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The Role of Judicial Activism in the Enforcement of Rule of Law in Nigeria

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Abstract

Judiciary activism is a form of judicial restraint which is used to represent proactive and courageous disposition of the judiciary in the enforcement of rule of law and protection of fundament rights.

It operates for the benefit of the various segments of the society to ensure that those whose rights has been or likely to be infringed upon are judicially and judiciously determined. In this context, judicial activism within the context of Nigerian constitutional law concerns the role of courts which are designed to ensure compliance with the values, norms, principles and constitutional law even when not specifically covered or mentioned in the constitutional text but which nevertheless stands as an integral part of the text by necessary implication. For this purpose, various constitutional provisions justifying judicial action and selected judgments of the Supreme Court having impacts on enforcement of law and due process are examined. The bottom line of this paper is potentially important because it involves the courts scrutinizing the manner in which power has been or is proposed to be exercised is in compliance with requirement of due process. The Nigerian judiciary as represented by courts has been playing significant role in this respect within its constitutional powers to advance rulthe law in Nigeria with regards to the other organs of government (that is the legislature and executives).

Keywords: Judicial activism, rule of law, enforcement, judiciary, Nigeria.

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دور النشاط القضائي في تعزيز سيادة القانون في نيجيريا

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المستخلص:
النشاط القضائي هو شكل من أشكال التقييد القضائي يُستخدم لتمثيل التصرف الاستباقي والشجاع للسلطة القضائية في تطبيق سيادة القانون وحماية الحقوق الأساسية. يعمل النشاط القضائي لصالح مختلف فئات المجتمع لضمان أن الأشخاص الذين تم انتهاك حقوقهم أو من المحتمل أن تُنتهك حقوقهم يُفصل في قضاياهم بشكل قضائي ومدروس. في هذا

السياق، يرتبط النشاط القضائي في إطار القانون الدستوري النيجيري بدور المحاكم التي تهدف إلى ضمان الامتثال للقيم والمعايير والمبادئ والقوانين الدستورية، حتى وإن لم تُذكر تحديدًا في نص الدستور، لكنها تمثل جزءًا لا يتجزأ من النص بشكل ضمني. لذا، يتم فحص العديد من الأحكام الدستورية التي تبرر الإجراءات القضائية، وبعض الأحكام الصادرة عن المحكمة العليا التي تؤثر على تطبيق القانون والامتثال للإجراءات القانونية الواجبة. المغزى الأساسي من هذه الورقة مهم لأنه ينطوي على تدقيق المحاكم في الطريقة التي تم بها أو يُقترح أن تُمارَس بها السلطة، لضمان الالتزام بمتطلبات الإجراءات القانونية الواجبة. لقد لعبت السلطة القضائية النيجيرية، ممثلة بالمحاكم، دورًا مهمًا في هذا الصدد ضمن سلطاتها الدستورية لتعزيز سيادة القانون في نيجيريا بالنسبة للأجهزة الحكومية الأخرى (أي السلطة التشريعية والتنفيذية).

الكلمات المفتاحية: النشاط القضائي، سيادة القانون، التنفيذ، السلطة القضائية، نيجيريا.

1. Introduction

Nigerians have been privileged to be living under a Constitution, the supreme law of the land, since 1999 when the country returned to democratic system of government. The constitution mandates the existence of courts designed, among other things, to protect citizens rights against any form of violations. As one would expect, these legal facts (the existence of constitution and courts) have consequences for the way in which Nigeria is governed particularly the observance of rule of law.

One of the features of the Nigeria democratic system of government, is that the powers of the legislative, executive and judicial are clearly stated in the Constitution[1]. The Constitution and its requirements impose meaningful restrictions on these arms of government (such as confining

the three branches of government to defined subject matters, and mandating a separation of powers between them). By implication the institutions may only exercise their powers in a manner consistent with the relevant provisions of the Constitution without interference with another arm's jurisdiction. Despite these restrictions, the Constitution still allows inherent reviews and balances in the observance of the relevant constitutional provisions in the course of exercising the allotted powers.

It is within this inherent power of checks and balances that the judicial activism of court manifest. That is, judicial power of intervention which may come to play where the institution of government exercised powers arbitrarily or in contravention of the limitations or manners set by the Constitution. It may also be employed where the power is exercised by appropriately authorized officials, contrary to properly enacted laws of general applicability. This especially necessary as prerequisite element of respecting the rule of law.

Rule of law is a prominent Constitutional concept and a fundamental principle upheld as a yardstick not only for gaging government performance, but to as well determine what is beneficial to humanity. This concept is the very essence and bedrock of our desired system of justice and of grate significance for justifying the legal order and legitimizing the system of every society.

Rule of law embodies the desired features of good governance in a democratic system, such as elected government by the people and for the people; separation of power and as well checks and balances; inclusive democracy and practical delineation of governmental

powers/actions against the individuals (the protection of human freedom and dignity); limited government; and the review by an independent judiciary as a central mechanism for constitutional enforcement and even beyond.[2] Hence, the rule of law is a hydra-headed concept that encapsulates a conglomerate of issues in law, the polity and society. To Ojo, it is "an unclear concept whose meaning and content vary from place to place."[3] Consequently, the relationship between activism by the court and rule of law is that, the conduct of government and the governed is regulated by the Constitution and the laws made under it, rather than by the capricious exercise of power. This constraint of having to govern under general laws means that every person irrespective of status or position in society are bound by law. Laws of general application act as bulwarks between the governments and the governed, shielding individuals from discriminatory treatment on the part of those in a position to exercise political power.

The term "judicial activism" is used descriptively in this context, to refer to decisions that limit the excessive use of power by the executive or legislative arms of government, nullify the use of power in contravention of the Constitution or statute, the enforcement of citizens' fundamental rights against violation, enforcing compliance with rule of law or expounding the provision of the constitution or laws to address novel issues or circumstances not contemplated or were no express provision can be found to addresses issue in controversy or the law is ambiguous or expressed in a general term[4]. Judicial activism within the framework of Nigerian Constitutional law concern the role of courts which is

designed to ensure compliance with the values, norms, principles and Constitutional law even when not specifically covered or mentioned in the constitutional text but which nevertheless form an integral part of the text by necessary implication. The principal advantage of this approach, within the context of rule of law is that it permits a more useful discussion of what? when judicial activism is legitimate and when it is not, articulating criteria for making that distinction.

Therefore, the existence of constitution and the rule of law are civilizing powers in every democratic society. They restrain the institutions of government, with all the significant resources and powers that they have at their disposal, through the requirement that the powers be exercised only on the occasions and upon the terms sanctioned by the Nigeria constitution and the laws made under them. For this reason, judicial activism and the rule of law are aptly described as the partners in protection of individual liberty and ensuring stability in the country's polity.

2. Constitutional Justification for Judicial Activism Rule of Law

The question most often asked is, where and from what source does the judicial activism originates? Where the judiciary does derives the power to counterbalance executive-legislative functions? While it is undisputable that there is no express provision from the Nigerian Constitution where judicial activism is defined, it has been argued that the concept derives its legitimacy from the Constitution itself. In the same vein the concept of rule of

law derives its legitimacy from the fact that state must be govern by law and as such all are bound by law validly enacted aimed all regulating the affairs of the state. The justification for this assertion can be supported from the following provisions of the Nigeria constitution:

The first provision of the constitution justifying the existence of judiciary's judicial activism and in essence promote rule of law in society is the provision of section 6(1): of the constitution vesting judicial powers of the Federation in the courts which also extend to all inherent powers and sanctions of a court of law. It goes further in section 6(6)(b) to grant the judiciary power of intervention in all matters between persons, or between government or authority and to any person in Nigeria, as well as to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

Secondly, the rule of law and judicial activism have their legitimacy from the fact that supremacy is the fundamental concept in the Nigeria democratic order. The rule of law requires both citizens and governments to be subject to known and standing laws. It is a development of equality before the law. In section 1(1) of the Constitution, it is provided that the Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

In furtherance of judicial activism and rule of law, the Constitution ensured under section 6(6) that the adjudicatory powers vested in the judiciary extend to all matters between individuals, or between the 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, thus emphasized the significance of equality before the law as an essential element of rule of law. Instructively, any matter instituted in court that is not related to or connected with civil rights and obligation cannot secure judicial intervention.

Relevant also is the provision of sections 17(1) and 17(2)(a) of the constitution of Social objectives which must be founded on ideals of Freedom, Equality and Justice. As such it guarantees every citizen equality of rights, obligations and opportunities before the law.

Thirdly, judicial assertiveness is also sanctioned by the constitutional provisions dealing with separation of power between the executive, the legislature and the judiciary (sections 4, 5 and 6). However, the doctrine also recognizes interface between the institutions in the form of checks and balance. The interface allows the judiciary to scrutinize, where necessary, the function of the other two institutions of government against arbitrary use of powers. It is within this model the judicial activism of courts emanates and the inroad of rule law in this context is the need for compliance with laws by the organs of government.

The fourth justification for rule of law and judicial activism can be underscored form the provision of section 1(3) of the 1999 Constitution of Nigeria which provides that “If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.”

Drawing from this provision, the only institution granted the role of declaring any law unconstitutional due to its inconsistency is the judiciary and the rationale behind this role is no more than the court enforcing the rule of law and due process. This provision is *impair material* with the postulation of Alexander Hamilton who argued in Federalist paper No. 78, that "No legislative act . . . contrary to the Constitution, can be valid," and "the courts were designed to . . . keep the [legislature] within the limits assigned to their authority."[5]

A careful perusal of the provision of section 1(3) of the Constitution shows that, even though separate roles are assigned to each of the three institution of government, notwithstanding, it goes further to vests in the judiciary the power to strike down laws that violate the Constitution of the Nigeria.

Fifthly, following from the above, the postulation is especially true drawing an inference from section 4(8) of the Constitution which subjects the exercise of legislative powers by the legislature to the jurisdiction of courts of law and of judicial tribunals established by law. It also forbids the legislature from enacting any law that is capable of ousting the jurisdiction of a court of law or of a judicial tribunal established by law.

Against the constitutional framework it appears not to be an option for the judiciary to "resolve" and uphold rule of law against any apparent unconstitutional conduct of the executive or the legislature or to nullify legislation that offend the spirits and letters of the Constitution or protect the fundamental rights of citizen. If the legislature produces

trash or failed to follow due process and the Court is asked to scrutinize it, the court has constitutional obligation to return trash and demand due process. INEC v, Musa[6]

It is however instructive to note that irrespective of the powers vested in the judiciary by the constitution and no matter how proactive a judge is in guarding the constitutional boundaries, they cannot and should never yield to the temptation of exercising legislative or executive powers. Indisputably, the Nigerian judiciary has always been very conscious of its limitations and guide against interference or assuming jurisdiction where it does not exists or where its intervention is clearly ousted.

Notwithstanding, judicial outright abdication of its role at time may just be as grave as judicial lawlessness, if it allows government to grow far beyond its intended powers. As such with respect to the other branches of government, even where the power is ousted, the judiciary will still scrutinize the laws to see whether the laws has been operated religiously. This is because the judiciary is bound by the constitutional oath that all judges take, and hence, by the words and to the meaning of the Constitution.

3. Understanding judicial activism and rule of law

The historical origin of the concept of judicial activism is linked to the writing of Schlesinger who explains the early American fears of King George Washington to contemporary worries about Richard Nixon and by contrast minted “judicial activism” in a fourteen-page article in Fortune Magazine.[7] In describing the rise of judicial activism to prominence, Schlesinger attempted the definition of judicial activism.[8] However, much of the

discussions on activism versus restraint were in the context of the Supreme Court's exercise of its constitutional power, asserted in *Marburry v Madison*[9] in 1803, to strike down legislation. However, relevant to the historical evolution of judicial activism discussion in this paper is the wider judicial function in relation to, dispute resolution, statutory interpretation and enforcement of rule of law as observed by Schlesinger that; "the most carefully drawn statute has its silence and ambiguities, it cannot provide for every concrete case. As the wisest American judge, Learned Hand, once put it, the words a judge must construe are "empty vessels into which he can open nearly anything he wills".[10] Famous positive example of judicial activism is *Brown v. Board of Education*[11], which has been universally hailed as a landmark decision for civil rights. However, other cases, such as *Obergefell v. Hodges*[12], *Griswold v. Connecticut*[13], *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*[14], *Roe v. Wade*[15], *and District of Columbia v. Heller*[16], have been both hailed and disparaged instances of judicial activism, depending on the political leanings of the commentators.

Yet, the term "judicial activism," despite its universality, popularity amongst legal experts, judges, scholars and politicians, it has not been given an appropriate and all-encompassing definition.[17] Rather it continued to be a subject of abuse and often viewed as disapproving. The difficulty associated with the concept lies, of course in the definition of the term and reason behind the misconception about what the term is all about.[18]

Interestingly, it is incorrect for any definer of a term to sound dogmatic or zip-lock when dealing with the meaning

of any concept[19] particularly, 'judicial activism'. This is because the definitions are usually products of individual characteristics often influenced by their perception or world view. Thus, judicial activism can be construed in a way that does not reflect wrong or in such a way that it has positive and real critical bite depending on the user's predisposition. Thus, advocates of diverse constitutional philosophies may apply the concept of judicial activism to different sets of judicial decisions.[20] The Supreme Court of Nigeria has lent credence to the challenge associated with precision in definition in the case of *FRN v Amaechie*[21] per Tobi JSC that:

…Definitions are definitions because they reflect the peculiarity, prejudice, slant and emotion of the person offering them, while a definer of a word (concept) may pretend to be impartial and unbiased; the final product of his definition will, in a number of situations, be a victim of bias.

Judicial activism does not carry any statutory or constitutional definition though it is used to represent the function of the judiciary or proactive role in promoting justice without fear or favour.[22] Judicial activism is a label often used with a variety of meanings,[23] however, irrespective of any definer's position, consideration of few definitions offered by scholars on the concept will help our understanding of what it entails.

To some scholars the term is described as judicial creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of rule of law or public duties. Others

criticized the term by describing it as judicial extremism, judicial terrorism, transgression into the domains of the other organs of the State and negating the constitutional spirit.[24] Judicial activism may is also define as meaning "the active process of implementing rule of law essential for the preservation of a functional democracy",[25]or[26] broadly described as an active role on the part of the Judiciary.[27]

While to some scholar judicial activism can be viewed in one or more of three perspectives of judicial overturning laws, departing from precedent, or ruling against preferred interpretation. [28] In short judicial activism is no more than rhetorically charged shorthand for the decision that a speaker disliked.[29]As such judicial activism can be viewed as the success of the judiciary in liberalizing access to justice and giving relief to disadvantaged groups, because of the efforts of justices. [30] Invariably, the proponent of judicial activism agreed that the courts do not only have the right but also the obligation to exercise the power of judicial review for the defence of the rights of political minorities in any democratic society.[31] Justice Michael[32] said that the judicial activism in India is responding to the need of the nation today. According to him, the law abhors vacuums left by the failure of the other branches of government to respond to urgent legal and social needs, into which the courts have sometimes stepped in. Whether this is a good thing or wise or fraught with peril or positive damaging to the judicial institutions, are questions exclusively for the Indian to judge. Indian jurists should certainly not think that they are alone with the controversies about judicial activism. In the United States

of America, Canada and Australia, the tension between judicial restraints has been present since the foundation of the Republic and the creation of the Supreme Court. The history of the Supreme Court of the United States teaches that judicial activism is not confined to a particular ideological or social viewpoint. It may be liberal. But it may also be quite conservative.[33]

The bottom line of judicial activism within the context of this paper is potentially important because it is used to represent proactive[34] and courageous disposition of the judiciary in the enforcement of rule of law and protection fundament rights for the benefit of the various segments of the society whose right has been, is being or likely be infringed upon are judicially and judiciously determined. The institution also contributes to checking the excesses of the executive and the legislature.[35]

In the Nigeria context, judicial activism is influenced by the American principles[36] which have found its way into the Nigerian legal system. For example; adversaries of judicial activism in Nigeria would criticize the court for holding that the power of impeachment[37] or of political party's power of substitution of a candidate for election purpose[38] is purely within the ambit of legislative proceedings or internal affairs of a political party.[39] While supporters of judicial activism in Nigeria may consider the court's judgment which declared the exercise of legislative power of impeachment[40] or substitution[41] of a candidate nominated for an election by a political party unconstitutional as appropriate. In any democratic society judicial activism could represent the judicial help to provide checks and balances in government.[42]

In the light of the above, this paper explicates judicial activism within the context of enforcing rule of law in the Nigeria political space by assessing some judgments of the Supreme Court to juxtapose this argument. For this purpose, various constitutional provisions justifying judicial activism and selected judgments of the Supreme Court having impact on enforcement of rule of law and due process are examined. It is our argument that judicial activism may not constitute a negative connotation because it forms part of the constitutional role of the courts.[43] By this understanding, an activist judiciary would be an ally of social progress, ready to interpret social and economic legislation in a manner conducive to the attainment of justice and democratic development.[44] This is in tandem with the observation of Ade-Ajayi and Akinseye that:

"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 the zeal to ensure that the powers that be do not trample upon the common man with impunity". [45]

In summary, it is manifestly clear from above discussion that judicial activism cannot be viewed in a restrictive perspective of a writer's personal conviction, political affiliation or as being solely against the doctrine of separation of power as aptly posited by Keenan thus:[46]

…Judicial activism is not a monolithic concept; rather, it can represent a number of distinct jurisprudential ideas that are worthy of further investigation. For example, when a scholar suggests that striking down arguably constitutional actions of other branches is judicial activism, they invite

debate over the age-old questions of how one can best interpret the constitution, and what should be the proper scope of judicial review in our tripartite system of government. Similarly, a charge of judicial activism disregarding precedent raises complex issues about the nature of a judicial holding, and amount of differences owed to different types of precedent. Indeed, each of the definitions…invites subsidiary questions that are as important as they are difficult to resolve.

In realm of rule of law, according to the constitutional ideology, everything must be done in compliance with the law. Rule of law encompasses, among other things, the principles of autonomy for the judiciary and equality before the law. In a democratic rule, rule of law is essential, and the cornerstone. It acts as a model for creating the perfect legal system. This suggests that the governed and the government must always provide legal justification for their acts. Rule of law has been severally defines as the acknowledgement, observance, and predominance of civil or regular laws as opposed to arbitrary laws and arbitrariness, martial law, emergency law and military rule.[47] It also been construed as the supremacy of regular law (most especially, the constitution and other laws of the land) as opposed to arbitrary power, and that every person (the rulers inclusive) is subject to the ordinary law.[48] In another perspective the rule of law is seen as the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power that excludes the existence of arbitrariness, prerogative, or even of rule of wide discretionary authority on the part of government.[49]

Following from the above exposition,[50] the far reaching conclusion is that each citizen has equal right to be protected by the law and at the same time has equal right to resist any infraction against his person and/or interests in property or otherwise. Instructively, this right to protect one's interest can be achieved through an independent judiciary free from executive or legislative control. The essential element required to provide a suitable environment for the supremacy and observance of the rule of law and respect for human rights are that:

a. the government, is established on a Constitution;
b. the establishment of government must be democratic.[51]
c. there exist an independent judiciary free from external and under influence.

In a democratic setting like that of ours in Nigeria, it is of utmost importance for the judiciary to play its constitutional role in upholding the rule of law even against itself or any other person and authority. For the judiciary to achieve this, an independence, impartiality and easily accessible courts, must be put in place and guaranteed. The jurisdiction of the Courts must be jealously protected for the enhancement of the rights of all citizens and for the sustainable promotion and enforcement of rule of law.

4. Judicial activism in enforcing rule of law

In any democratic society, judicial activism could represent judicial synergy at providing counterbalancing role against the effect transient majority Arguably, 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.[52] The principal difficulty in defining this concept is whether the terms "activism or restraint" do indeed overlap in certain context or seem frequently been used interchangeably and regardless that in some cases the legal usage is a term of art differing from popular usage.[53] A careful perusal of the definitions and descriptions of judicial activism above, the concept has some important characteristics which include:

1- Engaging judicial activism to advance social-political change in society,
2- Employing judicial activism as judicial role of confining the other arms of governments to their limits set by the constitution,[54]
3- The use of the term to describe a judgment that strikes down a legislation enacted by the legislature inconsistent with the provision of the constitution.
4- The use of interpretative power to address issue that are expressly provided in the Constitution of legislation, or clarify ambiguity in the wording of the law, without offending the laws.

This judicial proactive stand is of particular importance in a democratic society. It ensures that action of those that exercise political powers are in compliance with laws, that laws are enacted and executed in accordance with the will of the people. By enacting laws prejudicial to people's right, the legislature subjects itself to the risk of judicial intervention.[55] The Nigerian Supreme Court shows this importance when Attorney General Abia, Delta and Lagos States v Attorney General of the Federation held 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 wires 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 Constitution[56] Indisputably, the Supreme Court of Nigeria has on several occasion demonstrated it activism in checking the excesses of legislature which were against rule of law as will show in following sections or parts.

a. Curtailing executive rascality and lawlessness

It is not in doubt that the executive as an independent arm of government which enjoy the constitutional rights to function without interference from other two arms of government. However, evidence showed that judicial role of checking the executive is unavoidable in preserving rule of law. A very good example is the recent Supreme Court adjudication of a dispute between the President of the Federal Republic of Nigeria v. National Assembly, (2022) LPELR-58516 at 44 (SC) where the court reiterated the significance of respecting rule of law by the executive through its judicial activism. In the case President Muhammed Buhari after assenting to the 2022 Electoral Act, sought to have a perceived provision (Section 84(12) expunged from the Electoral Act on the ground that reservations/caveat where made before giving his assent, and followed same by writing a letter to the National Assembly (1st defendant) requesting it to cause the Electoral Act 2022 to be amended to delete the said Subsection (12) of Section 84 of **the Electoral Act.** In its response the court held that:

'the President cannot challenge the validity of an Act of the National Assembly that has come into operation after he had assented or after he had withheld his assent, His assent to the enactment of the said Act operate to estop him from challenging the Act as invalid for any reason, his role in law-making process ceases after his signification of assent or withholding of assent.

In above instances what the Presidents seemed to hold as justification for their action was protection of the Constitution, which they assumed to have been purportedly violated by Lagos State and the National Assembly. However, it is trite jurisdiction of the court is limited in this sense because, if a litigation is not instituted for the purpose of determining the civil right and obligation of the a parties, the question raised for determination and reliefs claimed have no nexus with the personal rights and obligations of the parties, the litigation has no life and the questions so raised for determination therein become general, abstract and academic questions that the court cannot exercise judicial power to determine by virtue of section 6(6)(b) of the 1999 Constitution of Nigeria (as amended).

It is also on record that the judicial activism of court in enforcing executive compliance with the rule of law became an issue in the case *Alhaji Atiku Abubakar v Attorney General of the Federation*, (2017) 2 All NLR 58, when the President Olusegun Obasanjo order that the office of the Vice President (Atiku Abubakar) be declared vacant and his immunity removed on the allegation that he switched allegiance from PDP to another party. The Supreme Court held that "the President had no power to declare the office of vacant and that the declaration was

unconstitutional, null and void. It further said that the process of removal of the President or Vice President was contained in section 143 of the Constitution through the National Assembly. One of the hallmarks of democracy is need to respect rule of law separation of power.

Another significance example of judicial activism in ensuring executive obedience with rule of law is the act of most Nigeria state governors of truncating democratically elected Local Government Councils and replacing them with caretaker committee. The unequivocal and unambiguous position of the Supreme Court as well as legislative synergy to correct the anomalies has been frustrated. These are positive steps that would have offered a ray of hope for progressive democratic governance at the grassroots, but the judgments were not enforced. This flagrant disrespect of rule of law appears to have recently been put to rest in the landmark judgment of the Supreme Court in the case of Attorney General of the Federation v 36 State Governors (2024). Before the recent decision, Supreme Court has in many decided cases declared the act of replacing Local Government council with caretaker committee unconstitutional, but the judgment had never been respected by the executive. The cases are the Attorney-General Plateau State v. Goyol.[57] Attorney General Benue State v. Umar,[58]Chigozie Eze Ors. v. Governor of Abia State,[59] Governor Ekiti State & Ors v. Olubunmo & Ors[60], Ajuwon & Ors v. Governor of Oyo State,[61] and Yantaba v. Governor of Katsina State.[62]

In summary, the performance of judicial obligation to adjudicate disputes between citizens and the state according

to law, and to restrain exercises of executive power that are inconsistent with constitutional or legal authority, courts are required to determine the executive action that the executive genuinely believed was constitutional and lawful, was in reality constitutional and lawful. In the event that the court considers that the requirements of lawfulness as basis for determining the dictate of the law (rule of law).

***b.* Restraining legislative aberration of rule of law**

Just like the executive, the legislative arm of government has received the harmer of judicial intervention in face outright disregard for rule of law. The linkage between the concept of judicial activism and rule law with regards to legislative function has to do with the fact that legislature must act within the scope and limit of its constitutional role, followed due process in enacting legislation and ensure that no legislation passed by the legislature takes away or affect the rights of citizens guaranteed in the Constitution. Thus, where the legislature did not contravene any of the listed, the court lacks jurisdiction to intervene in line with the doctrine of separation of power. However, where the opposite occurred, judicial intervention may be invited in the form of settlement of dispute, review of the legislative action or legislation or in the form of interpretation. The task of the courts become more complicated when faced with interpretation of constitutional provisions. The provisions of Constitutions, like other legislations, are often ambiguous, vague, contradictory, insufficiently explicit, or even silent as to constitutional disputes that courts must decide. Additionally, they sometimes seem inadequate to appropriately deal with developments that threaten

principles and values the constitution was intended to safeguard, developments that its founders and drafters either failed, or were unable to anticipate. As such it becomes an inescapable duty of the courts to give some meanings to the provision either of the Constitution or law under reference. This where judicial activism of the courts may be call in aid. It is significant to note that, Constitution cannot condescend all futuristic events thus in interpreting the law (constitution or statutes) the court has justification for judicial activism by assuming the mandate or the task of expounding the law to achieve the intent and living spirit of law. This is because, the power to interpret laws lies in the Court and it is duty bound to keep the law relevant at all times. This preposition is supported by Onu JSC where he stated thus:

It is important to state that the Constitution cannot condescend in its description of every right guaranteed therein. The Constitution is an organic document which must be treated as speaking from time to time, it can only describe rights it guarantees in broad terms, it is for the court to fill the fundamental right provisions with content such that would fulfill its purpose and infused them with life. A narrow and literal construction of human right or any provision in our Constitution can only make the Constitution arid in the sphere of rights. Such approach will retard the realization, enjoyment and protection of those citizen's rights and freedom and it is unacceptable.[63]

In this circumstance, where a court is confronted with the determining the constitutionality of the legislative assembly's action or legislation the court would first determine whether or not it has jurisdiction to intervene.

Instances that seem to favor such judicial intrusion in enforcing rule of law include, for instance, the case of Attorney General Ogun State & Ors v. Attorney General of the Federation,[64] where the Supreme Court declared unconstitutional a short Act of ten (10) sections enacted by the National Assembly that provide for Joint Local Government Account Allocation Monitoring Committees for each state in the Federation. The Act was found inconsistent with Section 162(8) of the 1999 Constitution. In Attorney General of Ondo State v Attorney General of the Federation,[65] the Supreme Court final word invalidated some provisions of the ICPC Act (2002) on the ground that it questioned the cardinal principles of federalism, namely, the requirement of equality and autonomy of the State Government and non-interference with functions of State Government. The Court further posited that both the states and federal government share the power to legislate in order to abolish corruption and abuse of office as provided in Section 15 of the Nigerian Constitution of 1999. So also is the case of Attorney General Abia State & Ors v Attorney General of the Federation,[66] in which the Court held that apart from the power conferred in item II of the Concurrent Legislative List and Section 7(6)(a) of the 1999 Constitution (power to make provision for statutory allocation of public revenue to local government councils in the Federation), the National Assembly does not possess any other power to enact laws affecting local government.

Another area which enforcement of rule manifests in relation to legislative function is in the realm of impeachment. Though the legislative power of the legislature is unquestionable, however, legislative power of

impeachment was once put to test in some important disputes. In the cases of Inakoju v Adeleke and Dapianlong v Dariye, where less than the percentage require by the Constitution to remove an executive went ahead to remove an executive in contravention of the rule of law. Notwithstanding, the outer clause in sub-section (10) of section 188 (142) the Constitution in the provision for impeachment, the judicial revolutionary scrutiny of the disputed impeachments, the Supreme Court found that the action of the legislature in the cases unconstitutional for failure to follow the procedure set down by the Constitution.

Arguably, all the exercises of court's judicial activism in the situations are inherently 'political' exercises. In that judicial activism involves the courts scrutinizing the manner in which power has been or is proposed to be exercised is in compliance with requirement of due process. Occasionally, it is suggested that the idea of judicial activism of legislative action for its lawfulness is, in fact means of ensuring that rule of law are adhere to in the action.

5. Conclusion

Rule of law is one of the most important features of good governance in a democracy. It ensures the operation of government is done in accordance with laws, preserves the Courts and jurisdiction to promotes checks and balances in exercise of governmental powers. Although in practice, there is no ideal promotion of the rule of law. Be that as it may, the Nigerian judiciary as represented by courts has been playing significant role within its constitutional powers to advance rule of law in Nigeria, especially on the

legislative and executive arms of government. It is indisputable that by virtue of separation of powers judiciary has no rights to interfere with functions of the other institutions of government, however, as the guardian of the constitution and protector of the rights of common man, there are situations in which the proactive role of the judiciary may be inevitable. The legality of such proactive intervention has its basis in the inherent powers of the judiciary, that supports its insistence where inevitable that the other arms of government must observe rule of law in their action and adhere strictly to the Constitutional stipulations in their function. Against this background, judiciary often guard jealously their jurisdiction.

[1] Sections 4 (legislative powers), 5 (executive powers) & 6 (judicial powers) of the 1999 Constitution of the Federal Republic of Nigeria (as amended, 2011).

[2] S.O. Ogerie, Fashioning the Constitution of Federal Democratic System (Pitman Publishing Co., Ibadan, 2002) p. 45.

[3] A. Ojo, Constitutional Law and Military Rule in Nigeria (Evans Bros., Ibadan, 1987) p. 239.

[4]

[5] 15. The Federalist NO. 78, at 379 (Alexander Hamilton) (Terence Ball ed., 2003).

[6] (2003) LPELR-24927(SC)

[7] Schlesinger A. M., The Supreme Court; 1947, Fortune Magazine, XXXV(1) p., 1 at 201, cited in Keenan D. K., The Origin and Current Meaning of Judicial Activism 1441 -1445

[8] Ibid

[9] 5 US (1 Cranch) 137 (1803)

[10] See Roosevelt, T., The Myth of Judicial Activism: Making Sense of Supreme Court Decision, pp.3 - 11Schlesinger ibid pp 211-212

[11] 1954 U.S. LEXIS 209

[12] 2015 U.S. 644

[13] 1965 U.S. LEXIS 2282

[14] 597 U.S. 1

[15] 410 U.S. 113

[16] 554 U.S. 570

[17]See, for instance, some of the works that are on judicial activism without really defining the term. Chad, M. Old father, Defining Judicial In-activism: Models of Adjudication and the Duty to Decide" p. 123, Richard, A. Posner, The Supreme Court, 2004 Term—Foreword: A Political Court(2005) 119, Harvard L.R., p. 31 at 54 and Stephen F. Smith, Activism as Restraint: Lessons from Criminal Procedurep. 1057 at 1077 and Ernest A. Young, Judicial Activism and Conservative Politicsp. 1146.

[18] Keenan, D. K., The Origin and Current Meanings of Judicial Activism, p. 1441 at 1442

[19] ibid

[20] Frank, R. S., The Boundaries of Judicial Roles, p 1; Sathe S P; Judicial Activism in India Transgressing Border and Enforcing Limits p 12. What is legitimate in one society may be illegitimate in another. For example the public interest jurisdiction exercise by Indian/Nigerian courts would probably be seen by American/Australian if exercise by their judges as an unwarranted intrusion into the executive or legislative functions.

[21]Federal Republic of Nigeria v Mike Anache inRe Olafisoye, p. 25

[22] Archi Cox; The Role of the Supreme Court Judicial Activism or Self Restraint, pp. 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).

[23] Keenan, D. K., the Origin and Current Meaning of Judicial Activism, pp 1463-1476 Thomas T, Judicial Activism Reconsidered p. 22 and Marshall, W. P., Conservatives and the Seven Sins of Judicial Activism pp 101-139

[24] Ibid

[25] Sathe, SP Judicial Activism in India: Transgressing Borders and Enforcing Limits, p 6; Ane Amissah, The Contribution of the Courts to Government: A West African View, (Oxford, Clarendon Press, 1981) p. 368

[26] See generally, Caprice, L. R., In search of Judicial Activism: Dangers in Quantifying the Qualitative, pp. 1-44

[27] Chaterji, S., For Public Administration: Is Judicial Activism Really Deterrent to Legislative Anarchy and Executive Tyranny? (1997), XLII, Indian J.P.A., , p 9 at 11

[28]. David, S. Interpreting the Constitution, (2005) Chicago Public Radio-Odyssey

[29]. Kermit, R. The Myth of Judicial Activism: Making Sense of the United States Supreme Court Decisions, p 26

[30]. Frederic, P. L. The Context of Judicial Activism: The Endurance of the Warren Court Legacy in Conservative Age (Browman & Littlefield, 1999) p 67 and Brain, Z. T., Beyond the Formalist-Realist Divide: The Role of Politics in Judiciary (Princeton University Press, 2010) p. 110

[31] Wakaba, Mihama-ku, Chiba-shi, The Spread and the Frequency of Constitutional Review (2009) Institute of Developing Economies IDE-JETRO P 1 at present about 80 percent of the Constitution around the world have provision for judicial review. See also Ginsbrurg Tom, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, Cambridge, 2003) p 81

[32] ibid pp 46-47

[33] ibid

[34] Frickey, P. P., & Smith S. S., Judicial Review, the Congressional Process, and Federalism Cases: An Interdisciplinary Critique and Linde, H.A., Due Process of Lawmaking, p. 194, Kermit, R., The Myth of Judicial Activism: Making Sense of the Supreme Court judgment, p. 3, see also Cross, F. B. & Stefanie, A., The Scientific Study of Judicial Activism. Pp. 1752-3

[35] As rightly observed in the case of Magor v Newport Corporation (1953) AC 189 per Lord Simmons, thus, "we sit here to find out the intention of Parliament and Ministers and carry it out; we do this better by filling in the gaps and making sense of the enactment as by opening it up to destructive analysis." Brice, D., (ed), Judicial Activism in Common Law Supreme Courts (Oxford University Oxford, 2007) pp 1-437, they examined judicial activism in the supreme court of common law countries.

[36]. Frank B C. and Stefane A, The Scientific Study of Judicial Activism (2007) 91 MIN L.R. pp1753-1754 and Robert, D. N., 'Judicial Governance Antithetic to Democracy', (2001) Ohio Uni. Lawyer Weekly, p. 4, Keenan, D. K., The Origin and Current Meaning of Judicial Activism, p.1448;

[37]Balarabe Musa v Auta Hamza, (1982) 3 SCNLR p. 229

[38]Dalhatu v Turaki, (2003) 7 SC 1 or (2003) 15 NWLR (pt 843) 300 and Onuoha v Okafor (1983) SCNLR or 14 NSCC 494

[39] Rushaw, R. J., 'The Presidential Election Disputes: The Political Question Doctrine and the Fourteenth Amendment', (2002) 29, Florida State University L. R.pp 603 – 623

[40]Inakoju v Adeleke (2007) 2 MJSC 1 and Dapainlong v Dariye (2007) 8 MJSC 140

[41]Amaechi v INEC I MJSC 1, Ugwu v Ararume (2007) 6 SC (pt i) 88 and Uzodinma v Izunwa (2011) 5 MJSC 1

[42]. Alabi M. A. O., The Supreme Court in the Nigerian Political System 1963-1997, p. 28. He posited that a study focusing on an understanding of the role of the higher bench in the political system must, therefore transcend a mere examination of the internal working of the judiciary. P. 33

[43] Asari, Y., Judicial Power:A Comparative Study Nigeria and the U.S.A. (WUSEN Publishers, 2003) pp 5-11

[44] Nwabueze, B. O, Judicial Guardianship of Constitutional Limitations in the Emergent Democracies in Africa, in Constitutional Democracy in Africa, PP 70-76

[45] Ade-Ajayi, J. F. & Yemi, Akinseye-George, The Making of a Judge, (Spectrum Books Ltd., Ibadan, 2008), p. 202 at 296.

[46] Keenan, K., The Origin and Current Meanings of "Judicial Activism 1444-1447, Thomas Tsowell; Judicial Activism Reconsidered, p 20 of 36

[47] Malemi E., Administrative Law, Cases and Materials (Grace Publishers Inc., Lagos, 2004) p. 47.

[48] Garner. B. A., The Black's Law Dictionary, 7th Edition (West Group Publishing Co., St. Paul Minn, 1999) p. 1332.

[49] A. V. Dicey, Introduction to the Study of the Law of the Constitution, 10th Edition, 1885, p. 199.

[50] B. O. Igwenyi, Modern Constitutional Law (Nwamazi Printing and Publishing Co. Ltd., Abakaliki 2006) p. 37.

[51] Malemi, op. cit., p. 50.

[52] Daley J., "Defining Judicial Restraint", in T.Campbell and J. Goldsworthy (eds.), (2007) Judicial Power, Democracy and Legal Positivism, Ashgate, p. 280

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

[54]This is the philosophy behind the doctrine of separation of power propounded by the great philosopher. L' Esprit des Lois (1748) xi, 4 The English version is Montesquieu: The Spirit of the Laws (1989), See also Locke, J., Second Treatise of Civil Government(1690) Ch xii, 143

[55] In the Indian case of Gupta v. Union of India, AIR (1982) SC 149, the Supreme Court through public interest litigation, has granted access to persons inspired by public interest to invite judicial intervention against abuse of power or misuse of power or inaction of the government.

[56]Attorney General Abia, Delta and Lagos State v. Attorney General of the Federation p 61.

[57](2007), 16 NWLR (Pt. 1059)

[58](2008). 1 NWLR (1068) 311 (CA)

[59](2014) 14 NWLR (pt 1426) 192 (SC)

[60](2017) 3 NWLR (1551) 1 (SC)

[61](2021) LLJR (SC)

[62](2022) 1 NWLR (1811) 259

[63] DSS v Agbakoba (1999) 3 NWLR (Pt.595) p. 95

[64](2002), 18 NWLR (pt. 798) 232, 12 SCNJ 199, or 12 SC (pt. ii) 1

[65](2002), 6 SCNJ 1 (2002), 6 SC (pti) 1 (2002), FWLR (pt iii) 1972, or Ors (2002), 9 NWLR (pt. 772) 222)

[66](2003) 1 SC (pt. ii) 1