled the country are guilty of pursuing selfish agenda, lust for power and dictatorial system of governance, placing high premium to personal loyalty and unethical acceptance of what the ruler or their political party or godfathers dictates. This was coupled with partisan use of state apparatus (police, army, and judiciary) and nation's resources for personal gains. Thus a conflict exists between democratic valued norms and the

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² The distribution of powers usually follow the concept Separation of powers between the executive, the legislature and the judiciary in a democratic system of government and the division of between Federal Military Council (exercising both the legislative and execution powers) and the judiciary in the Military system of government. See section 4, 5, and 6 of the Nigerian Constitution 1999

³ In a democratic system of government the Constitution of a country is usually the supreme law while the

operational realities of military authoritarianism⁴ as well as non-sustainable democratic institutions with non-transparent electioneering processes as the main characteristic feature of Nigerian democratic and military experiences. The judiciary as the last hope of common man and redeemer of this conflict has despite the long periods of authoritarian and military rule, committed to judicial activism enforcing the observance of rule of law which it has persistently pursued in Nigeria. It is instructive to note that none of these systems of government has been able to overwhelm each other. Historically however and notwithstanding the fact that democracy has not been able to function on a continuous basis due to corruption, mismanagement of public fund, inability to conduct free and transparent elections the military dictator's intrusion into government has not equally receive acceptance as the best or legitimate form of government. However there is the hope that the overall commitment to democracy would continue to persist as one of the most cherished form governance system that falters on that can cultivate voluntary popular support from citizens against military and its use of draconian Decrees.

One of the significance of constitutional rights revolution that cut across the Nigerian polity during the Military era of governance was the courageous and independent posture of the judiciary. For a judiciary, which was almost sidelined following the Military reaction to the Supreme Court's judgment in *Lakanmi v Attorney General (West)*,⁴ its sudden emergence at the heart of constitutional rights adjudication has witnessed significance achievements. Standing firmly between the individual citizens and the wielders of Military power, the judiciary has become the ultimate interventionist in the realm of constitutional rights necessitating a more active approach to adjudication. It is argued that although the concept of judicial activism is quite controversial, it has an important place and role to play in entrenching constitutional governance in Nigeria.

The constitutional rights protection can only be achieved where the judiciary uses its powers to negate the Military authoritarian impulses even against disruption of democracy. It is contended that the several human rights abuse which the judiciary had confronted during the Military era demonstrate the fact that Military system of government is not good for Nigeria. Hence the need for politician to play by the rule and guard against any act the might invite the Military to take over governance as previously witnessed for 23 years out of the 52 years of since Nigeria became an independent country.

Though the Nigeria judiciary sometimes exhibits a noticeably weak posture in checking arbitrary exercise of powers by the military, despite that the judiciary enjoys strong institutional autonomy and frequently employs its limited power to check the Military government.⁵ Considering the high levels of the military political autonomy in Nigeria, one may argue that the weak level of judicial oversight over the military is not surprising. Thus the question is, under what circumstances had Supreme Court acted in manner that challenged the Military hegemony in the protection of citizen's rights against the military myth in a country like Nigeria with weak democratic institutions? This paper examines

⁴ (1970) 1 NSCC 201

⁵ *Onabanjo v Special Military Tribunal Lagos Zone* (1984) 1 SCNLR 525, the Supreme Court maintained that despite the ouster clause in decree following the a revolution which alter the whole pre-existing legal order by Decrees, the court has jurisdiction to determine whether or not it has jurisdiction. See also *Lekwot v Judicial Tribunal* (1993) 2 NWLR (pt 276) 410 at 447

this question by focusing on critical cases of judicial activism during Military dispensation in Nigeria. This paper further examines the relationship between the judiciary and the military and argues that the judicial activism of the court was necessarily sustainable in more passive manner at the protection of people's rights. It is contended that judiciary notwithstanding its passivity was unexpectedly a centers of judicial activism that contributed to the checks and balances against violation of fundamental rights, civil liberties and restrictions on arbitrary exercise of state power by the Military. It is argued that the judiciary provided greater access to legal redress against the Military tyranny notwithstanding the replication of ouster clause in their Decrees. We contends that judicial activism was however possible because, successive Military government usually save the specific functions of the courts, this allow the citizens to take advantage of the privilege offered in seeking refuge in the courts with its activism in promoting their rights.

The paper offers a critical case study that demonstrates the perspective of judicial activism and it relationship with the military government in Nigeria. A theoretical explanation involving the tyrannical and illegal exercise of violence against citizens and the several legal processes following the Military actions reveal both the potential for judicial activism and the delicate conditions under which this activism is realized in Nigeria. The judiciary particularly the Supreme Court is insulated from Military pressures. Hence, judicial activism that contributes to the protection of individual rights against violation came from unexpected.

In the absence of citizen's protection from the military government and insertion of the ouster clauses in Decrees Supreme Court became veritable tool in balancing the scale of justice notwithstanding its vulnerability to pressures from the powerful state actors such as the Military. Despite judicial activism of the court the complicity of the military power that account for at least element of passivity by the judiciary in checking Military government a key variable that sustains in some instances the culture of impunity.

Conceptual Exposition of Judicial Activism or Passivity

The concept of judicial activism does not lend itself to an exact definition⁶. It has been defined as, a philosophy advocating that judges should interpret the Constitution to reflect contemporary conditions and values; when courts do not confine themselves to reasonable interpretations of law, but instead create law or when courts do not limit their ruling to the dispute before them, but instead establish a new rule to apply broadly to issues not presented in the specific action.⁷ At the core of the concept is the notion that in deciding a case judges (particularly those of the appellate court) may, or some advocate must, reform the law if the existing rules or principles appear defective or depart from established precedent.⁸ On such a perspective, judges should not hesitate to go beyond their traditional role as interpreters of the constitution and laws given to them by others in order to assume a role as independent policy. The array of existing disparate, even contradictory, ways of defining the concept has made its meaning increasingly unclear. We intend therefore to

⁶ Keenan D. K., (2004), *The Origin and Current Meanings of Judicial Activism*, California Law Review,
⁷ Keenan D. K., *The Origin and Current Meanings of Judicial Activism*, p. 1442, Kermit Roosevelt, T., (2006)
The Myth of Judicial Activism: Making Sense of Supreme Court's Decisions, ale University Press Publishers
and Marshall W. P., (2002), *Conservatives and the Seven Sins of Judicial Activism: Public Law and Legal*
Theory, University of Chicago Press.

use the concept in this paper to mean a situation in which judges construe Military decrees in presence of ouster clauses maintaining their traditional role to put a search light on the Decrees and seek to give effect to contemporary social conditions and values.

This concept is traditionally the opposite of the judicial restraint, whereby the courts may adopt a literal and restrictive interpretation of the ouster clauses in decrees with circumspection to avoid confrontation with the Military within limited spheres of their authority. On such a view, judges have no popular mandate to act against policy formulation by the Military that double as legislature and the executive thus, defer to the decisions of the Federal Military government in matters of policy making but only to the extent they act or stay within the limits of their powers as defined by the Decree(s).

The Historical evolution Military in the governance of Nigeria

Conflict⁹ it is argued is inevitable in any democracy. In Nigeria political spectrum conflicts have most often culminated into Military intervention by the country's armed forces making the system swing between the period of democracy and authoritarian rule almost every attempt at Nigerian democratization.

The first Military coup in Nigeria took place on January 15, 1966, following the allegation of corruption at the highest level of governance couple with political crises in the western part of the Country¹⁰ and the constitutional crisis of January 1965, following the controversial December 1965 federal election¹¹. It is apposite to explain that the first republic was abruptly brought to an end when it became clear that a violent conflict was inevitable despairing and the lack of political solution between 1960-1966 in the Nigeria political horizon many openly began to call for the army to intervene to break the political deadlock.¹²

The army responded in a deadly version, thus a group of radical army officers decided that the only means of breaking the political logjam was to execute a coup de' tat to overthrow the government and release opposition leader Obafemi Awolowo from prison and install him as the prime Minister.¹³ On January, 16 1966 rather than approved the appointment of Zanna Bucar Dipcharima, a politician of Northern Region as acting prime Minister, the acting President Nwafor Orizu himself of Eastern origin handed over power to Major general J.T.U. Aguyi Irosi also of Eastern origin as the Military head of state. This was allegedly at the behest of the rump cabinet, allegedly to enable Irosi to put down the revolt.

⁹ Corruption, ethnicity, insensitivities to governance and series of political violence were parts of the reasons for the 1966 army insurgence that led to the death of prominent politicians like the Prime Minister Tafawa Balewa, Sir Ahmadu Bello the Sardauna of Sokoto, Sir Akintola Premier Western Nigeria.

¹⁰ Following a dispute the erupted between the leaders of Action Group, Obafemi Awolowo and Ladoke Akintola, Akintola was removed by the governor Ademolekun exercising his power under section 33(10) of the 1960 Constitution, the removal of the premier instigated crisis in the Western House of Assembly and part of the country in general consequent upon which a state of emergency was declared in the regime. There were also legal battles on the removal in the cases of Akintola v Adegbenro (1962) All NLR 442 and Adegbenro v Akintola (1963) ALL NLR 305.

¹¹ <http://www.gamji.com/nowall.htm>

¹² Ademoyega Adewale, (1981) Why We Struck: The First Story of the Nigerian Coup Evans Brothers.

¹³ See generally. Madiebo Alexander A., (1982), The Nigerian Revolution and the Biafran War, (Fourth Dimension Publishers, (1980) and Major General JM Garba, Revolution in Nigeria: Another View, Africa Books Ltd

This account for the first incursion of Military into the Nigerian political system, Decree No. 1 of 1966 effectively suspended the constitution of Nigeria 1963. The Irosi regime, shaken by some Northern elements in the army on the provocative pictures and singing offensive song in mockery of the murdered Hausa politicians as well as the determination to take a revenge led to pocket of trouble in Ibadan Abeokuta and Ikeja Army Barracks, consequently Irosi was arrested and killed. General Yakubu Gowon (then Lt Col) was later made the Head of State and commander of the armed forces of Nigeria on July 29, 1966.¹⁴ The government of Yakubu Gowon was terminated by another coup d'etat that ushered in General Muritala Muhammed in 1975 though his tenure was short. He was murdered in an unsuccessful bloody coup led by Lt. Col. Bukar Suka Dimka. General Olusegun Obasanjo the then Chief of Staff Supreme Headquarters replace Muritala Muhammed. President Shehu Shagari of the Nigerian second democratic republic was deposed in December 1983 by General Muhammed Buhari¹⁵. The reasons that prompted the Armed Forces to take power from Shagari in December 1983 include: hunger, poverty, widespread corruption, economic mismanagement, election fraud, and general lack of concern for the problems of Nigerians and indiscipline.¹⁶

The regime did not last, the government was peacefully and in a bloodless coup d'etat overthrown by the SMC third ranking member, Army Chief of General Staff, General Ibrahim B. Babangida on August 27 1985¹⁷. However General Ibrahim Badmasi Babangida's annulment of June 12 election, which widely acclaimed to be the free fair election threw the country into turmoil, this eventually led to his unceremoniously handing over of power to an interim government headed by Chief Alex Sonekon on August 27 1993.¹⁸ However, Shonekan's government was incapable of handling the political crisis inherited from Babangida. With the country sliding into chaos, Defence Minister General Sanni Abacha¹⁹ quickly assume power and forced Sonekon's resignation on November 17, 1993. He died on June 8th 1998 and was replaced by General Abdulsalam Abubakar who handed over the government to a democratically elected President, Olusegun Okikiola Obasanjo in 1999.

¹⁴ Obasanjo Olusegun, (1978), Nzeogwu, Spectrum Book Ltd, Ibadan

¹⁵ Luckham Robin, (1971), *The Nigerian Military: A Sociological Analysis of Authority and Revolt; 1960-67*, Cambridge University Press and Tunji O., (1978), *The Turbulent Decade* (VisionLink Nig. Ltd, 1999), and Obasanjo Olusegun, Nzeogwu (Spectrum Book Ltd, Ibadan

¹⁶ Dudley Billy J., (1973), *Instability and Political Order: Politics and Crisis in Nigeria*, University Press, Ibadan

¹⁷ General Muhammed Buhari's government was alleged of misuse of power, violation of human rights, government failure to deal with the country's deepening economic crisis. On assumption of office, General Babangida quickly released political detainees held in various prisons across the country without any charges and restored freedom of press. See generally, Shehu Shagari, *Beckoned to Serve*, (Heinemann (Nig), 2001)

¹⁸ Obasanjo Olusegun, Nzeogwu (Spectrum Book Ltd, Ibadan, 1978)

¹⁹ General Sanni Abacha faced a lot of crisis during his tenure. There were three instances of allegation of plots to overthrow his government that is, 1990 40 officers were alleged to be plan coup, in 1995 General Olusegun Obasanjo, Shehu Musa Yaradua and others were also alleged to be plan coup and 1997 General Oladipo Diya, General Abdulkareem Adisa, Olanrewaju and others were equally alleged to be plan coup all were arrested and sentenced to death but were released by General Abdulsalam Abubakar on assumption of office as the Head of State. Ogoni civil disturbance actors led by Ken Saro-wiwa and eight others were executed on November 10th 1995. The Abacha government also faced a number of opposition figures that united to form an organization

Military and Civilian government in Nigeria since independent in 1960

S/N	PERIOD	PRESIDENT/HEAD OF STATE	MODE OF LEAVING THE OFFICE
1.	1960-1965	Tafawa Balewa/Nnamdi Azikwe	Coup (Military)
2.	1965-1966	M.G Aguiyi Ironsi	Coup (Military)
3.	1966-1975	Gen. Yakubu Gowon	Coup (Military)
4.	1975-1976 13 Feb.	Gen. Muritala Rahmat Muhammed	Coup/Murder (Military)
5.	1976-1979	Gen. Olusegun Obasanjo	Transition to civilian rule
6.	1979-1983	Alh. Sheu Usman Shagari	Coup (Military)
7.	1983-1985	Gen. Mohammadu Buhari	Coup (Military)
8.	1985-1993	Gen. Ibrahim Badamasi Babagida	Step Aside (Military)
9.	Aug1993- Nov 1993	Chief Alex Shonekan	Coup (Military)
10.	1993-7 th June1998	Gen. Sanni Abacha	Death
11.	1998-1999	Gen. Abdulsalam Abubakar	Transition to Civil Rule
12.	1999-2003	Gen. Olusegun Obasanjo	Election (Civilian)
13.	2003-2007	Gen. Olusegun Obasanjo	Election (Civilian)
14.	2007-2011	Alh. Musa. Yar' adua	Election (Civilian) Death
15.	2011-2015	Dr. Goodluck Jonathan.	Election (Civilian)
16.	2015 ----	Gen. Muhammadu Buhari	Election (Civilian)

Notwithstanding, the democratic potential do manifests itself through pressure for restoration of democracy after each appearance of Military on the scene of governance in Nigeria. However, without scintilla of doubt every Military takeover do receive its legitimacy through the demonstration of a sigh of relief by significantly large middle class of Nigerians because of corrupt practices mainly associated with politicians couple with mismanagement, insensitivity to people plight and weakness of governance. The question which hitherto must serve as lesson for the current political actors in Nigeria is that: Do Nigerian need Military intervention as alternative to deal with conflicts and particularly governmental corrupt practices as legitimate alternative to good governance?

Nigerian since its independence has benefited tremendously for courageous and uncompromising role of the judiciary. Disputes on the acceptability of electoral process as the ultimate source of democratic legitimacy brought the country's Military into mainstream politics and nurtured the tendencies for army intervention in 1966 and 1983. Keeping in view this phenomenon, exploring the key role played by the judiciary against Military autocratic system of governance is germane in enlightening politician to learn from the past Nigerian experiences and play by the rule of democracy to prevent Military appearance in governance again.

It is instructive to note that one of the characteristic features of every Military attempt in governance of Nigeria is firstly the promulgation of Decree²⁰ suspending some aspects of the Constitution and replacing same with Military Decrees and Edicts. Secondly the doctrine of separation of powers between the three institutions of government as practice in any democratic system of government globally is usually altered thereby sharing government powers between the Judiciary on one part and the Supreme Military Council holding on to the legislative and executive powers on the other hand. The refusal of the Military to erode the judiciary of its powers placed it in a pre-eminence position as interventionist in the affairs of the nation notwithstanding any hostility against the institution by successive Military administrators.

Thus in the following parts of the paper we intend to examine the legitimacy of judicial activism under the Military era. In our demonstration from the landmark judgments of the Supreme Court we examine judicial activism and its impact in protection of human rights under the regime and offer some suggestions as lessons for the political actors necessary for the protection of the Nigerian nascent democracy,

Judicial activism and Military Activism

Courts play a pivotal role in making sure that the Military rulers do not infringe on basic constitutional rights and civil liberties of citizens. From this perspective, a judiciary is active as long it is willing and capable of detecting and redressing rights violations committed by the Military and protecting vulnerable groups such as minorities and opposition figures from repression. Thus under what conditions does the judiciary assume an activist stance and become an agent justice for the common man in countries where Military actors often act with impunity? In Nigeria, from independent era in 1960 the judiciary started with commensurable judicial activism in checking military activism outlawing the autocratic, abuses and totalitarian actions in government particularly violation of citizens right. **The Lakanmi's**²¹ case provides an interesting judicial activism that directly addresses this theme running through this paper.

The fulcrum of the *Lakanmi v Attorney General Western Nigeria*²² started on 31st August, 1967 when the chairman of the Tribunal of Inquiry investigating the assets of some public officers of the Western State made orders which, inter alia, restrained the plaintiff/applicant from disposing of or otherwise dealing with their real properties until the Governor of the State made orders as to the operation of their bank accounts without the written consent of the State Military Governor and that rents accruing from those properties should be paid into the Government treasury²³.

The plaintiffs/applicant brought an application at the High Court of Western State in Ibadan for an Order of Certiorari to quash the order made by the chairman of the Assets Tribunal on the contentions, firstly that Edicts No 5 of 1967 was void since it purported to operate in the same field as the Federal military Government Decree No 51 of 1966 which empowered the National Military Government to investigate the assets of its public

²⁰ Decree No 1 of 1966,

²¹ (1970) 1 NSCC 201

²² ibid

²³ The orders were made under section (1) of the Public Officers and other persons (Investigation of Assets) Edicts No 5 of 1967 of Western Nigeria

officers which has earlier covered the field, and secondly that some provisions of the edicts No 5 of 1967 were inconsistent with Decree No 5 1966 and thus the orders that were made under Edict No 5 were ultra vires. At the trial court the contentions advanced in favour of the plaintiff/appellants was rejected. While the plaintiffs/appellants appealed to the Western State Court of Appeal, the Federal Military Government passed successive Decrees, namely; the Investigation of Assets (Public Officers and other Persons) Decree No 57 of 1968.

The Supreme Court held that the orders of the chairman of the Assets Tribunal must be quashed since both Edict No 5 of 1967 and Decree No. 45 of 1968 from which the tribunal's powers originated were ultra vires, null and void. Further, the court held that the Republican constitution remained the supreme law of the federation and all laws were subjects to it except so far as by necessity, the constitution ceases to have effect. Finally, the Supreme Court upheld the submission of learned counsel for the appellants that the events of 15th January, 1966 were not a revolution and consequently that the Federal Military Government was not a revolutionary government by a constitutional interim government.²⁴

However the judiciary made earlier skirmish and thus assumed a passive attitude in 1970 after Lakanmi's case because the Military descended heavily on judiciary through the promulgation of Decree No. 28 of 1970 simply called Supremacy Decree.²⁵ The only way to stop this Military overwhelming curtailment of freedoms is to make their coup fail but once they are in control it was a futile effort to adjudicate where jurisdiction is clearly ousted by Decree²⁶. Notwithstanding the Nigerian Supreme Courts had shown an overwhelming judicial activism for the wide range of arbitrary powers inherent in Decree.²⁷

It is instructive to note that the Supreme Court decision in Lakanmi's case was based on the assumption that the handover of Administration to the Military in 1966 was founded upon the fact publicly disclosed to the Nation as subsequently published in the official Gazette. The assumption turnout to be unacceptable to the Military Government particularly the assumption that what took place in 1966 was not a revolution. This prompted the over reaction of the Military vide the promulgation of Decree No 28 of 1970 to validate its action in Lakanmi's case.²⁸ Since then it was acknowledged that when there is successful abrupt change in government in a manner not contemplated by the Constitution, a revolution is deemed to have taken place even if such change was brought by the Military in a peaceful coup d 'etat.²⁹

²⁴ ibid

²⁵ Lakanmi V Attorney General (Western Nigeria)

²⁶ Alabi M. O. A., (2002), *The Supreme Court in the Nigerian Political System (1963-1997)*, Demyax Press Ltd., 256

²⁷ For example Decree No 2 & 13 of 1984, Decree No. 32, 1975, i.e. Constitution (Basic Provisions) Decree; Decree No 1 of 1979, the Federal Security (Detention of Persons) Decree; Decree No: 28 of 1970, the Federal Military Government (Supremacy and Enforcement of Powers) Decree and Decree No 24, 1967, i.e. Armed Forces and Police (Special Powers) Decree. The effect of all these Decrees is that they ousted the jurisdiction of courts to challenge any act done or assumed to have been done under the Decrees

²⁸ Alabi MOA, *The Supreme Court in the Nigerian Political System*. p. 256

²⁹ Attorney General of the Federation v Guardian pp 79-83.

It is worthy to note as rightly observe that this decision exemplified the historical existence of judicial activism of the Supreme Court of Nigeria a confidential building posture for the judiciary in it stand against tyranny, oppression in protecting citizen and democracy constitutionally. While Lakanmi's case has a history of checking military competition with democracy, it failed to curb the autocracy of the Nigeria Armed Forces. The Military reacted sharply to the Supreme Court decision in Lakanmi's by promulgating Decree No 28 of 1970 and more particularly by inserting ouster clauses in subsequent Decrees and Edicts stripping the judiciary of its power to question the laws enacted by the Military and any of its action under the said laws.

There are however, many decisions of the court which demonstrate the exercise of restraint in the construction of ouster clause following the promulgation of Decree No 28 of 1970. There are many cases that represent the consistent line of such judicial decision like: *Ademolekun v Council of University of Ibadan*,³⁰ *Kanada v Governor of Kaduna State*,³¹ *Adenrele Adejumo v Mobolaji Johnson*,³² *Attorney General of the Federation v Sode*,³³ *Obada v Military Governor of Kwara State*,³⁴ *Labiya v Anretiola*,³⁵ *Agip (Nig) Ltd v Attorney General Lagos State*,³⁶ *Attorney General Western Nigeria v Chief Sam Warri Essi*,³⁷ *Harriman Hope v Johnson Mobolaji*,³⁸ etc.

The phenomenon of the Decrees and their ouster clauses contributed to the emergence of courts exercise of judicial restraint otherwise passivity in the construction or determination of disputes arising from or connecting with the Federal Military Decrees. The Supreme Court had maintained in the cases that courts are precluded from making a decision to declare or make an inquiry to declare on the validity or otherwise of a Decree or Edict, within the context of the definition in the Decree, such decision shall be null and void.

However the Supreme Court still effectively evolved what is known as preservation or saving provision of its power by the Military Decree to open their jurisdiction to intervene on fundamental rights violation and enforcement of compliance with the rule of law.³⁹ The jurisdiction of the court was thus activated not by inquiring into the powers of the Military to enact Decree or the validity of a Decree but to inquire whether there is compliance with the Decrees while the government is exercising its power pursuant to an enacted Decree and insisting on the need to comply with law so made. For instance reference is made to Constitutional (Suspension and Modification) Decree No 1 of 1984⁴⁰ and the Constitutional (Suspension and Modification) Decree No 107 1993 particularly section 17⁴¹ which provides,

30 (1963) NMLR 258.

31 (1986) 4 NWLR (pt 34) 361

32 (1974) All NLR (2nd eds. Vol. 1) 26

33 (1990) 1 NWLR (pt 128) 500 at 518

34 (1990) 6 NWLR (pt 157) 482 at 498

35 (1992) 8 NWLR (pt 258) 139 at 170-1

36 (1972) All NLR 297

37 (1977) All NLR 56

38 (1970) All NLR 503

39 Fawehinmi v Abach (2001) AHRLR 172 (2000) 4 FWLR 53

All laws (other than any law to which section 16 of this Act applies) which whether being rule of law or a provision of an Act, a Decree or Edict or any other enactment or instrument whatsoever, was in force immediately before the commencement of this Act or made before that date but comes into force on or after the commencement of this Act, shall until that law is altered by an authority having power to do so, continue to have effect as if made in exercise of the powers conferred by or derived under this Act.

The purport of the above among other things would appear to have preserved the rule of law and the judicial powers of court in Nigeria. It has been contended that one major reason for the Federal Military Government ensuring that judicial powers were left in the hands of the judiciary was to maintain the rule of law as a basis for administration of public affair.⁴² In *Governor of Lagos State v Ojukwu*, Eso JSC lends credence to this preposition thus:

By virtue of Constitutional (Suspension and Modification) Decree No 1 of 1984, a good number of the provision of the Constitution were suspended. Indeed what was left was what had been permitted by the Federal Military Government to exist. All provisions relating to the judiciary were saved. Section 6 of the Constitution the most important provision, in so far as the institution known as the judiciary is concerned which vested in courts judicial powers of the Federation was left extant. The Military Government had the power and still has, to put an end to the existence of that provision. It has not done so, and that must have been advisedly for it does intend that the rule of law should be preserved. It is the clearest indication against the rule of tyranny, by sheer force of arms against a presumption subjecting the nation to the rule of might as against the rule of rights.

In some instances, the courts displayed rare courage propelled by a determination to do justice as in the cases of *Government of Lagos State v Ojukwu*,⁴³ *Eleso v Government of Ogun State*,⁴⁴ *Fawehinmi v Abach* (1993) and *Abaye v. Ofili v Attorney-General of Rivers*.⁴⁵ The only way to stop this Military overwhelming curtailment of freedoms⁴⁶ is to make their coup fail but once they are in control it was a futile effort to adjudicate where jurisdiction is clearly ousted by Decree⁴⁷. Notwithstanding the Nigerian Supreme Courts had shown an overwhelming judicial activism for the wide range of arbitrary powers inherent in Decree.⁴⁸

⁴² Uwaifo JSC in *Attorney General of the Federation v Guardian* p. 71

⁴³ (1986) 1 N.W.L.R. (Pt.18) p.621

⁴⁴ (1990) 2 N.W.L.R. (Pt.133) p.420

⁴⁵ (1988) 1 N.W.L.R. (Pt.15) p.134

⁴⁶ *Lakanmi V Attorney General (Western Nigeria)*

⁴⁷ Alabi M. O. A., *The Supreme Court in the Nigerian Political System*. 256

⁴⁸ For example Decree No 2 & 13 of 1984, Decree No. 32. 1975, i.e. Constitution (Basic Provisions) Decree; Decree No 1 of 1979, the Federal Security (Detention of Persons) Decree; Decree No: 28 of 1970, the Federal Military Government (Supremacy and Enforcement of Powers) Decree and Decree No 24, 1967, i.e. Armed Forces and Police (Special Powers) Decree. The effect of all these Decrees is that they ousted the jurisdiction of courts to challenge any act done or assumed to have been done under the Decrees

Judicial activism Dimension on Ouster clauses in Military Decrees

The judiciary in the Military era of governance was more active in scrutinizing outer clauses that tends to take always the court's power as well as the unprogressive actions of the military. This is possible as rightly observed by Chief Obafemi Awolowo⁴⁹ that: "Under the Military rule, the rule of law is not totally suppressed, but largely in abeyance."

In *Uwaifo v Attorney General Bendel State*⁵⁰ for instance; the basis of the appellant dispute, generally speaking was that since the appellant retired as Chief Accountant from the Bendel State service 1972, he could not be brought in for investigation under Decree No. 10 of 1976 as validated by Decree No. 18 of 1977 and the forfeiture of his property under Edict No. 10(2) was null and void. However the main point which this appeal must decide is the effect of Section 6 of the Constitution of 1979 especially of subsection 6(d) with reference to the effect of the forfeiture of the appellant's properties having regard to the existing laws, Decree No. 10 of 1979, Edict No. 10 of 1977 and Decree No. 18 of 1977⁵¹. There is no doubt in mind that while the military were in power, although certain sections of the 1963 Constitution were left in force, it was nevertheless clear that such sections were to be subservient to the provisions of their Decrees. This is borne out by the provisions of Section 14(2) of Act No. 32 of 1975 which reads:

The provisions of the Constitution of the Federation and of the States not suspended by Decree No. 1 of 1966 to the extent that those provisions were in force immediately before the commencement of this Decree, shall continue in force as modified or amended by Decree No.1 of 1966 or any other Decree but shall for the avoidance of doubt, have effect subject to this Decree.

It seems to me that there was always a deliberate and conscious effort on the part of the military regime to exclude access to the court in a number of their legislations. It could not therefore have been an act of dereliction of duty that the appellant herein did not seek to assert his rights while the military were in power. If he had chosen to go to court in the face of the clear prohibition spelt out in the decrees above, his efforts would have yielded no beneficial results. This must explain why he had to wait until one day after the 1979 Constitution came into force before filling this action⁵². Thus since the Decrees were enacted before the coming into force of the 1999 Constitution and by virtue of section 6(6)(d) therefore retaining the existence of the Decree, the Jurisdiction of High to the matter is ousted. That disposes finally all the extensive arguments of learned counsel for the appellant and the appeal completely fail⁵³.

⁴⁹ The Press in the Service of the State, Voice of Wisdom, 93 at 101

⁵⁰ (1982) 7 SC

⁵¹ Under Decree No. 37 of 1968 the court's jurisdiction is ousted under Section 12 the court's jurisdiction is ousted; under Decree no. 10 of 1976 the ouster clause is to be found in Section 6 while under Decree No. 18 it is to be found in Sections 1(2) and 3(2). The wording of the exclusion clause is almost identical in each case.

⁵² Section 4 (8) of the 1999 Constitution provides against ouster of the court's jurisdiction. It reads: 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

In another landmark case of *Peenok Investments Ltd v hotel Presidential*⁵⁴ the jurisdiction of the court was sought in determining among other issues in controversy before the court, the validity and consistency of Edict 15 and 17 of 1972 in connection with section 31 of the 1963 Constitution relating to the governor's power of compulsory acquisition of property. The Supreme Court in its activist posture in protecting the right of citizen ruled that Edict 15 and 17 of 1972 and the Cancellation Notice made in regard to the appellant property to wit: Rivers State Government Notice No 412 of 26th day of September, 1973 are void of no effect and unconstitutional as being in consistent with the clear provisions of section 31 of the constitution of the Federal Republic of Nigeria 1963.

The judicial activism in the Military era manifestly appeared in its gross confrontation and opposition to ouster clause. Ouster clauses are regarded as an aberration, outrageous provision and one that should be treated with extreme caution since these are regarded as unwarranted affront and unnecessary challenges to the jurisdiction of the courts which the court guard jealous⁵⁵. To rely on the ouster clause as a shield to an illegality and disrespect for the Constitution against judicial activist is antithetical to the ideal and practice of the rule of law and a threat to democratic governance. Indeed Uwaifo JSC in *Attorney General Lagos state v Guardian News Paper*⁵⁶ did observed thus:

It is antithetical to the ideal and practice of the rule of law for anyone to render the judiciary ineffective through any subterfuge, or by sheer exercise of absolute authority or by interrorem posturing, it is even more so when a glittering façade of judicial independence is presented upon some identified grand norm only to seek to protect every government act by ouster clause. We should be able to say, and I do say, that it is not good for a country such as Nigeria which, in the words of Yaqub Ali, J, of the Supreme Court of Pakistan in *Jilani v Government of Punjab*, Pak L.D (172) Sc 139 at 219, being "a perfectly good country was made laughing stock" in the manner of undemocratic and unconstitutional governance impinging on the rule of law and human rights, when Pakistan found herself in similar circumstances like Nigeria.

Instructively, judicial activism of the court will not be extended to ouster clause if there is evidence of compliance with the stipulated procedure; otherwise the court will be entitled to invoke its jurisdiction to nullify any act done⁵⁷. It was observed in the case of *Okeke v. Attorney General Anambra State*,⁵⁸ per Uwaifo that;

Decree No. 13 of 1984 is ouster legislation. Once the provision of a Decree or Constitution ousting the jurisdiction of the courts on any specific matters is clear and unambiguous, the court is bound to observe and apply them. They are not entitled, even when the ouster has drastic effect on the right of any person, to approach its interpretation by a false or twisted meaning given to it by unacceptable restricted construction.

⁵⁴ (1982) 12 SC 1

⁵⁵ Inakoju v Adeleke

⁵⁶ A. G. Lagos v Guardian News Paper (1999) 5 SC (pt iii) 59 at 73 para 40

⁵⁷ See, Jimoh v Olawoye (2003) 10 NWLR (pt 828) 307 at 337 and Adebisi v Sorinmade (2004) ALLFWLR (pt 239) 923 at 948.

⁵⁸ (1992) 1 NWLR (pt 215) 60 at 86

Similarly, the court⁵⁹ notwithstanding ouster clauses in Decrees has often repeated that its jurisdiction must be jealously guarded if only for the reason that the beginning of dictatorships in many parts of the world had often commenced with usurpation of authority of the Courts and many dictators were often known to become restive under the procedural and structural safeguards employed by the courts for the purpose of enhancing the rule of law and preserving the personal and proprietary rights of individuals. It is this vein that the Courts insist, wherever possible, to avoid a rigid adherence to Military Decrees on the basis of ouster clause and insist on curbing the tendency of those, who would like to establish Courts which are virtually Kangaroo under different guise and smoke screens of judicial regularity. This, the Courts, in the discharge of their appointed duties, has sternly endeavour to resist⁶⁰. The Supreme Court in the case of *Nwosu v. Imo State Environmental Sanitation Authority & 4 Ors*⁶¹ emphasised the fact that the Military in the exercise of its combined executive and legislative power cannot absolutely take away the Nigerian citizen access to court. The court in the case held that:

A person's access to have his civil right adjudicated upon by the Court may be restricted or ousted by statute; the language of such a statute must be construed strictly by the court. But once, with such an approach, it is clear that the ouster or restriction of the jurisdiction was intended, and that, from the facts of the particular case, it is squarely within the four corners of the statute, the Court has no alternative but to hold that its jurisdiction has been ousted.

The judicial activism of the Supreme Court has been that where the provisions of any decree, act or law ousts the jurisdiction of a Court from determining a matter the Court does not easily chicken out and surrender.⁶² It examines critically the language of the statute ousting its jurisdiction to see whether the wordings are clear and unambiguous and whether in truth and in law, its jurisdiction has been ousted thereby ensuring that access to the Court is not taken away unjustifiably⁶³.

The court in its activism, regards ouster clauses as an unusual and unfriendly provision which should be treated with extreme caution since they are regarded as an unwarranted affront and unnecessary challenge to the jurisdiction of court which courts guard jealously⁶⁴. When ouster clauses are provided in statute, the courts invoke section 6 as barometer to police their constitutionality or constitutionalism. Though the courts become helpless when the Constitution itself provides for ouster clause... in such a situation the courts hold their heads and arms in despair and desperation. They can only bark but cannot

⁵⁹ Sofekun v Akinyemi & Ors pp. 25-26

⁶⁰ ibid

⁶¹ (1990) 2 NWLR (pt 135) 688, Ogugu v The State (1994) 9 NWLR (Pt 66) 1

⁶² Attorney General of the Federation v Guardian News Paper

⁶³ Adeyemi & Ors v. Opeyori (1979) 9 & 10 SC 31 and Uthi v Onoyivwe (1991) 1 NWLR (Pt.166) 166 The grundnorm in Nigeria under the Military administration is i.e. the Constitution (Suspension and Modification) Decree No. 107 of 1993 and the subsequent Decrees regulating the exercise of executive, legislative and judicial powers in the country. Section 5 of Decree No. 107 for example enacts as follows: "No question as to the validity of this Decree or any other Decree made during the period 31st December 1983 to 26th August 1993 or made after the commencement of this Decree or of an Edict shall be entertained by any court of law in Nigeria." Another example is the Federal Military Government (Supremacy and Enforcement of Powers)

bite. Their jurisdiction is to give effect to the ouster clause because, that is what is in the Constitution or what Constitution says⁶⁵.

Thus when the Supreme Court is construing the provision of an ouster clause in statute, including the provision of the constitution, the courts usually scrutinize every aspects of such provision with a view to ensuring that everything done under such statute is done strictly in compliance with the provision of the statute or constitution⁶⁶. This is because, where the court find that there is failure to strictly comply with what the statute provide for, such act purported to be done under the statute would be ultra vires and would be declared null and void as such action would be regarded not to have been carried out under the said provision of statute or Constitution⁶⁷. Thus the Supreme Court as activist court is legitimate where it is exercise to ensure compliance with the rule of law and protect the citizen. Tobi JSC in *Maikyo v Itodo*⁶⁸ said that:

Where, therefore, a person's right of access to court is taken away or restricted by either the constitution or any statute, the language of any such provision is usually construed very cautiously and strictly. In course of interpreting such provisions, the language of any statute or provision will not be extended beyond its least onerous meaning unless clear word are used to justify such extension. This is mainly because it is the practice of the courts to guard its jurisdiction jealously⁶⁹.

The question has being whether the court should be passive and refuse to exercise it power simply because it jurisdiction is ousted even where it takes away the right of citizen, in fact it should not. In fact this position has credence in judgment of the Supreme Court in *Agwunna v Attorney General Federation*⁷⁰ where the court said:

...It is not the law that once an ouster of jurisdiction clause is raised in any proceedings, the court must automatically throws in towel, decline jurisdiction and strike out the suit. The court, where it is faced with an ouster clause still has a duty to inquire into the issue to enable it determine whether or not it has jurisdiction to entertain the action.

It is worthy to rightly observe that these decisions exemplified the historical existence of judicial activism of the Supreme Court of Nigeria, a confidential building posture for the judiciary in it stand against Military tyranny, oppression in protecting citizen and democracy constitutionally. The only way to curb Military lawlessness and legislative arrogance is through fearless judicial activism, which for during the Military dispensation, the Nigerian judiciary particularly the Supreme Court of Nigeria has exhibited in it land mark decisions. The court even went further to emphasis the need to ensure that its decisions are respected and enforced by Military government as aptly shown in the case of *Military Governor of Lagos State v Ojukwu*⁷¹ Eso JSC rightly observed:

⁶⁵ Ekpe v Calabar Local Government (1993) 3 NWLR (pt 281) 324

⁶⁶ ibid

⁶⁷ Ekpe v Calabar Local Government 324

⁶⁸ Maikyo v Itodo (2007) 5 MJSC 60 at 66 see also Ekpo v Calabr Local Government p. 321

⁶⁹ See Inakoju v Adeleke p. 42-43, Agwunna v A.G Federation (1995) 5 NWLR (pt 396) 418 and Osadebey v A.G Bendel State (1991) 1 NWLR (pt 169) 355.

⁷⁰ Osadebay v Attorney General of Bendel State, 533 at 571 Agwuna v Attorney General of Federation p. 438

⁷¹ (1986) 1 NSCC (Vol 13) 304 at 313 or (1986) All NLR 133

If Government treat court order with levity and contempt the confidence of the citizen in the courts will be seriously eroded and the effect that will be the beginning of anarchy in replacement of the rule of law. If anyone should be wary of orders of court it is the authorities, for they more than anyone else need the application of the rule of law in order to govern properly and effectively.

Conclusion

There appear to be a general consensus that judicial activism served Nigeria citizen effectively during the Military dispensation. The Supreme Court's willingness to tackle controversial ouster clause in Decrees and legal issues in a serious and thoughtful manner can be said to have placed it on a prime legitimacy. It has also been demonstrated that the great contribution of judicial activism in Nigeria has been to provide a safety valve against Military violation of human rights and a hope that justice is not beyond reach common Nigerian citizen. Furthermore, the courts adoption of a pro-active role to make up for the inefficiencies of the executive has proved beneficial to Indian society. People in general believe that if any institution or Military authority acts even in a manner inconsistency with its own Decrees or Edicts, the judiciary will step in to right the wrong.

Whilst we will commend the activist role taken by the Nigerian judiciary, a note of caution must be sounded on the political actors against the danger of Military incursion into government. The political class must endeavour to reduce corruption to the barest minimum, develop the political will in dealing with politically motivated crisis without sentiment⁷² and ensure accountability transparency in government. The process of democratic transition through election must be seen to be free and fair. These and many more have been the basic reasons which successive Military coup plotters have given in over throwing civilian government in the past and it must be prevented.

The judiciary represented by courts must not shirk its sacred to the nation responsibility but must remain active in the interest of both the government and all persons in Nigeria. It may be concluded by reference to the statement of Hamilton that "the judiciary certainly has no sword or purse,¹¹² but if their judgments fully reflect the contemporary hopes, aspirations and fears of the people, they will carry the people along for without the people, there will be no swords and purses".⁷³

The main lesson that can be drawn from this paper is that judicial activism is a powerful weapon which courts in Nigeria have employed to counter Military tyranny and autocracy but also it can be used to promote, protect and stabilize democracy by being fearless in their judgments on political and election disputes. Judicial activism of the court is at all time veritable mechanism to check arbitrariness in government as Uwaifo JSC rightly observed:

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No Nigeria doubt the extent at which the violent protest following the declaration of Goodluck E. Jonathan as the winner of the 2011 presidential election has caused the country, recording of lost lives and properties that worth billions. The new trend of Boko Haram bombing in the North, the revenge attack on the Northerner in the South ethnic and religious crisis in Plateau and Kaduna, kidnapping of foreigners and the activities of the

In order for the judiciary to perform its allocated functions under the Constitution effectively and satisfactorily, it must be purposive in upholding the rule of law. It is its sacred responsibility to do so... The Constitution, even in a Military regime, which makes this possible, remains un-amended...then it is legitimate to insist that the provisions of that Constitution shall prevail. It is antithetical to the idea and practice of the rule of law for anyone to render the judiciary ineffective through any subterfuge, or by sheer exercise of absolute authority or by *interrorem posture*. It is even more so when a glittering façade of judicial independence is presented upon some identical grundnorm only to seek to protect every government action by ouster clause...⁷⁴

Suggestions

- Democratic system of government, rule of law and judicial independence is a difficult challenge when the military has traditional and a very powerful position in business and politics. Especially, where government has its focus on the Military for internal security and it is developed as a political force. Dismantling military influence, interests and reducing its influence on politics is a precondition for sustainable democratic stability in Nigeria, this must be taken seriously. Political actors should note that the army still has the vision of itself as the supervisor of national political development.
- The failure to ensure participatory governance and organize a free, fair and transparent election has caused much alienation at the popular level. Significant number of citizens feels that they are irrelevant to power management at the federal, state and local government levels. The political leaders should avoid been so engrossed in their power game that they would not be concerned about the interest and welfare of the poor electorate.
- Frequent mass demonstrations (i.e. removal of fuel subsidy), public disorder, and militancy (Niger Delta and Boko Haram) insurgents may generally weaken government control of the public which can lead to military action, since the army leadership thinks the civilian government is not capable of running the country properly. The political leaders should employ a better mechanism to address the phenomenon.
- Danger looms when military influence on politics is increased, the democracy endangered, and the democratic quality can regress⁷⁵. Military impact on political decision-making, however, cannot only be exerted from outside, but also from

⁷⁴ Attorney General of the Federation v Guardian (1999) 5 SC (pt iii) 59 at 73-4

⁷⁵ The military may exert influence and truncate democratic rule, where they act as politicians. Some retire military personnel in government are former, Major General David Mark (Senate President), General Olagunsoye Oyindola (PDP Secretary former Civilian Governor Osun State) Late Rear Amiral Mohammed Lawal (past governor Kwara State, General Muritala Iyako (governor Adamawa State), General Abdullahi Adangba and General Mohammed Gusau (former security advisers to president Obasanjo), , Muritala Iyako (Governor Adamawa) Jona Jang (Civilian Governor Plateau State) are rather positive examples of military leaders becoming heads of governments, the engagement of retired President General Olusegun Obasanjo as elected president was negative for the further democratic deepening in the Nigeria. The ruling party in Nigeria PDP has the domination of the Military retired generals as its financiers such retired generals as Lt. General T.Y. Danjuma, Major General Alli Mohammed Gusau, Lt. General I. Wushishi, General I.B. Babangida, and several others. See; Dhikru A. Y., Nigeria's Fourth Republic and the Challenge of a Faltering Democratization (2011) 12, 3, African Studies Quarterly

inside the political scene when active or retired army members act as politicians. Such a scenario is a quite common feature in many young democracies which must be checked.

- Political leader should seldom use the military for internal purposes, such as support for police forces, administration or developmental aids, the military leadership might be encouraged to take over these policy areas on their responsibility what further undermines civilian power.