

from the dictatorial or authoritarian past.

Arguably, the understanding of the Judiciary even in its undeveloped form cannot, but remain significant in understanding the politics and government of a nascent democracy like Nigeria. Discussing any constitutional democracy around the world usually starts with a consideration of the three institutional pillars that constitutes the organs of government. Pertinently thus, the edifice of governance is vested in the institutions of the executive, the legislature and the judiciary.² The jurisdictions of these institutions are elaborately defined in the Constitution, the supreme law of a country that operates a democratic system of government.³ According to the usual allocation of powers, the primary duty of the Legislature (be it at the federal/central or states level) is to legislate for peace and good governance of the country, while the Executive functions to execute laws. The Judiciary on its own part gives force to the law through the interpretation of laws. In the realm of law enforcement, the Constitution vests the certain roles on the judiciary. These include the interpretation of the Constitution and legislations passed by the legislative assemblies and the determination of the validity of executive and legislative actions.⁴ The constitution also vests the role of protecting citizens' fundamental rights guaranteed by the constitution on the judiciary as well as the power to settle disputes as a third party interventionist. The settlement of such disputes extends to deciding disputes between individuals, between individuals and the government, and disputes arising between federal/central authorities and the state/regional authorities.⁵ It is through the performance of these roles that judicial activism comes into play, particularly when the judiciary reviews the actions of the other institutions of government, as to whether they have exceeded the limits set by the Constitution or whether they have infringed on the fundamental rights of citizens through arbitrary legislations and executive actions.⁶

Although in this paper, an attempt is made to investigate whether judicial departure from a previous judgment (judicial precedent/ *Stare decisis*) amounts to judicial activism or is an expression of judicial excess, the paper

² Ibrahim Imam., the (2005), *Executive, Legislative and Judiciary: An Insight into their functions under the Nigerian Democratic Setting*, JOPSREL, 4(1), 8-9, and Nwabueze B O., *The Presidential Constitution of Nigeria 1979*, (London, Sweet & Maxwell, 1982), 32-33

³ Yusuf O A., (2002), *Separation of Powers under the 1999 Constitution of the Federal Republic of Nigeria: A critical Review*, NBA Ilorin Bar Journal 1(2), and Popoola A. O., (2000), *Enforcing the Principle of Separation of Powers: A Review of the 1999 Constitution*, Seminar paper presented at International Commission of Jurists, Legal Research Institute and Resource Development Centre, Abuja,

⁴ Id.

⁵ Id.

⁶ Segal, Jeffrey A., (1997) *Separation of Powers Game in the Positive Theory of Congress and Courts*, *American Political Science Review*, 91(1), 28, and Awotokun, K. *Governance and Legislative Control in Nigeria: Lessons from the Second and Third Republic*, (San-Francisco: International Scholars Publications, 1998), 4

focuses more on the development of laws through judicial activism. And if judicial departure from established precedent is judicial activism, this paper inquires whether it is appropriate and needed under constitutional schemes and whether the Judiciary has exercised such activism properly for the development of law or acted in error. If there has been judicial transgression in overruling a precedent, on what grounds has the judiciary exceeded its limits and what should be the remedy or future course of action to prevent the judiciary from departing from an established precedent while discharging its duties and acting within the limits assigned by the Constitution.⁷ This paper examines the efficacy of judicial correction of previous judgments in subsequent actions where a conclusion is reached that the earlier judgment was wrongly decided and same cannot stand the test of time.

2. Definition and Conceptualization of Judicial activism

From the outset, it must be stated that concept of 'Judicial Activism' acquires real meaning only when viewed and interpreted within a particular context. This is because the meaning of a concept has to be studied overtly and covertly.⁸ It needs to be emphasized that the concept of judicial activism from the perspective of striking down a precedent, and particularly in the Nigerian context can be described as the court's exercise of its power as a social engineer to sustain rule of law and democracy.⁹ The term "judicial activism," despite its popularity amongst legal experts, judges, scholars and politicians, has not until recently been given an appropriate definition. Arguably, the term "judicial activism" still carries generates conflicting views.¹⁰ While some may exalt the term, describing it variously as judicial creativity, attainment of substantial justice or dynamism of the judges, a revolution in the field of human rights and social welfare through enforcement of public duties, etc., others have criticized the term, describing it as judicial extremism, judicial terrorism, transgression into the domain of the other organs of the State and negating the constitutional spirit, etc.¹¹ However, to define it broadly, judicial activism represents the assumption of an active role on the part of the Judiciary¹² or an active process by the courts geared towards implementing the rule of

⁷ Ibrahim I. et al, (2011), *Judicial Activism and Intervention in the Doctrine of Political Question in Nigeria: An Analytical Exposition*, African Journal of Criminology, 1(2), 1-4,

⁸ Alexander M. Bickel, *the Least Dangerous Branch*, 2nd ed., (Yale University Press, 1982), p. 4 see also Ibrahim I., (2010), *Judicial Attitude to Semantic and Grammatical Ambiguities in Law*, Kogi State University Bi-annual Journal of Public Law (KSU-BJPL), 96-97

⁹ Elliot, M., *The Constitutional Foundations of Judicial Review*, (Hart Publishing, Oxford and Portland, (2001), 107-108

¹⁰ Culled from Manika, (2006), *Judicial Activism: A Means for Attaining Good Governance*, Nyaya Deep, NALSA, VII(3), 117-132, at 120,

¹¹ Id.

It is therefore pertinent to contend that a judgment of the court given for the purpose of seeking justice in a particular case, ignoring established precedent or an interpretation of the law in such a way as to conform to social realities would be considered a valid development of the laws and proper. Such conception means that the other political institutions affected would not be denied the right to correct their mistakes, thereby providing a remedy for any usurpation of power by elected representatives.¹⁹ On the other hand this view implies that judicial activism becomes the most valuable instrument when the legislative machinery grinds to a halt as regards any issue or when an established precedent becomes obsolete or cannot address the exigency of contemporary times.²⁰ In other words, judges should not be scared of adjudicating any particular case because the law has not been enacted by the legislature to cover the situation.²¹

These definitions, while focusing on the meaning of the text of a Constitution or statute, connect the terms 'activism' and 'restraint' with the function of the judiciary such as interpretation of the constitution, traditional function of dispute settlement and judicial review.²² Arguably whether judges should strictly apply the rules of standing by an established precedent, whether judges should not consider a case until the applicant has exhausted other remedies, whether judges should avoid deciding 'political questions', are questions which sometimes are deemed necessary for distinguishing 'judicial restraint' from 'judicial activism'.²³ The principal difficulty is to determine whether the terms "activism or restraint" do indeed overlap in certain context or could be used interchangeably notwithstanding the fact that legal usage is an art rather than a science and words may be used differently in the legal context.²⁴

It may argued that within a liberal context, the conception of judicial activism allows considerable flexibility in appropriate circumstances especially, in the case of judicial precedents that cannot stand the test of time giving room for courts to ignore or overrule such precedent. In the context of this paper, the expression 'activist' should mean, 'one who favours intensified

¹⁹ Dragoljub Popovic, (2009) Prevailing Judicial Activism over Self Restraint in the Jurisprudence of the European Court of Human Rights, *Creighton Law Review*. 42, 361 at 363

²⁰ Thijmen, K., the Roots of Judicial Activism in Protecting Human Rights: The European Dimension Studies, (F. Matscher & H. Petzold, 1988), 325

²¹ *PDP v INEC* (1999) 5 SC (pt iii) 30

²² Choper, G., *Judicial Review and National Political Process: A Fundamental Reconsideration of the Role of the Supreme Court*; (Chicago University Press, 1980), 2-6

²³ Sterling Harwood, "Judicial Activism: A Restraint Defence", (Austin & Winfield Publisher, Inc, London, 1996) Daley, J., *Defining Judicial Restraint*, Campbell, T and Goldsworthy J., (eds.), *Judicial Power, Democracy and Legal Positivism*, (Ashgate, 2007), 280

²⁴ *DPP for Northern Ireland v Lynch* [1975] AC 653 at 688 per Lord Simon

neutral arbiter of public law.³⁵ Justice Antonia Scalia's comments in *Hubbard v. United States*³⁶ illustrates this point. Scalia, who has said that stare decisis is merely an "administrative convenience,"³⁷ cautioned in *Hubbard* against calling the underlying decision "wrongly decided."³⁸ More justification in reversing precedent is needed, he said, because a judge "who ignores stare decisis must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong."³⁹ To do otherwise would completely nullify the doctrine's effect.⁴⁰

The doctrine of judicial precedence requires that the principle of law on which a court bases its decision must be related to the material facts or issues for it to be followed by courts lower in hierarchy, and may be followed by a court of coordinate jurisdiction or a court which is higher in hierarchy in future similar cases. When a court is under obligation to follow a previous decision, the precedent is said to be binding. When a court has discretion whether or not to follow a previous decision, the precedent is said to be persuasive. Case law or judge-made law is one of the sources of law in Common Law countries. However, judges do not make laws in the sense in which legislators do.⁴¹ Thus, Prof. C. K. Allen has noted that:

By no possible extensions of his office can a judge introduce new rules for the compensation of injured employee, for national health insurance, for the rate of taxation, for appropriation of public money. The legislature can project into the future a rule of law which has never before existed. The courts can do nothing of the kind.⁴²

It is therefore arguably justifiable that when a judge decides a particular case, the blackboard is not wiped out; the decision may stand as an authority for future cases on similar facts and same may cease to be applied if its continuous operation will occasion a miscarriage of justice. Consequently, a judge may create new rules in applying precedent to novel circumstances. And where there is a lacuna or no precedent or law governing the situation before a court, the judge may also create new precedent or rules.⁴³

4. Judicial Activism: Dimension of Departing from Established Precedent

Just as invalidating a statute is not necessarily inappropriate judicial activism,

³⁵ Id.

³⁶ 514 U.S. 695 (1995)

³⁷ *Payne*, 501 U.S. at 834 (Scalia, J., concurring)

³⁸ *Hubbard*, 514 U.S. at 716, see generally, Christopher, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of stare decisis in the U.S. Supreme Court Influence Social Change*

³⁹ Id.

⁴⁰ Id.

⁴¹ See generally, Elias T. O. (ed.), *Nigerian Essays in Jurisprudence*, (Lagos, MIJ Publishers, 1993), Elegido J. M. *Jurisprudence*, (Ibadan, Spectrum Books Limited, 2006), and Obilade *The Nigerian Legal System*;

⁴² Allen K. C. *Law in the Making*, 6th ed., (London, Clarendon Press, 1964), 294

⁴³ Ephraim A. I., *The Rationality of Judicial Precedent in Nigeria's Jurisprudence*,

neither is reversing a precedent.⁴⁴ It is the author's view that if a consensus exists that an initial precedent was 'wrong' 'erroneous', 'perverse' and/or 'altered by subsequent legislation' or 'wrongly' decided, then its reversal would be no less than appropriate. This is one of the many inconveniences in the application of judicial precedents which justify judicial activism, as aptly captured in the statement of Elias T. O.⁴⁵ that:

... Its tendency towards bulk and complexity in the growth of the Common Law, the possibility of having to make sometimes illogical distinctions between cases that are apparently similar in order to avoid having to follow inconvenient precedents, which sometimes continued application of old and outmoded decisions to current social and economic problems and the difficulty of determining the ratio decidendi of a case where different reasons were given for reaching the same conclusion...

This core metric for measuring judicial activism presupposes in this instance that, "where the Constitution says yes and a prior judicial decision says no, a court has not merely the power, but the obligation, to prefer the Constitution".⁴⁶ Indeed, perhaps the original precedent was such that its reversal would constitute an effort to re-orient the legal doctrine to defer more appropriately to the elected branches and thus an instance of judicial activism.⁴⁷

However the determining the propriety of ignoring precedent is not as simple. Two important distinctions must be drawn both of which are related to the source of the precedent.⁴⁸ One distinction depends on whether the precedent is vertical or horizontal and the other depends on whether the precedent is a matter of constitutional, statutory or common law.⁴⁹ In the vertical sense, some instances of disregarding precedent are almost universally considered inappropriate.⁵⁰ A court of inferior authority is bound by the decision of a court of superior authority if called upon to decide upon facts similar to facts already tried by the superior court.⁵¹ It is the law that a decision of a court of competent jurisdiction even where it is palpably, unattractive or unsupportable by sound legal reasoning remains a good law

⁴⁴ Keenan D, Kmiec, (2004) the Origin and Current Meaning of Judicial Activism, California Law Review, 1466 see also Kamal, H., "the Role of the Judiciary as a Catalyst of Social Change", www.SupremeCourt.gov.pk/jc/Article accessed August 16, 2015, 1-4

⁴⁵ Elias T. O., *Judicial Process in Newer Commonwealth* (Lagos, University of Lagos Press, 1990), 127

⁴⁶ Gary Lawson., (1994), the Constitutional Case against Precedent, Harvard Journal of Law & Public Policy, 27-28. However, for precedent to have meaning it must be given some deference even when a Justice believes it may have been mistaken. See Keenan D K., "the Origin and Current Meaning of Judicial Activism", 1473

⁴⁷ Id. Keenan, 1467

⁴⁸ Gray Lawson, the Constitutional Case against Precedent

⁴⁹ Keenan D. K., "the Origin and Current Meaning of Judicial Activism"

⁵⁰ Id.

⁵¹ Phillips J. *Introduction to English Law*, 11 th ed., (London, Butterworth, 1985), 17

and binding until it is set aside by a superior court of competent jurisdiction.⁵² Thus, the Supreme Court as the apex and final court of appeal in Nigeria will frown at any refusal by lower courts to follow its precedents. This is aptly shown in the case of *Dalhatu v Turaki*⁵³ where the court lambasted a lower court that refused to follow its decision as unfortunate describing the action as “gross insubordination”, “judicial rascality”, and “judicial impertinent.” The Supreme Court went further to assert that even if the Court was wrong the lower court judge was also wrong not to have followed the age-long established doctrine of stare decisis otherwise known as judicial precedence.⁵⁴

Another perspective from which deviation from precedent may be evaluated is the horizontal perspective. This is based on the practice that a court should abide by or follow its own prior decisions in similar cases.⁵⁵ This is a more complicated and debatable matter.⁵⁶ Scholars agree that it may be proper to disregard horizontal precedent because stare decisis itself may be unconstitutional. Common Law precedents are also subject of consideration in the practice of judicial activism. The Supreme Court of the United States and that of defer to common law precedents because it feels that lower courts are in a better position to change that law and the lower courts in this respect accept their role as caretakers of the common law and therefore willing to help it evolve over time.⁵⁷ Constitutional law precedents often take the center stage in questions of judicial activism because of the difficulty in amending the constitution. This makes the courts the most expedient option for changing obsolete constitutional doctrines and practices. Statutory precedent on the other hand, often enjoys a strong presumption of correctness.⁵⁸ Courts reason that once they construe a statute their interpretation becomes part of the statute itself so that overruling earlier judicial opinions is akin to repealing and re-writing the statute, which is something that only the legislature is supposed to do.⁵⁹ Keenan who gave these propositions concluded that the examples suggest that even one of the most uncontroversial definitions of judicial activism requires reading deeper into jurisprudential concepts than one might

⁵² *Abacha v Fawchinmi* (2002) 2 NSCQR 489 at 549, (addition of Supreme Court mine for emphasis)

⁵³ (2003) 7 SC 1 at 24-25

⁵⁴ *Id.* see also Gary Lawson., the Constitutional Case against Precedent, 26

⁵⁵ Ferejohn, J., and Weingast, B., (1992), A Positive Theory of Statutory Interpretation, *International Review of Law and Economics*, 12, 263-279,

⁵⁶ Keenan D.K., the Origin and Current Meaning of Judicial Activism 1467-1468

⁵⁷ *Id.* 1469-1470

⁵⁸ *Nwachukwu v State* (2002) 7 SC (pt i) 124 at 133 there is a general presumption of law to the effect that the formal requisites for the validity of all judicial or official acts were complied with so long as they are shown to have been done in a manner substantially regular. The position of the law is summarized by the Latin maxim *omnia prae sumun tar rite scesse acta* which mean that all acts are presumed to have been done right and regularly until the contrary is proved. This presumption of law is commonly applied particularly to judicial and official acts and the onus of proving the contrary lies on him who alleges such contrary position. See sections 150(1), (2), (3) and 4 of the Evidence Act

⁵⁹ Keenan D.K., the Origin and Current Meaning of Judicial Activism, 1470

first contemplate. Adherence to precedence is surely a virtue in most cases but it is helpful to ascertain out precisely what kind of precedent and what kind of law is in issue. It is only then that one can make a constructive point about judicial activism.⁶⁰

The word precedent in its widest and most purposeful sense means the use of past decision as a guide in giving other decisions.⁶¹ Precedence involves the reasonable practice of treating like cases alike.⁶² The doctrine of judicial precedent requires courts to follow prior and established decisions in a similar case. It is the policy of courts to stand by precedents and not to upturn settled points.⁶³ One of the classical descriptive arguments against judicial activism is the practice of departing from established precedent.⁶⁴

This paper's argument in favour of judicial activism is based on the premises that the doctrine of judicial precedence does not represent an absolute and rigid standard but rather a guiding principle or norm established by the courts. Among the reasons for the application of the doctrine of judicial precedence in Nigeria are the need to ensure certainty, stability, impartiality and consistency in judicial decisions.⁶⁵ This position was emphasis by the Supreme Court in the case of *Ojosipe v Ikabala*⁶⁶ where the court observed that "the principle of stare decisis is part of laws by which we are enjoined to follow our previous decisions, we cannot shut out our eyes or ears to the alarming degree of instability which must follow in consequence of our failure or refusal to do this".⁶⁷

It is instructive however to point out that in an adversarial legal system like the Nigerian legal system, the law always defeats the expectations of at least one party. For a legal process to maintain its prestige it requires persistent and conspicuous efforts at attaining impartiality so that even the defeated party will be impressed with the judicial process.⁶⁸ Thus, in a bid to ensure certainty in law, efforts have been made to free the legal process from interfering with the exercise of the legislative or the executive powers. This view argues that the judiciary in its activist posture has to utilize what is established and not concern itself with what the law ought to be. In *Amaechi v INEC*⁶⁹ the Supreme

⁶⁰ Id. 1471

⁶¹ Farrar JI & Douglas AM, Introduction to Legal Method, 3rd ed., (London, Sweet & Maxwell, 1990), 87

⁶² Adisa v Oyinwola & Ors (2000) 2 NSCQR (pt II) 1264 at 1284

⁶³ Elias T.O., Judicial Process in the Common Wealth, (Lagos State University Press, 1999), 112.

⁶⁴ Gray Lawson, The Constitutional Case Against Precedent; P 18

⁶⁵ See Aluko A. O., (1990), The Doctrine of stare Decisis and the Nigerian Legal System: A Theoretical Perspective, LASU Law Journal, 111, 28

⁶⁶ Ojosipe v Ikabala (1987) 3 NWLR (PT 61) 377

⁶⁷ Id. p. 406

⁶⁸ Maris C. Law and Scientific Method (New York Press, 1933), 194, the court has a standing and rigid invitation to do substantial justice to all matter before it. Justice which must not be allowed to be inhibited by any paraphernalia of technically Amaechi V. INEC (2008) IMJSC 205

Court said:

The fundamental duty of the judge is to expound the law and not to expand it. He must decide what the law is and not what it ought to be. Where words used in couching the provisions are clear and unambiguous, they must be given their ordinary and grammatical meaning.

This paper's further criticism against the opposition of judicial activism for non-adherence to precedent on ground of non-adherence to precedent is that attempts to place law, through judicial precedents, in a hermetically sealed container, denies the law of a fundamental attribute of being a living organism. Significantly, laws are inextricably linked with the very fabric of our society. Therefore; laws must be relevant at all times to such dynamism as changes and developments in the society.⁷⁰ Therefore, one will concede to the legitimacy of judicial activism with respect to ignoring judicial precedent viewing it from the observation of Liwelly,⁷¹ that men seek an illusory certainty in the law because they have not relinquished a childish need for an authoritative father and have unconsciously tried to find in the law a substitute for those attribute of fairness, certainty and infallibility ascribed in childhood to a father. Thus, by giving up our obsession with a father substitute, we can realize that until a court has pronounced on some particular questions, no law on that subject is yet in existence. This means that the law is uncertain as regards a specific situation until a decision is taken about that specific situation.⁷²

Stare decisis, another name for judicial precedence, itself may however be unconstitutional if the court follows a decision which is erroneous, perverse, a nullity, per incuriam or in error.⁷³ Thus it must recognize a balance between certainty and the need for justice to be dispensed, particularly at the apex court.⁷⁴ Thus, it is definitely right judicial activism for a court to depart from such a precedent that falls within the categories mentioned above. The problem of *stare decisis* was summed up by Bodenheimer⁷⁵ thus:

...assuming that there is close relation between equality and justice, it must be realized that the justice contemplated by *stare decisis* is that between a past and present decision. Justice on the other hand may require modification of the standards of equality because of changes in social outlook. While *stare decisis* promotes equality in time justice may be more concerned with equality in space

⁶⁹ (2008) 1 MJSC 1192

⁷⁰ Aluko A.O., (1934), *The Doctrine of Stare Decisis and the Nigerian Legal System, A Theoretical Perspective*, p. 28

⁷¹ Liwelly, (1994) *The Constitution as an Institution*, Colorado Law Review, 34, 1 at 7

⁷² Id.

⁷³ Therefore a simple departure from precedent is not tantamount to activism but raise question considering the respected of precedent. Robert C. L.; *In Search of Judicial Activism: Danger in Qualifying the Qualitative*, 10

⁷⁴ Uwaifo JSC in *Idoniboye Obu v NNPC* (2003) 1 SC (pt i) 40 at 61

⁷⁵ Bodenheimer, *The Philosophy of Law*, (Cambridge Mass, 1962), 254

time measured in term of contemporary value judgment.

The end result of the inequality in space time as against time has the implications that courts would have become less relevant to the society. As Davies⁷⁶ put it, it would only be a question of time before classes of litigants removed themselves from the jurisdiction of the courts by resort to arbitration and other methods of dispute resolution. It is therefore not surprising that efforts were latter made in England to mitigate the harsher effects of rigid adherence to the doctrine of judicial precedent as rightly summed up by Lord Gardiner⁷⁷ thus:

Their lordships regard the use of precedent as an indispensable foundation upon which to decide what the law is and its application to individual cases. It provides at least some degree of certainty upon which individuals rely in the conduct of their affairs as well as a basis for orderly development of legal rules. Their lordships nevertheless recognize that too rigid an adherence to precedent may lead to injustice in the particular case and also unduly restrict the proper development of the law. They proposed therefore to modify their present practice and while treating former decisions of this House as normally binding and to depart from a previous decision when it appears right to do so. ...this announcement is not intended to affect the use of precedent elsewhere than to this house.

The Supreme Court will not depart or overrule its earlier decisions at the whims and caprices of a party or a counsel. In this view, before the court considers a departure from its previous judgment, an appellant or party who desires to have this done must comply with the necessary procedure provided by the rules.⁷⁸ The party must convince the court that it is necessary to do so and in the process furnish it with cogent reason. It is apposite to state that in Nigeria, despite the time-honoured principle of judicial precedence, the Supreme Court does not considered itself to be absolutely bound by its former decision.⁷⁹ Consequently the court has an inherent power to depart from or ignore established stare decisis and for this purpose has laid down conditions

⁷⁶ Davis S, (1961), *The Future of Judges-Make Public Law in England: Problem of Practical Jurisprudence*, Colorado Law Review, 61, 201

⁷⁷ Davis v Johnson [1985] 2 WLR 182

⁷⁸ Re-Olatsoye pp. 96-97 and Adesokun v Adetunji (1994) 5 NWLR (pt 346) 540 at 562, Order 3 Rule 5(4) Supreme Court Rules (as amended in 1999) provides that if the parties intends to invite the court to depart from one of its own decision, this shall be clearly stated in the separate paragraph of the brief, to which special attention shall be drawn and the intention shall also be restated as of one reason.

⁷⁹ Nnemeke Agu JSC stated that as a court of ultimate resort it need to depart, overrule or ignore precedent when the interest of justice does not dictate otherwise, so when established principle is beset with a substantial error such that to follow it will amount to furthering injustice. See Asanya v State (1991) 3 LRCN 720 11744.

for doing same in a plethora of cases⁸⁰ as follows;

- i) When the judgment is obtained by fraud or deceit
- ii) When the judgment is a nullity such as when the court itself was not competent, or
- iii) When the court was misled into giving judgment under a mistaken belief that the parties had consented to it; or
- iv) When judgment was given in the absence of jurisdiction; or
- v) Where the procedure adopted was such as to deprive the decision or judgment of the character of legitimate adjudication.

Based on the same premise, a court may confront a circumstance where it will either have to strike down a statute or have to overrule one of its precedents as Bello 81 JSC rightly observed that;

the court will not adhere to the rule of *stare decisis* but will depart from its previous decision if such decision is inconsistent with the provision of the constitution or if it is erroneously reached or per incuriam and will if followed, perpetuate hardship and considerable injustice or it will cause temporary disturbance of rights acquired under it or will continue to fetter the existence of judicial discretion.⁸²

The court being the custodian of the Constitution must always prevent unconstitutional statute or precedent. Having in mind the above conditionality upon which a court (Supreme Court) may ignore precedent, judicial activism will be competent if carried out in compliance with this parameter. The justification for judicial activism resulting in the departure from *stare decisis* is well captured in the word of Aderemi JSC in the case of *Dapianlong v Dariye* that:

We are infallible because we are final, but we are final because we are infallible. Let it be said that as we are all mortals, infallibility can never be our virtue. From time to time, as human beings, we must make mistakes, but let those mistakes be genuine and honest, let them be seen to reflect the limit of our human knowledge.⁸³

A judicial precedent is not an inexorable command in the area of constitutional law, but by and large it is preferred because it is even-handed, predictable, fosters reliance on judicial decisions and contributes to the actual and

⁸⁰ ADH Ltd v AT Ltd (2007) 10 MJSC at 94-95, Alao v ACB Ltd (2000) 9 NWLR (pt 672) 264, Madukolu v Nkemdilim (1962) 2 SCNLR 341, Igwe v Kalu (2002) 14 NWLR (pt 787) 435, Chima v Ude (1996) 7 NWLR (pt 461) 379 Yong v Bristol Aeroplanc (1944) 1 KB 718

⁸¹ Odi & ors V Osafire (1985) 1 NSCC 14

⁸² Id.

⁸³ Dapianlong v Dariye, 223

Conclusion

This paper concludes that the virtue in judicial activism is that the court can determine which rulings were thought to be most important and well-grounded in law and principle at any given point in time. This allows judges to test several hypotheses about the rise and fall of precedent. The paper established that instances where precedents are overruled are usually thought to be much more important than other judicial decisions, and such cases quickly become and remain more important than the overruled precedent. This paper demonstrated that the courts are usually careful to ground the overruling of a precedent in another precedent, and the care it exercises can be understood from the significance of judicial activism. Thus, judicial activism in departing from an established precedent shows the nature of qualitative assessments courts usually make in regard to decided cases and how legal reasoning may evolve over time. The paper concluded that the fallibility of judges like any other human being further justifies departure from precedent in the event that a court discovers that a previous judgment was wrong or cannot stand the test of time.

law essential for the preservation of a functional democracy".¹³ Lord Denning,¹⁴ the father of judicial activism has given suggestions while searching for the spirit of the British Constitution. His suggestions (which undertone judicial activism) rest upon three instincts; "the instinct for justice, which he associates particularly with independence of the judges and certainty of the law; the instinct for liberty which involves freedom of discussion (including freedom of the press) and also freedom of association (including the right to form political parties); finally, a practical instinct which leads to a balancing of rights with duties, and powers with safe guards, so that neither rights nor powers shall be exceeded or abused..."¹⁵

A Nigerian scholar Chukwuma¹⁶ opines that, "there is no better definition of judicial activism than the judges interpreting laws to meet the demands of substantive justice, irrespective of the bare letters of the law and the Constitution. It implies the Judiciary bringing its head out and demonstrating that it hears the cry of the oppressed, sees the oppressive bravado of the oppressor and interprets the law to show that oppression and arbitrariness do not pay the oppressed and the society". Suleiman Ismaila Nchi¹⁷ another Nigerian scholar is of the view that judicial activism represents a departure from literal interpretation of statute and rigid adherence to judicial precedent and courts' liberality in favouring progressive social policies that will ensure greater equity in social relations. This is marked by a rejection of the traditional restraints on the exercise of judicial power and includes judicial decisions suggestive of social engineering, which may touch on areas of executive and legislative competence thereby negating a rigid adherence to the principle of separation of powers.

Supporting the above postulations is the position of Lord L. Scarman¹⁸ that "Law, it was strongly felt, can be developed into more and more refined notions, interconnections and codifications coupled with increasingly sophisticated ways of interpretation. 'A rather harmless pastime,' even legalistic might react. That attitude changes, however, when it is judges themselves who start 'developing' the law into something 'better'. Judicial activism it is called, often pejoratively."

¹² Chatterji, S., (1997) For Public Administration: Is Judicial Activism Really Deterrent to Legislative Anarchy and Executive Tyranny?, *Indian J.P.A.*, XLII, 9, 11

¹³ See generally Sathe, S. P., *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, (Oxford University Press, 2005); Ane Amisshah, *The Contribution of the Courts to Government: A West African View*, (Oxford Clarendon Press, 1981), 368

¹⁴ Denning, *Changing Law* (1953), culled from Edward Mac Whinney, *Judicial Review*, 23-24, (4th ed. University of Toronto Press, 1965)

¹⁵ *Id.*

¹⁶ *Daily Independent*, Thursday, November 1, 2007, II

¹⁷ Suleiman I. N. *The Nigerian Law Dictionary*, (Green-World Publishing Company, 1996), 296

¹⁸ Quoted in Bas de Gaay Fortman, (2006), *A Comparative Exploration into Human Rights as a Moral – Political Force in Judicial Law Developments*, *Utrecht Law Review*, 2(1), 22-23 at 22,

activities'. In this sense, every judge is or at least should be activist.²⁵ Moreso every judge is an activist either on the forward gear or on the reverse..²⁶

In summary the fact is, where there is clear evidence or conclusion by courts that a judgment or decision was wrongly decided, annulled by a subsequent legislation, obsolete or considered perverse, judicial officers (judges) could adopt either a passive or an active stance in the dispensation of justice by departing, overruling or ignoring the precedent. In such circumstances, the courts do not only have the right, but also an obligation to exercise its power in the defence of justice and the rights of the parties before it. Their concern should be on how to obtain results with a pragmatic approach rather than a dogmatic adherence to precedent.

3. Conceptualizing Judicial Precedence

Conceptually, the doctrine of judicial precedence/stare decisis is concerned with the importance of case law in any judicial system globally. It is in reality a lawyers' term for legal experience. It is a common phenomenon that human beings tend to repeat things they have done before. Arguably the field of law is not an exception to this general tendency for the creation of ascertainable patterns, and this assertion can be made with greater justification when the need for some degree of certainty in the law is considered.²⁷ If one case has decided a point of law then it is logical that decision will be referred to in the future. But if judicial precedence is simply legal jargon for experience, why does it deserve our attention? Why can we say that, during one's training in the law and afterwards, one will have to possess a clear understanding of the intricacies of judicial precedence? The answer lies in the fact that the term 'experience' only begins to describe the situation. Instructively, even when a layperson uses the term 'precedent' there is an implication that what was done before should be done again. That a starting point in trying to solve a problem is to see what examples exist where this (or similar) problems have been tackled before.

The doctrine of judicial precedence or stare decisis, is thus one of the attributes of the Common Law system which has become part of the Nigerian

²⁵ See, Rory, Leishman, *Against Judicial Activism: the Decline of Democracy in Canada*, (McGill Queen's University Press, 2006) and Kelly, J B *Governing with Charter, Legislative Judicial Activism and Framer Intent*, (UBC Press, 2006) pp. 310-336 see also Okere, B O, (1987), *Judicial Activism or Passivity in Interpreting the Nigerian Constitution*, *International Constitutional Law Quarterly*, 36(4), 788-816

²⁶ Ashok, K., (1998), *Judicial Activism and Social Transformation*, 1(1) *UPS JPS* 26-36, <www.indlaw.com/publication/article> accessed on April 10, 2010, see also Peter H. R., et al, *Federalism and the Charter: Leading Constitutional Decisions*, (Carleton University Press, Ottawa, 1989), 19

²⁷ Archi Cox; (1987), *the Role of the Supreme Court Judicial Activism or Self Restraint*, (1987) 47, *MD L Review*, 47, 118-200, (arguing that the process of constitutional interpretation by an independent judiciary usually leads to the avoidance of the extreme of either judicial activism or judicial restraint and thus keeps the Constitution a living instrument relevant to a constantly changing society while also preserving the authority of the original document and constitution tradition of the past).

Legal System derived from the English Legal System.²⁸ The very core conception of judicial precedence is that questions ought to be decided today in the same way as it was decided yesterday simply because they were decided that way yesterday.²⁹ A doctrine or precedent manifests when a new issue is brought before the courts for adjudication. Once a novel principle is developed, it becomes binding for later similar cases, and in this way achieves the status of a legal rule without having to wait for the much slower development of a common practice among the population at large.³⁰ This proposition was emphasized in the case of *Clement v. Iwuanyanwu*,³¹ where Oputa (JSC) observed that a precedent is an adjudged case or decision of a higher court considered as furnishing an example or authority for an identical or similar question afterwards arising on similar question of law.

Christopher³² is of the opinion that the conception of stare decisis fits within the framework of the traditional legal analysis that the Court (Supreme Court) regularly employs in evaluating the viability of precedents. Even though, empirical studies have explored stare decisis from an attitudinal or legal perspective, none has examined in any detail what type of legal criteria are actually used to depart from an established binding precedent. Investigating the legal factors that the Court applies to its overruling and overturning of cases is important since it may be the first step in understanding whether courts adopted a "radical" theory of judicial precedence or stare decisis.³³ Once such legal factors are ascertained, it is then possible to analyze their application in cases and determine whether the Court is making social policy through its precedent-shattering decisions, and in the process compromising the rule of law with its judicial politics.³⁴ Christopher further reiterated that a typical discussion of stare decisis and its impact on precedent often begins with posing the question whether there is a "special justification" for overruling past law. While this term defies simple definition, it is clear that the Court tries to adopt a principled approach in its stare decisis decision-making where society can presume that bedrock principles are founded in law rather than in the proclivities of individuals. Using this rhetoric allows the Supreme Court to preserve the popular conception that it is a legitimate and

²⁸ Obilade Akintunde, *The Nigerian Legal System*; (Ibadan, Spectrum Book Limited, 2007), 66

²⁹ Ephraim A. I., (2014), *The Rationality of Judicial Precedent in Nigeria's Jurisprudence*, *American International Journal of Contemporary Research*, 4(5), 151, In that case the fact, the subject matter in the present case must be similar with the previously decided case.

³⁰ See, Okafor Iloch, *The Appellate in our Legal System: An Evaluation*, Okonkwa, C. O. (ed.), "Contemporary issues in Nigerian Law," (Tonia Macro Publishers Ltd, 1992)

³¹ (1998) 3NWLR (Pt. 107), 54

³² Christopher P. B., (1999), *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, *Akron Law Review*, 32(2)

³³ Id.

³⁴ Id.

first contemplate. Adherence to precedence is surely a virtue in most cases but it is helpful to ascertain out precisely what kind of precedent and what kind of law is in issue. It is only then that one can make a constructive point about judicial activism.⁶⁰

The word precedent in its widest and most purposeful sense means the use of past decision as a guide in giving other decisions.⁶¹ Precedence involves the reasonable practice of treating like cases alike.⁶² The doctrine of judicial precedent requires courts to follow prior and established decisions in a similar case. It is the policy of courts to stand by precedents and not to upturn settled points.⁶³ One of the classical descriptive arguments against judicial activism is the practice of departing from established precedent.⁶⁴

This paper's argument in favour of judicial activism is based on the premises that the doctrine of judicial precedence does not represent an absolute and rigid standard but rather a guiding principle or norm established by the courts. Among the reasons for the application of the doctrine of judicial precedence in Nigeria are the need to ensure certainty, stability, impartiality and consistency in judicial decisions.⁶⁵ This position was emphasis by the Supreme Court in the case of *Ojosipe v Ikabala*⁶⁶ where the court observed that "the principle of stare decisis is part of laws by which we are enjoined to follow our previous decisions, we cannot shut out our eyes or ears to the alarming degree of instability which must follow in consequence of our failure or refusal to do this".⁶⁷

It is instructive however to point out that in an adversarial legal system like the Nigerian legal system, the law always defeats the expectations of at least one party. For a legal process to maintain its prestige it requires persistent and conspicuous efforts at attaining impartiality so that even the defeated party will be impressed with the judicial process.⁶⁸ Thus, in a bid to ensure certainty in law, efforts have been made to free the legal process from interfering with the exercise of the legislative or the executive powers. This view argues that the judiciary in its activist posture has to utilize what is established and not concern itself with what the law ought to be. In *Amaechi v INEC*⁶⁹ the Supreme

⁶⁰ Id. 1471

⁶¹ Farrar J I & Douglas A M, Introduction to Legal Method, 3rd ed., (London, Sweet & Maxwell, 1990), 87

⁶² Adisa v Oyinwola & Ors (2000) 2 NSCQR (pt II) 1264 at 1284

⁶³ Elias T.O., Judicial Process in the Common Wealth, (Lagos State University Press, 1999), 112.

⁶⁴ Gray Lawson, The Constitutional Case Against Precedent; P 18

⁶⁵ See Aluko A. O., (1990), The Doctrine of stare Decisis and the Nigerian Legal System: A Theoretical Perspective, LASU Law Journal, 111, 28

⁶⁶ Ojosipe v Ikabala (1987) 3 NWLR (PT 61) 377

⁶⁷ Id. p. 406

⁶⁸ Maris C. Law and Scientific Method (New York Press, 1933), 194, the court has a standing and rigid invitation to do substantial justice to all matter before it. Justice which must not be allowed to be inhibited by any paraphernalia of technically Amaechi V. INEC (2008) IMJSC 205

perceived integrity of the judicial process.⁸⁴ In the act of judicial activism expressed in departure from established precedents, the Nigerian Supreme Court 85 has cautioned against the influence of ingenious counsel who may selfishly induce the courts to embark on judicial activism:

The jurisdiction of this court to depart from its decision should not be invoked with flippancy by raising issues which do not rightly arise in the case and which by reason of the facts of the particular case does not involve the application of any problematic principle of law enunciated in a previous decisions.

Judicial activism is justified in all cases where judgment is made per incuriam and for that reason the court may depart from it if it is satisfied that the decision was wrong and there is a need to reverse or alter it in the interest of justice. 86 In the case of *Eperokun v University of Lagos*⁸⁷ Oputa JSC stated the main benefits of the preceding decision:

Standing by a previous decision which has not been proved to be perverse, or to have been decided per incuriam or proved to faulty legally or procedurally has a lot of advantages. It fosters stability and enhances the development of a consistent and coherent body of law. In addition, it preserves continuity and manifest respect for the past. It also assures equality of treatment for litigants similarly situated. It likewise spares the judge the task of re-examining rules of law, or principles with each succeeding case, and finally it affords the law a desirable measure of predictability.

From either the perspective of standing by or departing from precedent, one could draw the conclusion that there are a number of obligations directly applicable in determining the applicability of precedent to a particular case. This explains this paper's emphasis on the fact that the rationale behind departure from precedent must be justifiable on specific grounds.⁸⁸ This can be seen in the response by advocates of judicial activism to the objection raised against departure from precedent and their argument that having regard to the role of the judiciary in the development of law, it is not appropriate to put judicial precedence in an iron sealed container.

⁸⁴ Justice Rehnquist concurring in the case of *Crawford v Washington* 541 US 36, 75 (2004) (quoting *Pyne v Tennessee* 501 US 808, 827-28 (1991))

⁸⁵ *Idoniboye Obu V NNPC*, 61

⁸⁶ *Global Transport Oceanico S. A. and ors v Free Enterprises Nigeria Ltd* (2001) 2 SC 154 at 165-166

⁸⁷ (1986) 4 NWLR (pt 34) 162 at 193

⁸⁸ In *Architect Registration Council v Fassassi* (No 4) (1987) 3 NWLR (pt 59) 42 at 46 Eso JCS statement confirmed the study position that judicial activism departing from established precedent is allowed where he posited that: "The Supreme Court, and it is only the Supreme Court, that may depart from the principle laid down in their decision in the case in future cases, but that does not alter the rights, privileges or detriment to the parties concerned, arising from the original case. Such is the constitutional power of the Supreme Court that learned counsel, probably rightly, wondered if the Justices of the Supreme Court were supermen".

Developing the Law through Judicial Activism in Nigeria: Judicial Departure from Established Precedent Perspective

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Keywords: Judiciary, Democracy, Precedent, Activism, Restraint, Judgment

Abstract

The powers and limitations of government institutions in Nigeria are defined in the Constitution. The institutions exercise separate powers and from this perspective, the primary duty of legislature is to legislate for peace and good governance of the country, the executive executes laws and the judiciary enforces the law, settles disputes and interprets the Constitution and statutes. Through their functions, judges pass judgments, including in new or novel situations, which in turn become precedents. However there have been arguments concerning the departure of courts from established precedents within the context of judicial activism. This investigation which is purely doctrinal relies on primary and secondary sources for information. The paper examines the development of law through the concept of judicial activism. The paper consists of five (5) parts; (i.) the introductory part, (ii.) the conceptual analysis of judicial activism, (iii.) the conceptual analysis of judicial precedence, (iv.) judicial precedence or stare decisis as a metric for measuring judicial activism, and (v.) the conclusion. It is concluded that judicial departure from a wrongly decided matter or a decision reached per incuriam, even if it is an established precedent, is appropriate.

1. Introduction

A modern study of government in contemporary nation states is impossible without an appreciation of the role of the judiciary as the voice for the voiceless and the oppressed and a blind dispenser of justice without fear or favour, affection or ill-will.¹ This is significant when viewed in the light of democracy and the dismantling of autocratic/dictatorial military regimes, particularly in Nigeria. Incidentally, the development of the Judiciary and the pre-eminent position it has taken in many democracies worldwide establishes the fact that the institution has attained an enviable status through its role as an independent arbiter and custodian of constitutionalism. Notwithstanding any weakness of the Judiciary in contemporary nation states, particularly in developing democracies Nigeria inclusive, the Judiciary remains the most visible institution of governance, the one that distinguishes the democratic present

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¹ Egbewole, W. O., (2013) *Judex Hope for the Hopeful and the Hopeless* 139th Inaugural Lecture of the University of Ilorin, (University of Ilorin, Press, 2013)



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