

SEPARATION OF POWERS: THE JUDICIAL ACTIVISM
PERSPECTIVES IN CURBING LEGISLATIVE ABERRATION OF
THE CONSTITUTION

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Abstract

Judicial pronouncement has often been termed "Judicial Activism" and viewed from various perspectives, this metamorphosis, in the functioning of the judiciary, has invited varied reactions ranging from exuberance to caution to pessimism. Some political pundit described it as judicial over-activism; some other political as well as legal scholars have alleged that the judiciary is usurping legislative/executive powers in the guise of public interest. The doctrine of separation of powers has raised significant constitutional issues such as whether the institutions of government are absolutely independent of one another or the extent to which the level of interaction in the name of checks and balances exist among them. There are also cases which raise issues concerning separation of powers and judicial interference in legislative exercise of their powers. This paper examines judicial activism in relation to the doctrine of separation of powers with the in-built mechanism of checks and balances. A case review of instances of checks and balances resulting from judicial pronouncement shall be examined and conclusion with suggestions proffer.

INTRODUCTION

A myth of separation of powers is in the establishment and maintenance of liberty based on the division of governmental powers into three branches, of the legislature, the executive and the judiciary.¹ A country that has proclaimed itself a welfare State seeks its institutions to perform their functions within the limited powers constitutionally assigned to them. Those who enact laws are, however, not the same as

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¹ Vile M. J. C., 1998, Constitutionalism and the Separation of Powers, Indianapolis, In Liberty Fund, 1998, p 14

those who implement them.² The implementation of these laws has, of necessity, to be left to the governmental machinery that is the executive arm of government. There is also the institution vested with the power to interpret the law, examine legislative and executive action in a situation of legal disputes. The bureaucratic apathy and administrative callousness of those who man this machinery compel the beneficiaries of such legislation to sometime resort to the courts to ensure that these benefits are made available to them and they are within the constitutional limitation. This is where judicial activism concept has its place to the extent that, the Constitution is usually clear as to who should perform judicial act. And since it is the exclusive function of the judiciary to exercise judicial function, any member of the executive or legislature who interferes with those functions must be prepared to face the consequences of such interpolating conduct by way of an action by a person aggrieved³.

The paper is divided into five parts, the introduction, examination of the concept of judicial activism and separation of powers and the constitutional justification for judicial activism in curbing legislative tyranny and enforcing its limitations. Thus within the confine of this paper the nexus between judicial activism and legislative action is posited to be based on the doctrine of checks and balances inherent in constitutional principle of separation of powers. We argue that separation of power may be defined as a constitutional political system that creates separate executive, legislative, and judicial branches of government. This definition has important implications for the literature on federalism and the separation of powers. Most of the literature on separation of powers has emphasized the relationship between the three institutions of government with the inherent checks and balances⁴. The intuition behind our definition is that the separation of powers is an essential feature of constitutional government. Our purpose is to elucidate the constitutional underpinnings of judicial activism in curbing legislative tyranny. An

2 See generally Nwabueze B. O., 1982, *The Presidential Constitution of Nigeria*, London Sweet & Maxwell, pp. 32-36

3 *Egbuniwe v Federal Republic of Nigeria* (2010) 2 NWLR 368, see also *Steel Bell (Nig) Ltd v Governor of Cross Rivers State* (1996) 3 NWLR (pt 438) 571

4 The Constitution of the countries enshrined the doctrine of separation of powers between the executive, the legislative and judicial arm of government. John Mostesques; *The Spirit of Law* (1948) page 18; John Locke: *Treaties on Government* (1960) and Nwabueze B. O. 1982, *The Presidential Constitution of Nigeria*; pp. 32-33

inherent feature of constitutional government is the capacity to legislate and adjudicate. In what follows, we examine the meaning of judicial activism and the separation of powers and the constitutional legitimacy of checks and balances as well as the limitations while overlooking the separation of powers within both institutions of government.

The judiciary plays an important role in enforcement of compliance with the Constitution wherein the institutions of government derive their powers. The appraisal of the judiciary in the performance of their function is the main focus of this paper. Therefore we adopt the definition of Judicial Activism articulated by Peter Russell⁵ as meaning: Judicial vigor in enforcing constitutional limitations on the other branches of government and its readiness to veto the policies of those branches of government on constitutional grounds'

This definition captures the powers of the judiciary which include dispute settlement, interpretation and the inherent power of judicial review within the concept of checks and balances. Instructively therefore, the concept of constitutional supremacy provides the inroad for the court to consider and determine propriety or otherwise of legislative actions or legislations. Thus, where a court found legislative actions or legislations inconsistent with the Constitution the court can declare same as null and void, thereby enforcing limitation and compliance with the rule of law in governance.

JUDICIAL ACTIVISM

The judiciary has a key role to play in a democracy and as an arm of government it is invested with judicial powers, the power to interpret, construct and apply the law⁶. Thus, judicial activism does not necessarily involve a confrontational or anti-government stance by the judiciary. Indeed judicial activism means no more than judicial dynamism coupled with zeal to ensure that the powers that be do not trample upon the common man with impunity.⁷

5 Peter H. R., et al, 1989, *Federalism and the Charter: Leading Constitutional Decisions*, Carleton University Press, Ottawa, p 19

6 Dominic A., 2002, The Three Arms of Government in Nigeria Towards a Harmonious Co-existence in Nigeria Multi-Party Democracy, 2, *New Vistas In Law Series, Faculty of Law, University of Jos*, p296

7 Ade-Ajayi J. F., & Akinseye-George, Y, 2008, *The Making of a Judge* in Kayode Eso (ed.), Ibadan, Spectrum Books Ltd, p 202 at 296.

Judicial activism has been viewed as a pejorative term used to describe judicial power to interpret the constitution⁸, statute and legislation based on the judicial functions by being strict (passive) in its construction of Constitution, Statute and Legislation or liberal in interpretation of constitution, statute and legislation⁹. The proponents¹⁰ argued for a judiciary which is active and adopt a liberal approach while the opponents canvassed judicial restraint whereby a more conservative approach is employed that is "take the law as it is and not as it ought to be".

Activism is a helpful category in that it focuses attention on the judiciary's institutional role rather than the merit of a particular judgment¹¹. The usefulness of judicial activism depends however on the recognition that while we may plausibly describe different aspects of judicial acts as either activist or restraint, such terminology will yield a persuasive on-balance characterizations of decisions much less of particular judges or courts¹².

- 8 Ashok, K. J., 1998, Judicial Activism and Social Transformation, 1(1), *UPS Journal of Political Science* pp 26-36 available in www.indlaw.com/publication/article accessed on 10/04/2010 pp. 26-36. See also B. O. Okeke; 1987, Judicial Activism or Passivity in Interpreting the Constitution, Interpreting the Nigerian Constitution, 30, *International Comparative Law Quarterly*, p 790, Cross F. B. & Lindquist S. A., *The Scientific Study of Judicial Activism*,
- 9 See, Roosevelt, K., 2006, *The Myth of Judicial Activism: Making Sense of Supreme Court's Decisions*, Yale University Press Publishers, 2006, 272pp. James B. Kelly, 2006, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*, Law and Society Series, UBC Press Publishers, p 33. S. P. Sathe, 2005, *Judicial Activism in India Transgressing Boarder and Enforcing Limits*, Oxford University Press Publishers, 2005.
- 10 See Scalia A., 1989, Originalism: The lesser Evil, *California Law Review*, p. 849. Pinelli C., 2009, The Concept and Practice of Judicial Activism in the Experience of some Western Constitutional Democracies' *Judicial International*, XIII, 2007, p. 33 <http://www.ssrn.com> visited on 30th December 2009.
- 11 K.. D. Kmiec, 2004 *The Origin and Current Meanings of Judicial Activism*, *California Law Review*, 2004, T. Tsowell; 'Judicial Activism Reconsidered', Hoover Institute Leland Stand ford University, available at www.tsowell.com/judicial.html, visited on 10/08/2010
- 12 Ernest, A. Y., 2002, Judicial Activism and Conservative Politics, *University of Colorado Law Review*, 73, 1339 at p 1141. Available at www.scholarship.law.duk.edu/cgi/view

It has been argued¹³ that judicial restraint may lead to submission of the judiciary to the whims and caprices of the political branches and obfuscate the doctrine of separation of powers or oppression and tyranny¹⁴. It has been noted that the end result of this position would lead to oppression and tyranny¹⁵. Though the proponents of judicial activism have maintained that the courts do not only have the right but also an obligation to exercise their power for the defense of the rights of the political minorities, because when there is government failure in this respect, it is only the courts that have the duty to remedy the violation¹⁶. The doctrine captures the mind-set of framers of Constitution by making the judiciary a mechanism for providing the necessary checks and balances inherent in the principle of separation of powers to the other arms of government. Without scintilla of any doubt, judicial activism is an inherent power of court with embodied capacity to evaluate and control congressional/legislative powers and the executive under the constitutional doctrine of separation of powers¹⁷. The judiciary is significant in any democratic society, because democracy and justice are twin bedfellows. Man's capacity for justice makes democracy possible. There seems to be an umbilical cord linking democracy and justice. If that cord snaps the result will be injustice. It will be a failure of democracy¹⁸.

Judicial activism, in fact is not a distinctly separate concept from the usual judicial activities. The expression "judicial activism" lexically as well as in ordinary parlance means, 'being active' 'doing things with decision' and the expression 'activist' should mean, 'one who favour intensified activities'. In this sense every judge is, or at least, should be activist. Every judge is an activist either on the forward gear or on the reserve¹⁹.

13 A. Kurupt, 2006, Reinterpreting 'Federalism' and Judicial Activism for Good Governance in Indian', (2006) *India Socio-Legal Journal*, xxxi (i) pp 41-56 particularly p. 52-53

14 S. S. Welch, G. John, S., Michael, C. John, and B. Harry, *Understanding American Government*, Minneapolis, West Publishing Co, 1993, p56

15 *ibid*

16 *ibid*

17 P. P. Frickey & S. S. Smith, 2002, Judicial Review, the Congressional Process, and Federalism Cases: An Interdisciplinary Critique', *Yale Journal*, pp 1707-1756 and Linde, H.A., 1976 Due Process of Lawmaking, *Nebraska Law Review*, p. 197

18 Oputa JSC: *Judicial Activism: A Catalyst for Political Stability*, The Guardian Newspaper of Tuesday, September 16th 2003, p. 7

19 Ashok K., *Judicial Activism and Social Transformation*, pp 26-36

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The above proposition support the fact that the court as custodian of the Constitution and the judges saddled with judicial power must see to it that the Constitution is at all times respected and the rule of law maintained. In this paradigm a court that follows the Constitution to the latter should be active. The justices of the Supreme Court of Nigeria demonstrated this quality in the case of *PDP v INEC*²⁰ in protecting the right of Bony Haruna to ascend the position of governor of Adamawa State when Atiku was chosen as the Vice President of Olusegun Obasanjo (as he then was). The scenario that call for the interpretative powers of the court in that case was not contemplated by the drafter of Constitution that user in the Nigerian democracy in 1999.²¹

In the Nigerian modern democracy, the courts have not been slow to respond to the demand made upon them and to mould their remedies to meet the situations and have increasingly come to direct the method of implementing such reforms as a check on the working of these institutions as rightly observed by Shyllon²² that courts of law exist and function in this country because the public in general have confidence in the body of judicial officers who administer justice and the body of legal practitioners who assist them in discharging their onerous and highly delicate task...there is no justification for the existence of the judiciary except in its existence for the defence of the citizen, for the citizen put his views across with all potency, for him to vent his feelings and his success in the public for him to breath freedom around him.

SEPARATION OF POWERS DOCTRINE

This is the notable feature of countries with written Constitution²³ that is, the distribution of the exercise of governmental functions among the three principal and separate departments and for the structure of democracy to remain successful of the Legislature, the Executive and the Judiciary²⁴. The role of each must be jealously guarded and remain

20 *People Democratic Party v INEC* (1999) 7 SC (pt ii) 30 and *Obi v INEC* (2007) 9 MJSC 1

21 Constitution (Transition) Decree No 3 of 1999

22 F. Shyllon, *Freedom Justice and Due Process of Law*, University Press, Ibadan, 1986, pp. 17-18

23 1963, 1979 and 1999 Constitution of the Federal Republic of Nigeria

24 Section 4, 5 and 6 of the Nigeria Constitution 1999, Benjamin Fletcher Wright, ed., *The Federalist* by Alexander Hamilton, James Madison, and John Jay

uninterrupted. The Constitution also prescribes scope and limits for each institution and that within its jurisdiction, the exercise of power are Supreme. In *Re-Olafisoye*²⁵ the doctrine was reaffirmed per Tobi JSC that the doctrine rests upon necessary implication from the establishment by the Constitution of the Federal and State Governments as separate and autonomous governments, and the necessity for the maintenance of their capacity to continue to exercise their respective constitutional functions as such governments... the principle of autonomy in a federal system implies further that neither the central government nor its regional can confer functions or impose duties, obligations, restrictions and liabilities on the functionaries of the other.

The division of governmental powers among three branches, namely the Executive, the Legislature and the Judiciary, is an established doctrine in any constitutional democratic governance as propounded by great philosophers.²⁶ The philosophy behind the doctrine is premised on the danger inherent in vesting government powers on single individual or group of people, thus the significance of distributing and specifying the power of government within the three institutions. The object of this doctrine is to prevent despotism, arbitrariness and totalitarian in governance. The philosophy equally contemplates non interference, usurpation and or infringement of the powers of an institution by the other²⁷.

Notwithstanding the separate jurisdiction emphasized in the doctrine, there is however some level of interaction among the three institutions in form of checks and balances²⁸ on the activities of government that pave the way for judicial activism. While the judiciary checks the Legislature and the Executive through its power of interpretation, determination of dispute and the validity of the actions of the other, the Legislatures can re-

(Cambridge, Mass.: Belknap Press of Harvard University Press, 1966), pp. 491 - 494 <http://www.hn.psu.edu/faculty/jmanis/jimspdf.htm> visited on 16/06/2011

²⁵ *Re-Olafisoye* (2004) 1 SC (pt i) 27 at 54

²⁶ John Mosteques; 1948, *The spirit of Law*, p. 18; John Locke; 1960, *Treaties on Government* (1960)

²⁷ Nwabueze B. O. *The Presidential Constitution of Nigeria* pp. 40

²⁸ Acherman, B., 2002, *The New Separation of Powers*, *Harvard Law Review*, 113, pp 642-727 and Elias T.O. 1999, *Judicial Process in the Common Wealth*, Lagos State University Press, 1999, p. 112.

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enact a law invalidated by the judiciary, they can, subject to constitutional limitation remove a judicial officer or Executive²⁹.

Within the structure of United States of America, three-branch democracy, each branch carries with it certain responsibilities, obligations and duties that are necessary for the government to function properly³⁰. The Federal Constitution charges the Legislative branch with the responsibility of enacting the law, the Executive branch with the obligation to determine the most effective way to carry out the law, and the Judicial branch with the duty of interpreting the law to ensure that the law or the manner in which the law is enforced does not interfere with rights guaranteed by the Constitution³¹.

The Constitution of Pakistan also provides for "separation of powers" with in-built mechanism of "checks and balances" between the legislative, executive and judicial organs of the state. The document calls for "Independence of the judiciary" and ordains its "separation from the Executive". To complement the notion of judicial independence, the Constitution contains elaborate provisions for qualifications and mode of appointment of judges of superior courts³². For the democratic structure to remain successful, the role of each government branch must remain separate from and provide appropriate checks and balances on the others³³. In a democracy, the power of any branch, institution or arm of Government is not absolute. Thus, there is nothing like judicial supremacy because, the judicial powers are as constitutionally limited as it is those of the Legislature or the Executive of their several assignments. Judicial activism may be connected with legislative activism: Legislature may modify a court judgment by rewriting or re-enacting a void judgment or a judicial decision may later be reversed by a later judicial decision resulting from adverse public opinion.³⁴ In this perspective the judges'

29 *ibid*

30 Matthew, B. T., *Avoiding Judicial In-activism: The use of Legislative History to Determine Legislative Intent in Statutory Interpretation*, p. 190, R. G. Alberto, *Attorney General's Remark* at George Mason University (2005) available at <http://www.usdoj.gov/ag/speeches/2005/ag-speech-051018.htm> accessed on 22/12/2010 see also *United Public Workers of Am. V Mitchell* 330 US 7

31 *Ibid*

32 Jain, M. P., *Indian Constitution* (3rd ed), N.M. Triathlon, 1978, p. 241

33 *ibid*

34 Uwais CJN, *The Guardian, Sunday Nigerian News Paper* of 15th June 2003 page A8

opinion in a case can be of practical applicability for the legislature in re-enacting or modifying an impugned legislation. Historically the courts decisions, opinions and exposure of the lacuna in the Electoral Acts during election petition cases since 1999 have directly or indirectly assisted the legislature in the several amendments of Electoral Acts 2002, 2006 and 2011 respectively.

The Pakistan Constitutions (1956, 1962 and 1973) provide for a system of governance dedicated to democratic norms, rule of law, fundamental rights, inter-provincial co-ordination and harmony and anchored on principles of federalism and on separation of powers between the Executive, Legislature and the Judiciary. A specific and separate role was visualized and provided for each of these important organs of the State³⁵. This principle was lucidly explained in the case of *Al-Jehad Trust vs. Federation of Pakistan*³⁶, thus:

... the Legislature has to legislate, the Executive has to execute laws and the Judiciary has to interpret the Constitution and laws. The success of the system of governance can be guaranteed and achieved only when these pillars of the State exercise their powers and authority within their limits without transgressing into the field of the others by acting in the spirit of harmony, cooperation and coordination.

It is worthy of note that the Pakistan judiciary like in other countries operating a constitutional democracy, is made responsible for checking the transgressions of the Constitutional provisions by either the Executive or the Legislature. This watch dog role is legitimized by provisions in the Pakistan Constitution that secure the independence of the judiciary³⁷. This is rightly evidenced from the comment of Mr. Ajmal Mian, in the case of *Sharaf Faridi v Federation of Pakistan*³⁸, that ...the Pakistan judiciary was assigned very important role to play, namely, to act

³⁵ See generally Hassan, P. 2011, *Environmental Protection, Rule of Law and the Judicial Crisis in Pakistan*, www.qjc.edu.pk/publications/pdf/2%20article%20of%20Dr.%20Pervez.doc accessed on August 3rd, 2011

³⁶ PLD 1996 Supreme Court 324 and 399

³⁷ Article 2A, Article 175 and Article 209 of the Pakistan Constitution 1973 provides for the independence of the judiciary.

³⁸ PLD 1989 Karachi 404, at 427-28, (Ajmal Mian was Chief Justice of the Sindh High Court, as he then was (and later to be the Chief Justice of Pakistan))

as the Watch Dog and to ensure that none of organs or the Government functionaries acts in violation of any of the provisions of the Constitution or of any other law. Since the above role entrusted to the judiciary under the Constitution was very delicate, it was envisaged that the judiciary would be independent and separate from the other organs of the State.

Judicial activism in the context of separation of power in Nigeria, India³⁹, South Africa or United States⁴⁰ therefore has its foundation and legitimacy derived from the Constitution and it stands as a mechanism of being a watchdog to the other arms of government. Significantly therefore the exercise of power by any of the three institutions of government and its legitimacy must be traced to the Constitution of Nigeria⁴¹. The significance of this principle can be seen from the observation of the Supreme Court in the case of *Dapialong v Dariye*⁴² that: the constitution of any country is what is called the organic law or ground norm of the people. It contains all the laws from which the Constitutions of states derive their creation, legitimacy and very being. The constitution is also the unifying force in the nation, appropriating rights and imposing obligations on the people who are subject to its operation. It is very important composite documents, the interpretation of constitution which is subject to recognized canon of interpretation designed to craft to enhance and sustain the existence in which Constitution are held.

39 See *S. P. Gupta v. Union of India*, AIR (1982) SC 149, and *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473, *Bandhua Mukti Morcha v. Union of India*, AIR (1984) SC 802, *Sunil Batra v. Delhi Administration*, AIR (1978) SC 1675. See also the Nigerian cases of *Fawehinmi v Akilu & Anor* (1987) 1 NWLR pt 67 p 797

40 *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) though the United Constitution did not specifically provide for judicial review

41 Mathew, B. T., 2006, Avoiding Judicial In-Activism: the use of Legislative History to determine Legislative Intent in Statutory Interpretation, *Washburn Law Journal*, 46, pp189-222. By this mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberty of the people from executive concentration of authority. The framers of the United States Constitution recognized that "liberty was dependent upon separation of government into three branches of the Executive, The Legislative and the Judiciary. Nwabueze B.O. *The Presidential Constitution of Nigeria* p. 36

42 (2007) 2 MJSC 1

The concept of judicial activism found its legitimacy in the structural checks and balances essential to our form of government⁴³, the democratic governance provides additional inherent check on the activities of government⁴⁴. This political check is of particular importance in ensuring that laws are enacted and carried out in accordance with the will of the people. By enacting laws in opposition to the will of the people, the legislature subjects itself to the risk of political repercussion. The Nigerian Supreme Court evidently shows the importance of this that:

When a legislature enacts law in accordance with the constitution, this court (supreme court) and courts below it have not the jurisdiction to question the vires of the law on grounds of non desirability or morality or for any plausible reason at all because the primary duty of a legislature is to make laws, and courts of law cannot remove the constitutional power, unless the law passed is ultra vires the Constitution⁴⁵

It may be argued that when talking of judicial activism within the role of the court and its checks and balance on legislative action, precedent has shown that one cannot separate judicial function in face of disputes on constitutionality of a legislation or legislative unconstitutional action from judicial intervention nor positive effect of such intervention on democratic stability in Nigeria. In this approach, all judicial function whether they are articulated in law or not are obligated by the Constitution. From a more positivist approach therefore, judicial activism is derived from the customary and constitutional function of the court. However, a free and independence judiciary is the cornerstone to a democratic nation. To provide a just and impartial checks and balances envisioned by the law, the judiciary is deliberately insulated from the

43 Ferejohn, J., and Weingast, B., *Limitation of Statutes: Strategic Statutory Interpretation*, *Georgetown Law Journal*, 80, 565-582 and Wang, Chenguang, 2006, Lawmaking Functions of the Chinese Courts: Judicial activism in a County of Rapid Social Changes, *Front. Law China, Research Article; Higher Education Press and Springer-Verlag* p 1-5, www.lawschool.cornell.edu/international/.../wangarticleapril2009 accessed 12/06/2011

44 See David Cole, 1998, Jurisdiction and Liberty; Habeas Corpus and Due Process as Limit on Congress Control of Federal Jurisdiction, *Georgia Law Journal*, 2, 509

45 *A.G. Abia, Delta and Lagos state v. AGF* (2006) a MSSC 61

political process. However, when there is governmental legislature failure in their respective duty, courts have a duty to remedy the violation.⁴⁶

DOCTRINE OF CHECKS AND BALANCES AND LIMITATIONS

Checks and balances inherent in the doctrine of separation of powers provide the legal basis and justification for the three institutions of government (the Executive, the Legislature and the Judiciary) to put the powers of the other under scrutiny⁴⁷. This doctrine which provides an inroad for the judicial activism because the powers granted to the judiciary under the Constitution are extensive and sections 6 of the Nigerian constitution taken together with other provision of the Constitution 4(8) are to act as protectors to the individual against the arbitrariness, tyranny whether from the executive or the legislative branches of government. That is clearly the intention of the framers of the Constitution⁴⁸.

The Nigerian Constitution undoubtedly placed the judiciary in a pre-eminent position with great responsibility. The judiciary and the legislative arms of government can interact in different ways i.e. the legislature make laws for the peace and good governance, the executive to execute and the judiciary interpret the law and determine the validity of a law or statute enacted, determine legal disputes and examines whether an executive or legislative action is done within the parameter or compliance with the law⁴⁹.

46 *Abaribe v Abia State House of Assembly* (2002) 14 NWLR (pt 788) 466 at p 486 C-D; Smithy S.I. and Ishiyama I, 2002, Judicial Activism in Post Communist Politics, *Law and Society Review* 36, pp 719-741 & Frickey P.P. & Smith, S.S., 2000, Judicial Review and Legislative Process, Some Empirical and Normative Aspect of Due Process of Lawmaking and Boalt, *Law-Making*, Working Paper in Public Law. p.1 & *Marbury V Madison* p 137

47 Dominic Asada, 2010, The Three Arms of Government in Nigeria: Towards Harmonious Co-Existence in Nigeria Multi-Party Democracy, *New Vista in Law, University of Jos*, 2, p. 302, James Madison, *The Federalist Paper No 37*, A Penn State Electronic Classic Series Publication available at <http://www.hn.edu/faculty/jimans/jimanspdf> or see, Benjamine Fletcher Wright (ed): 1985, *The Federalist* by Alexander Hamilton, James Madison and John Jay, Cambridge Mass: Beknap Press, of Harvard University Press, 1966 (n.d) *Unongo v. Aku* (1985) 6 NCLR pg. 262

48 *Unongo v. Aku* (1985) 6 NCLR pg. 262

49 Section 4(8) of the Nigerian Constitution 1999 as amended

The legislature can re-enact a law invalidated by the judiciary. Similarly the legislature can impeach an executive or a judicial officer, and or to confirm appointment and or support removal of a judicial officer (chief justice) upon the recommendation of the executive. This represents the power of the legislature to check the other branches of government within the doctrine of separation of powers. It is therefore rightly posited that the framer of the Constitution set the stage for judicial activism when it vested the judicial powers of Federation of Nigeria in the judiciary⁵⁰.

Aside from the powers vested in judiciary the legislature is also placed under the scrutiny of the court, by the Nigeria Constitution⁵¹ where it provides; 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 oust or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

Therefore where there is constitutional provision setting out the procedure for any legislative action any default in the procedure in exercise of legislative power is actionable and liable to judicial scrutiny⁵². The justification for judicial activism within realm was answered by the Supreme Court.⁵³ The statement of Muhammed JSC in the case of

50 Section 6(6) of the Nigerian Constitution 1999 (as amended in 2010) That the judicial powers of the courts (a) shall extends, notwithstanding anything to the contrary in the constitution to all inherent powers and sanctions of a court of law; (b) shall extends to all matters between persons to between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person; and (c) shall not, except as otherwise provided in the Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in chapter II of the Constitution

51 Section 4(8) 1999 Constitution

52 Alabi, M.O.A., 2010, *Quis Custodiet Custoded? Scope and Limit of Legislative Powers*, Alabi & Egbewole (ed) Perspectives of the Legislature in the Government of Nigeria, (2010) African Training Research Centre in Administration for Development (CAFRAD) P284

53 (2009) 12 MJSC (pt ii) 40 at 61 and *Attorney General Ondo State v Attorney General of the Federation*

*Balonwu v Governor of Anambra State*⁵⁴ lends credence to this argument thus:

The Constitution is organic instrument which confers powers and also creates rights and limitations. It is the supreme law in which certain principles of fundamental nature are established. Thus, once the powers the rights and the limitations under the Constitution are identified as having been created, there exercise cannot be disputed in a court of law. However, the extent of such powers, rights and limitation and their implications may be sought to be interpreted and explained by the court in cases properly brought before it.

The judicial arm of government in Nigeria has taken the advantage of 'coordination dispute settlements, interpretative and judicial review powers' device and checks and balances for settling some contentious constitutional issues and clever use of the judicial activism has allowed the court to achieve his goal without seeming to run roughshod over the wishes of democratically elected politicians neither also the spirit of the Constitution. The several judicial acts of striking down of legislative actions exhibited in the cases of *Attorney General Abia & 35 ors v Attorney General of the Federation*⁵⁵ where the court nullified the Monitoring of Allocation to Local Government Act 2006 from Federation Account on the ground that it offended the federal system in the Constitution, the case of *Attorney General Ogun State v Attorney General of the Federation*⁵⁶ in which the court nullified the Joint Local Government Account Alteration Act 2004, the case of *INEC v Musa*⁵⁷ where some sections⁵⁸ of Electoral Act 2001 were nullified as unconstitutional, the case of *Attorney General Lagos State v Attorney General of the Federation* in which the court held that the issue of Urban and Regional Planning matter is not within the legislative competence of the National Assembly being a residual matter in which the state House of Assembly has the legislative power to legislate on, the case of *Attorney*

⁵⁴ *ibid*

⁵⁵ (2006) 9 MJSC 1

⁵⁶ (2003) 18 NWLR (pt 798) 232

⁵⁷ (2003) 1 SC (pt 1) 106

⁵⁸ some of the sections of 2001 Electoral Act invalidated prohibits public servant from membership of political party, this led to the formation and registration of Political Party, this led to the formation of Political Parties in 2003

*General Abia State v Attorney General of the Federation*⁵⁹ in which the court held that the National Assembly has no legislative power to enact legislation affecting Local Government, and the determination of qualification and tenure of Local Government Chairman and Councilors and *Attorney General Ondo State v Attorney General of the Federation*⁶⁰ in the voiding of some sections of the ICPC Act, were clearly evident of checks on legislative tyranny and exercise of judicial power under the constitution to ensure that things are done in consistent way with the law.

It is however instructive to note that this power of judicial checks on legislative tyranny is not absolute because it is equally subject to legislative and or executive checks. For instance the Nigeria and Pakistan Constitutions⁶¹ provide the grounds as well as forum and procedure for the removal of judges of the superior courts. The Pakistan Supreme Judicial Council, consisting of the senior judges of the Supreme Court and High Courts, on its own or on a reference made by the President, may recommend the removal of a Judge on the ground of misconduct or physical or mental incapacity. Thus, the judicial officer can be checked where his action is becoming unconstitutional.

Similarly the legislative arm of government can check the judiciary by reversing an annulled legislation or to re-enact same. The National Assembly has the power, in the course of legislating, or making law, to nullify or abrogate decisions of any court of law, including the Supreme Court, the highest Court of the land. In other words, courts of law cannot question the vires of the legislature to nullify or abrogate the common law and once that is done, the particular decision of the court will no more have the force of law. But that is only one side of the coin. The other side is that the courts, in the exercise of their judicial powers under Section 6 of the constitution, have the jurisdiction to nullify legislation, which is not enacted in accordance with the constitution⁶².

Annulling legislation leaves the legislature free to enact a virtually infinite number of other laws to pursue same goals (so long as the goals

59 (2002) 6 NWLR (pt 7630) 764

60 (2002) 9 NWLR (pt 722) 306

61 Article 209 of the Constitution of Pakistan, section 292 of the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2010)

62 Ibid

itself is legitimate). In fact judicial opinion will often give the legislature guidance/direction as to how that might be accomplished.⁶³

FINDINGS

Judicial activism can provide insight, vision and instigates the enactment of beneficial laws to the society. This may occur where legislation is invalidated thus, judicial opinion in the case can influence the legislature while re-enacting a law.

Judicial activism promotes stability in constitutional democracy particularly when court acts within their constitutional limitation in providing checks and balances in government. In this paradigm, courts have the duty to provide leadership with regards to enforcing compliance with Constitution.

Judicial activism gives the judiciary the courage to stand firm against government aberration and abuses by invalidating unconstitutional acts of the legislature and the executive or legislature.

Judicial activism has kept the hope of common man that sees the courts as the last hope of resort to ventilate the grievances.

CONCLUSION

We do not deny the rationale behind separation of powers in any democratic government and its many important benefits. However we contend at the same time that there is no reason to prevent court's intervention when the rule of law is breached or constitution is disrespected by legislature. Doing so on any of these grounds will help to address the collective action or problems inherent in legislation or legislative unconstitutional actions. This paper thus, essentially explores judicial activism within the purview of enforcement of rule of law against legislative tyranny by justifying increased judicial enforcement and access to remedies that allow aggrieved citizen or state to pursue legitimate claims.

It is argued herein that judicial activism does not envisage a situation of confrontation between the Legislature, the Executive and the Judiciary⁶⁴; it rather visualizes greater coordination among the three, based on respect for one another. The term also is firstly often referred to

63 Timothy S., 2006, The Wolves and the Sheep of Constitutional Law; A Review of Roosevelt The Myth of Judicial Activism, *Journal of Law and Politics*, xxiii, pp 31-33

64 See *Lunko v State* 52

deliberate attempts to influence judicial decision making from political angle. A primary observation in this respect is that this is not a pejorative of the left⁶⁵. In the second premises of understanding the concept is judicial impartiality based on a serious striving for judicial neutrality and objectivity, accordingly the type of adventurous judgments herein refers to an active attempt to ground judicial decisions is strong as well as sustainable notions of what is right⁶⁶. Therefore, while the judiciary must be trusted with powers, it is pertinent that, the Court is not above the Constitution and must be conscious of the conscience of the preamble. Great self-restraint is the hall-mark of judicial activism of the court. More importantly there is no water tight supremacy of judiciary since the legislature can re-enact law invalidated by the courts.

The Judiciary cannot take over the functions of the Legislature nor the Executive⁶⁷. The Courts themselves must display prudence and moderation and be conscious of the need for comity of instrumentalities as basic to good governance. An activist Court is surely far more effective than a legal positivist conservative Court to protect the society against legislative adventurism and executive tyranny. When our chosen representatives have failed to give us a welfare state, let it spring from the Judiciary, though the proponent of judicial review may however, argued for restraint.

65 Bas de Gaay Fortman, 2006, *Adventurous Judgments A Comparative Exploration into Human Rights as a Moral-Political Force in Judicial Law Development*, *Utrecht Law Review*, 2(2), p 22

66 Ibid pp 22-In the United States of America for example there appears to be continuous political pressure from the right to get judges appointed who would judge from partisan rightist perspective on issues such as abortion .

67 V. R. K Iyer, *Judicial Activism and Administrative Autonomy*, (1997) *The India Journal of Public Administrator*, Vol. XLII, p. 1