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JUDICIAL REVIEW OF LEGISLATION IN NIGERIA: A CONSTITUTIONAL IMPERATIVE

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Abstract:

The principle of judicial review has been described as the examination by a country's court of the actions of the legislature, executive and administrative branches of government to ensure that those actions conform to the provisions of the Constitution¹. Judicial review illustrates the application of separation of powers in modern governmental system. This article stresses that the exercise of the power of judicial review of legislation by the judiciary is a requirement of the Constitution and not an exercise of supremacy over the legislature. The article considers judicial review as a process enshrined in the principle of separation of powers. It also considers powers of the legislature including the constitutionally prescribed mode of law making and the powers of the judiciary. It concludes by emphasizing that judicial review is performed to uphold the supremacy of the Constitution.

Keywords: Judicial review, legislation, Nigeria, separation of powers, supremacy of the Constitution.

1. Introduction

The idea that parliament is capable of enacting laws that could turn a man into a woman and vice versa may have been true in some ancient jurisdictions especially England but it is doubtful today if such could still be held to be valid.²This is so considering the new expanding regime of constitutionalism where most modern societies including the post EU England,³ (where general legislative practice) have more or less acquired the form and format of the contemporary reality namely the dominance of the rule of law, legislative standards and constitutionalism as against the hitherto nebulous claim to parliamentary sovereignty.⁴

Under the present system of democratic governance in Nigeria, a proposed law may be desirable and still held to be unconstitutional and therefore null and void for the simple reason that it is being initiated by the wrong body or being introduced through an unconstitutionally inappropriate method or both.⁵ The Nigerian Constitution is a document generally acclaimed to be the basis of all legitimate laws and the very idea of legislation presupposes that the operative national Constitution would be followed to the letters in the course of law making if the basic normative characteristics of all modern laws, namely,

¹ Madu, V. C. (2012), 'Judicial review of legislation'. NIALS International Journal of Legislative Drafting (NIJL), Vol. 1, No. 1. Pp. 157-184.

² Ibid

³ See Elliot, M. (2004), (United Kingdom) Parliamentary sovereignty under pressure: in Int. J., Constitutional Law, 2 (3): 545-627.

⁴ Parliamentary sovereignty is the most important part of the UK Constitution. It makes parliament the supreme legal authority in the UK which can create or end any law. The courts cannot overrule its legislation and no parliament can pass laws that future parliaments cannot change.

⁵ Madu V. C. Supra, note 1

legitimacy, validity and enforceability are to be assured.⁶

The mode for assessing the legitimacy and validity of legislation in Nigeria is through the process of judicial review. This process is enshrined in the context of the principle of separation of powers, the main purpose of which is to institute a system of checks and balances⁷ on legislative powers. Judicial review can therefore be seen as a principal tool at the disposal of the judiciary for checking the legislature.⁸

2. Separation of Powers

The doctrine of separation of powers is the regulatory principle enshrined in the constitutional arrangement of governmental powers in Nigeria based on the American model as opposed to the British model inherited at independence.⁹

The modern postulation of the doctrine is to be found in Montesquieu,¹⁰ who posited that when the legislative, executive and judicial powers are united in the same person or body there can be no liberty and to prevent the abuse of power it is necessary that one power should be a check on another.

By this doctrine, Montesquieu formulated a system where the three governmental functions were separated in different organs making them independent of each other and in that wise acting as checks and balances upon each other to prevent tyranny and abuse of powers.

In more contemporary democracies such as Nigeria, section 147 (4)¹¹ provides that no individual is entitled to serve in more than one of the three branches of government simultaneously.¹² However, it should be noted that each branch is not strictly confined to their various generic functions.¹³ The powers and functions of the three arms invariably overlap. The purpose as in Montesquieu's definition of separation of powers is for one arm to serve as a check on another arm so as to prevent the abuse of power. For instance, the executive exercises legislative-like powers when so delegated by the legislature in making subsidiary legislation, the judiciary may also, under powers delegated to it by the legislature, make subsidiary legislation such as the rules of the court, a function that is legislative in nature.¹⁴ Furthermore, in conducting its oversight functions, the legislature may assume judiciary like powers in summoning witnesses and in convicting for contempt where it is rebuffed by such witnesses.¹⁵

3. The Legislature in Nigeria

Following the adoption and application of the doctrine of separation of powers under the Nigerian Presidential Constitution, the legislature is the first arm of government in the tripartite classification of powers.¹⁶ Nigeria adopted a bicameral legislature at the national level which is made up of the Senate and House of Representatives while the legislative system in the States is unicameral¹⁷ that is, there exists only one legislative house in the States which is also known as the State House of Assembly.

The legislature is regarded as an assemblage of representatives of the people elected under a legal framework to make laws for the good of the society. It has also been described as an institutional body responsible for making laws for a nation and one through which

⁶ Ibid

⁷ Egbewole, W. O. and Etudaiye, M. A. 'Judicial Review and the Legislature under the 1999 Constitution.' www.etudaiyeandco.com. retrieved 24/08/2013.

⁸ Ibid

⁹ See sections 4, 5 and 6 of the 1999 Constitution of the Federal Republic of Nigeria for the tripartite classification of governmental powers into the legislative, executive and judiciary.

¹⁰ Baron de Montesquieu (1748), *Le spirit de Lois* Chapter xi, pp. 3-6.

¹¹ Section 147, Nigerian Constitution, *supra*, note 9

¹² Chand, H. (1981), 'Nigerian Constitutional Law,' Modinager Santosh Publishing House, 1st ed. At 238. See also the case of *Ahmad v Sokoto State House of Assembly and another*, (2002) 44, WRN. P. 52.

¹³ See Ahmadu, R. A. and Ajiboye N. (2004) ed. 'A handbook on Legislative Practice and Procedure of the National Assembly, Abuja: National Secretariat of Nigeria Legislature. P. 26.

¹⁴ Ibid

¹⁵ Ibid. Note further sections 147(2) and 192(2) of the 1999 Constitution, relating to the confirmation of appointment of Ministers of the Federal Republic of Nigeria and Commissioners in state governments respectively. Note also the ratification of treaties by Senate in section 12(1) of the Constitution of Nigeria.

¹⁶ See section 4, 1999 Constitution, *supra*, note 9.

¹⁷ Ibid.

the collective will of the people or part of it is articulated, expressed and implemented.¹⁸

The legislature also controls through legislation, all economic, social and political activities of the nation and scrutinizes the policies of the executive while also providing a framework for the judiciary to operate.¹⁹

3.1 Legislative Powers

Legislative powers simply refer to the law making powers of the legislature which include power to make new laws, alter existing ones, guard and repeal laws.²⁰ The legislature has the constitutional prerogative to make laws and that power is reposed exclusively in such body even though it may be delegated to some agencies in the executive department for operational conveniences but the ultimate and primary function of law making (legislation) is vested in the legislature. Section 4(1)²¹ vests legislative powers in the legislature. It provides as follows;

“The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives”

The purposes of the power were stated in section 4(2)²² as: follows;

“The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative list set out in Part I of the second schedule to this Constitution.”

Section 4(4)²³ further provides that the National Assembly shall have power over

- a) Any matter in the Concurrent Legislative list
- b) Any other matter to which it is empowered to make laws by the Constitution.

Section 4(7) (a) (b) (c)²⁴ vests law making power in the House of Assembly of a State with respect to any matter not included in the Exclusive Legislative list also known as the residual list; any matter included in the Concurrent Legislative list and any matter with respect to which it is empowered by the Constitution to make laws.

By way of explanation, the Exclusive Legislative List deals with specific items over which only the National Assembly have sole prerogative to legislate upon, to the exclusion of the States and Local Governments. The items which are 68 in number include among others; defence, aviation, currency, customs and excise duties, citizenship, naturalization and aliens, creation of states, immigration, drugs and poisons, copyright, insurance, external affairs, meteorology, telephone and telegraphs.²⁵

On the other hand, the Concurrent Legislative List includes 30 items over which both the National Assembly and the State House of Assembly could legislate. The items include among others, public funds at state and local government levels, antiquities and monuments, archives, collection of taxes, elections and electricity.²⁶

The last category of powers is that contained on the residual list described in section 4(7)(a)²⁷ as any matter not included in the Exclusive Legislative List over which the States have the exclusive prerogative to legislate.

The various tiers of government cannot lawfully legislate beyond the jurisdictional boundaries prescribed by the Constitution having clearly set the scope and limitations of the law making powers allocated to both federal and state legislatures. In the case of conflict between the legislation made by the National Assembly and that of State Assembly, the federal legislation shall prevail and the state law becomes void to the extent of the inconsistency. This principle was lucidly illustrated in the case of Attorney General of Abia

¹⁸Ihedioha, E; The Legislature: Roles, misconceptions and experience in democratic Nigeria (1), being extracts from a paper presented at a public lecture organized by the Department of Political Science, University of Lagos. In vanguard Newspapers of July 01, 2012.

¹⁹Ibid

²⁰Madu, V. C. Supra, note 1.

²¹Section 4 (1), 1999 Constitution of the Federal Republic of Nigeria.

²²Section 4(2), Ibid.

²³Section 4(4), Ibid.

²⁴Section 4 (7) (a) (b) (c), Ibid.

²⁵See Second Schedule, Part I, 1999 Constitution of Nigeria, for the Exclusive Legislative List.

²⁶See part II, 1999 Constitution of Nigeria, Ibid for the Concurrent Legislative List.

²⁷Section 4(7)(a), 1999 Constitution of Nigeria.

*State v Attorney General of the Federation*²⁸ where the Supreme Court held in respect of the doctrine of covering the field that if any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail and that other law shall to the extent of the inconsistency, be void.

3.2 Law Making Process

The Constitution²⁹ specifically sets out the mode of enactment of the Acts of the National Assembly and the Laws of the State House of Assembly. Section 58³⁰ provides that the law making power shall be exercised by bills which may originate in either Senate or the House of Representatives and shall not become law until assented to by the president except where he withholds his assent and the bill is again passed by each house by two thirds majority, the bill shall become law and the assent of the President shall not be required.³¹

This process is generally referred to as the legislative process. The Constitution provides for a similar procedure for the State House of Assembly.³²

Sections 60 and 101³³ empowers the National Assembly and State House of Assembly to regulate their procedure. By this provision, the various Legislative Houses Standing Orders and Rules of Business/Procedure were adapted.³⁴ Order XII Rule 3 (1)³⁵ provides as follows;

“Every bill shall receive three readings previous to its passage, which readings shall be in three different days, unless the House unanimously directs otherwise and the speaker shall give notice of each reading whether it is first, second or third.”

The process of the bill passage has been enumerated as,

i. First Reading.

This stage involves the formal declaration of the short title of the bill. Order xii Rule 2 (1) (6)³⁶ provides that upon the short title of the bill being read aloud by the clerk, the bill shall be deemed to have been read the first time.

ii. Second Reading

The bill after the first reading will be scheduled for the second reading by the Rules and Business Committee. The second reading gives the members the ample opportunity to deliberate on the general principles of the bill (its merits and demerits). In this wise legislators can decide to approve or reject the bill.³⁷ Order XII Rule 4 (1)³⁸ provides as follows:

“On the order for the second reading of a bill being read, a motion may be made ‘that the bill be now read a second time’ and a debate may arise covering the merits and general principles of the bill”.

iii. Committal to Committee

The standard legislative practice is that a bill after the second reading shall stand committed to a Standing Committee for thorough scrutiny³⁹. It is in the Standing Committee that the bill will be subjected to far reaching deliberations including public hearing and contributions of experts on the subject matter of that proposed law.

²⁸ (2002) 17, WRN 1, 21, 37

²⁹ 1999 Constitution of the Federal Republic of Nigeria.

³⁰ Section 58, Ibid.

³¹ Section 58 (5), Ibid.

³² Section 100, Ibid.

³³ See sections 60 and 101, Ibid.

³⁴ See Anyaegbunam, E. O. (2012) ‘Law making and the enabling legal framework in Nigeria: A Critical overview’ NIALS Int. Journal of Legislative Drafting (NJLD), vol. 1, No. 1

³⁵ Order XII Rule 3(1) of the Standing Orders of the House of Representatives.

³⁶ Order XII Rule 2(1) House of Representatives Rules provides for the formal declaration of the short title which is the first reading.

³⁷ In Anyaegbunam, E. O. Supra note 34.

³⁸ Order XII Rule 4(1) supra, note 35.

³⁹ Anyaegbunam, O. E., supra, note 34.

iv. Report Stage

The Standing Committee that treated and deliberated on the bill will through the Business and Rules Committee state a date to present its findings to the House. The Chairman of that Standing Committee will report the bill to the House⁴⁰.

v. Committee of the Whole House

At this stage, the presiding officer of the House will leave the chair and take the place of one of his assistants. The mace will be lowered and the Presiding officer will be referred to as chairman who will call the number of every clause in succession or the first and last number of a group of clauses. If there are proposed amendments he shall put forward the proposed amendments⁴¹.

vi. Third Reading

After a bill has been reported to the committee of the whole House, it will proceed to the third reading. There can be room at this stage for correction and amendment if there are errors or oversight highlighted in the course of the journey of the bill; the motion will then be moved that the bill be read the 'third time'⁴². The question will be without debate and if supported by the requisite number of members, the presiding officer will then call upon the clerk to read aloud the long title of the bill. The presiding officer will also repeat the long title of the bill and declare it read the third time and passed⁴³.

vii. Engrossment of a bill

Engrossment involves the production of a final 'clean copy' of a bill by the legal department after the embodiment of all amendments agreed to by legislators.

The bill will be drawn up in the proper legal drafting format and sealed with an authenticated certificate endorsed by the clerk of the House. Thereafter the bill will be presented to the chief executive (President or governor of a state) for his assent or otherwise⁴⁴.

4. The Judiciary

The third arm of the realm is the judiciary which is the only branch not made up of elected representatives but of personnel appointed to perform the very fundamental role of adjudication in society.⁴⁵

The judiciary has been described as the specialized differentiated structures, processes and personnel that are devoted to the task of performing on a continuous basis one of the three inter-related and independent governmental functions in modern and modernizing societies. The specific governmental functions performed by the judiciary in these societies are known as rule adjudication as distinct from the two governmental functions of rule making and application.⁴⁶

Regarding the significance of the judiciary, Justice Nnamani⁴⁷ believes and asserted; "It has been generally acknowledged that the judiciary is the guardian of our Constitution, the protector of our cherished governance under the Rule of Law, the guardian of our fundamental rights, the enforcer of all the laws without which the stability of society can be threatened, the maintainer of public order and public security, the guarantee against arbitrariness and generally the only insurance for a just and happy society."

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Mowoe, K. M. (2008) 'Constitutional Law in Nigeria' Malthouse Press Limited, Lagos. P. 177.

⁴⁶ Oloko, (1990) 'Independence of the Judiciary with particular reference to Appointments, Removal and Disciplines'. Published in Law, Development and Administration in Nigeria by Yemi Osinbajo and Awa U. Kalu P. 533.

⁴⁷ Nnamani, 'The Judiciary in the 1990s. Expectation and challenges', in *Justices: A journal of Contemporary Legal Problems*, Vol. 1, No. 3 (1990) p. 27.

4.1 Judicial Powers

The term judicial powers denote the authority vested in the courts to hear and decide cases and to make binding judgments. It is the authority which the court exercises in interpreting the law and pronouncing on the competing rights and obligations of disputing parties.⁴⁸

The Nigerian Constitution specifically invests judicial powers in the Federal and States Courts. Section 6(1) and(2) of the Constitution⁴⁹ provides;

1. The judicial powers of the Federation shall be vested in the Courts to which this section relates being Courts established for the Federation.
2. The judicial powers of a state shall be vested in the courts to which this section relates being courts established subject as provided by this Constitution for a State.

By section 6(6)(a) and (b)⁵⁰ the judicial powers vested in the courts also extend to all inherent powers and sanctions of a court of law and to all matters between persons or between government or authority or all actions and proceedings for the determination of any question as to the civil rights and obligations of the person.

The provision of the Nigerian Constitution on the powers of the judiciary accords with the position in some other jurisdictions.⁵¹ For example in the landmark case of *Marbury v Madison*,⁵² Justice Marshall wrote that the interpretation of the law is the proper and peculiar province of the courts. That it is emphatically the province and duty of the judicial department to say what the law is.

4.1.1 Power of Judicial Review

The importance of the court in any political system is the exercise of the power of control over the other branches of government. In countries with written Constitutions like Nigeria, Courts may question and invalidate legislative enactments and executive actions on account of their constitutionality.⁵³ This control is achieved through the process of judicial review.

The concept of judicial review has been defined as a courts authority to examine an executive or legislative act and to invalidate that act if it is contrary to constitutional principles⁵⁴. This includes the power of the courts to review laws, treaties, policies, or executive Orders relevant to cases before the courts and nullify (overturn) those that are found unconstitutional.⁵⁵ The concept is a standard part of British Common Law that became part of the legal process in the United States (US).⁵⁶ The first recorded use under the US Constitution was in 1792 when the Circuit Courts found an act of Congress related to military veterans unconstitutional. Congress rewrote the law without protest in 1793.⁵⁷ The US Supreme Court first exercised judicial review in 1796 in the case of *Hylton v United States*⁵⁸ although the rationale for using it had been laid in the *Federalist No 78*.⁵⁹ This was the first instance in which the Supreme Court evaluated the constitutionality of a federal law. In that case, the legislation, a carriage tax, was upheld. In a later case that year, *Ware v Hylton*,⁶⁰ the Ellsworth Court determined that the Treaty of Paris took precedence over an otherwise constitutional state law and nullified the law.

The United States Supreme Court case most often credited with affirming the

⁴⁸ Obiozor, G. A. (2010). 'The Constitutional vesting of Judicial powers in the judicature in Nigeria – The problem with section 6 (6) (d) of the Constitution of 1999. NIALS Law and Development Journal, p. 219.

⁴⁹ Section 6(1)(2), 1999 Constitution, *supra*, note 29.

⁵⁰ Section 6(6) (a) (b), *ibid*. See also the case of *Adesanya v President of the Federal Republic of Nigeria*, (1981) 5 SC. 112; (1981) 2 NCLR 358 which defines judicial powers as that used to determine controversies between its subjects or between itself and its subjects.

⁵¹ See section 76 of the Constitution of the Commonwealth of Australia, 1960.

⁵² (1803), 5 US (1 Cranch) 137

⁵³ Alabi, M. O. A. (2002). 'The Supreme Court in the Nigerian Political System, 1963-1979' (Ibadan, Demyaxs Press Ltd.) p. 52.

⁵⁴ Farlex Inc. (2004-2013), 'Judicial Review', Legal Dictionary – The Free Dictionary www.thefreedictionary.com retrieved 19/09/2013.

⁵⁵ What is judicial review and how is it used? Wiki.answers.com>wiki answers> categories > Law and Legal Issues> Children and the Law > Emancipation and Ages for moving out. Retrieved 07/11/2013

⁵⁶ *Ibid*

⁵⁷ *Ibid*

⁵⁸ (1796) 3 US 171.

⁵⁹ Wiki Answers.com. *Supra* at note 55

⁶⁰ (1796) 3 US 199.

doctrine of judicial review is the case of *Marbury v Madison*⁶¹ in which justice Marshall declared section 13 of the Judiciary Act of 1789 unconstitutional. He reasoned that since it is the duty of a court in a lawsuit to declare the law, and since the Constitution is the supreme law of the land, where a rule of statutory law conflicts with a rule of the Constitution, then the law of the Constitution must prevail. That is, the courts have the duty to review the constitutionality of acts of congress and to declare them void when they are contrary to the Constitution. Marshall asserted that it is emphatically the province and duty of the judicial department to say what the law is⁶². This was the first time the Supreme Court overturned federal legislation.⁶³

Since that decision, Federal Courts in the United States (US) have exercised the power of judicial review many times and it is now a settled doctrine. As at 2010, the United States Supreme Court had held unconstitutional some 163 Acts of the US Congress.⁶⁴ It greatly strengthened the power of the judicial branch which had thus far been weaker than the other two.⁶⁵ Judicial review is part of the United States system of checks and balances on government.⁶⁶ By this process the Supreme Court has the power to review acts of legislative and executive branches to ensure that they don't become too powerful or abrogate the constitutional rights of the country's citizens.⁶⁷ The concept of judicial review is usually associated with the United States' Courts vested with ultimate judicial authority and prior to the early 1800s, no country in the world gave its judicial branch such authority.⁶⁸

However, Nigeria has adopted the position in the US by giving similar interpretation to the concept. Professor Nwabueze⁶⁹ defined judicial review as the power of the court in appropriate proceedings before it to declare a legislative or executive act either contrary to, or not in accordance with the Constitution, with the effect of rendering the act invalid or vindicating its validity and so putting it beyond the challenge in the future.

Under the 1999 Constitution of Nigeria, the power of judicial review of legislative acts derive principally from the provisions of section 4 (8)⁷⁰ which states as follows:

"Save as otherwise provided by this Constitution, the exercise of legislative Powers by the National Assembly or by a House of Assembly shall be subject to the Jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law that ousts the jurisdiction of a Court of law and of judicial tribunal established by law."

The Constitution further 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."⁷¹

The Court in the case of *Adikwu v Federal House of Representatives*⁷² recognized the fact that section 4 (8) provides for the control of legislative powers by the courts. As per *Eso JSC in Attorney General Bendel State v Attorney General Federation*⁷³;

"The powers conferred on the courts by section 4(8) are wider than the inherent powers to interpret the constitutional system such as ours. The express provision of the powers vested in the courts and the mandatory nature of it indicate to my mind an intention on the part of the framers of the Constitution that the Courts should have this power to scrutinize the exercise

⁶¹ Supra, note 52. This decision was subsequently followed in *Dred Scott v Sandford* (1857) 60 US (19 HOW) 393, 15L. Ed. 691, where the Supreme Court ruled the Missouri compromise of 1820 unconstitutional. See also *M'culloch v Maryland*, 17 US 316, 4L Ed 579 (1819).

⁶² Ibid

⁶³ Wiki Answers.com Supra, Note 55

⁶⁴ See Congressional Research Services, *The Constitution of the United States, Analysis and Interpretation* (2008) supplement. Pp. 163-164.

⁶⁵ Wiki Answers.com. Supra Note 55

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Farlex inc. Supra, note 54

⁶⁹ Nwabueze, B. O. (1982), *The Presidential Constitution of Nigeria*: London: Churst & Co. Lagos, Nwanife Publishers.

⁷⁰ Section 4(8), 1999 Constitution, Supra. Note 29

⁷¹ Section 1 (3), 1999 Constitution of the Federal Republic of Nigeria.

⁷² (1982) 3 NCLR, 394 SC

⁷³ (1981) 10 SC 1.

of legislative power by the National Assembly. The inherent power is provided for in section 6(6)(d) and the ultra vires doctrine could be applied in respect of any law which violated section 4(2)(3) but yet, the Constitution stipulated section 4(8). It seems to be one of the many checks and balances contained in our Constitution. It is also unique among written Constitutions.”

The above case establishes that courts have been vested with powers by the Constitution to review legislation and other powers exercised by the legislature.

It should be noted however that the judicial authority can only nullify the offending provisions of a particular statute.⁷⁴ This principle was applied in the case of Attorney General of Abia State v Attorney General of Federation⁷⁵ where the issue was whether the National Assembly could enact an Electoral Act that contained provisions stipulating the tenure of local government councils. The Supreme Court held that item II on the exclusive legislative list only empowers the National Assembly to make provision for the procedure for local government elections and therefore the issue of tenure of elected officials became a residual matter under the legislative jurisdiction of the House of Assembly of the State by virtue of section 4 (7) (a) of the Constitution. The particular provision was thus struck out of the Act for being unconstitutional.

The doctrine of judicial review is enshrined in the concept of separation of powers the main purpose of which is to institute a system of checks and balances. It is a principal tool at the disposal of the judiciary for checking the legislature.⁷⁶

In the United States however, the exercise of judicial review is subject to important rules of judicial restraint which restricts the Supreme Court and the State Courts from extending its power⁷⁷. The Supreme Court will hear only cases or controversies, actual live disputes between adversary parties who are asserting valuable legal rights. This means the courts cannot issue advisory opinion on legislation⁷⁸. In addition, a party bringing suit must have standing (a direct stake in the outcome) in order to challenge a statute. The most important rule of judicial restraint is that statutes are presumptively valid which means that legislators did not intend to violate the Constitution. It follows that the burden of proof is on the party that raises the issue of unconstitutionality⁷⁹. In addition, if a court can construe a disputed statute in a manner that allows it to remain intact without tampering with the meaning of the words or if a Court can decide a case on unconstitutional grounds, these courses are to be preferred. Finally, a court will not sit in judgment of the motives or wisdom of legislators, nor will it hold a statute invalid merely because it is deemed to be unwise or democratic⁸⁰.

A similar position to that of the United States also applies in Nigeria as there are basic principles guiding the exercise of judicial review. This includes among others;

- i. The rule of ultra vires: This means that any act done in excess of that given by the Constitution or any enabling statute is done ultra vires. If an enabling law lays down a procedure for the doing of any particular thing and that procedure is not followed, all acts emanating there from become null and void. The Courts consider in a judicial review cases of ultra vires and such acts are declared null and void.⁸¹
- ii. Locus Standi: This implies that the party seeking redress must be able to show that the act or statute is invalid and that he has sustained or was in the process of sustaining some kind of injury as a result of the enforcement or preparation of that act or statute⁸².
- iii. Possession of jurisdiction: Jurisdiction is the power or authority of a Court to hear and determine matters which statute has given it judicial power to adjudicate upon. That the Court must have jurisdiction is a fundamental

⁷⁴Alabi, M. O. A., Supra, note 53.

⁷⁵(2002) 9 NSC QR 670

⁷⁶Egbewole, W. , and Etudaiye, M., supra note 7.

⁷⁷Farlex Inc., Supra, note 54.

⁷⁸Ibid

⁷⁹Ibid

⁸⁰Ibid

⁸¹See Banjo v Abeokuta U.D.C (1965) NMLR, 295

⁸²See section 46(1) of the 1999 Constitution of Nigeria. See also Olawoyin v. Attorney General, Northern Region of Nigeria (1961) 1 ALL NLR 269.

limitation that is placed upon judicial review particularly in areas where the court's jurisdiction has been ousted⁸³.

Several cases have been decided by the Nigerian courts dealing with review of legislation. For example the case of Governor of Kaduna State v The House of Assembly, Kaduna State & Anor.⁸⁴ where the Kaduna State House of Assembly in passing the Local Government Edict (Amendment) law of 1979 had arrogated to itself powers to execute certain aspects of the law. The High Court of Kaduna State held that those portions of the law had flouted the constitutional provisions relating to separation of executive and legislative powers and therefore nullified them.

Similarly, in the case of Attorney General of Ondo State v Attorney General of Federation & Ors⁸⁵, the court declared null and void sections 26 (3) and 35 of the Corrupt Practices and other Related Offences Act, 2000 for being unconstitutional.

Furthermore in Attorney General of Bendel State v. Attorney General of Federation & Ors⁸⁶, the court held that even though the Allocation of Revenue (Federation Account) Act of 1981 had been authenticated in compliance with the Authentication Act, the procedure adopted by the National Assembly in passing the bill contravened the provisions of the 1979 Constitution and declared it unconstitutional, null and void and of no effect whatsoever.

Courts in Nigeria have also intervened through judicial review of legislative act over impeachment procedure. For example the legislature construed the provision of section 188 (10) of the Constitution to mean the total ouster of judicial intervention in impeachment process.⁸⁷ In the absence of judicial precedent on the matter, five state governors namely; Rashidi Ladoja of Oyo State, Ayodele Fayose of Ekiti State, Joshua Dariye of Plateau State, Peter Obi of Anambra State and Diepreye Alamieseigha of Bayelsa State were impeached by their legislatures in breach of constitutional provisions.⁸⁸ During the review of the cases, it was discovered that the legislative process that led to the removal of these governors was contrary to the procedure laid down in section 188 of the Constitution and subsequently the Court reinstated Rashidi Ladoja, Peter Obi and Joshua Dariye.⁸⁹

4.2 Grounds for Judicial Review

4.2.1 Constitutional Supremacy

The major purpose of judicial review is for the courts to uphold what is constitutional or legal.

In *Marbury v Madison*,⁹⁰ John Marshall argued that the court system as a whole and the Supreme Court which is the top court in the land has the power to decide if a government law, regulation or action was constitutional because the court system is the place where legal matters are decided.

The concept of the supremacy of the Constitution means that the Constitution as a legal document is the ultimate of all laws, and that all laws must conform to it, before they can be regarded as valid.⁹¹ Section 1 (1)⁹² of the Constitution provides for its supremacy and bindingness on all authorities and persons in Nigeria. While section 1 (3) further established that any law inconsistent with the provisions of the Constitution shall be void to the extent of the inconsistency.⁹³

A legislature that proceeds to pass a law, the contents and purpose of which are in flagrant violation of the spirit and letter of the Constitution is not acting within the ambit of the law making powers granted it.⁹⁴ It therefore follows that any piece of legislation can be

⁸³ Egbewole, W. and Etudaiye, M. *Supra*, note 7. See also *Adamolekun v The Council of University of Ibadan* (1968) NMLR (253)

⁸⁴ (1982) 3 NCLR, 635.

⁸⁵ (2002) 27, WRN 1, 58, 202, 283.

⁸⁶ (1982) 3 NCLR 166

⁸⁷ Fagbadebo, O., 'Judicial Review of Impeachment Procedure: Implication for Democratic Stability in Nigeria'. www.allacademic.com/meta/p_mla. Retrieved 07/11/2013.

⁸⁸ *Ibid*

⁸⁹ *Ibid*. see also the case of *Inakoju v. Adeleke, Rasheed Ladoja & Ors*. 29 NSCQR 959

⁹⁰ *Supra*, note 52.

⁹¹ Mowoe, K. M., *Supra*, Note 45.

⁹² Section 1 (1), 1999 Constitution, *supra*, note 29

⁹³ Section 1(3). *Ibid*.

⁹⁴ Ayua, I. A. (2000), 'Issues in the 1999 Constitution,' NIALS press, p. 47.

invalidated by the courts where such legislation is repugnant to the Constitution.⁹⁵

The Courts in Nigeria have made extensive pronouncements on the importance of the concept of judicial review in democratic settings. Whenever the Courts hold that the act of an individual government, agency or arm is contrary to the provisions of the Constitution, and thus null and void, it is upholding the concept of the supremacy of the Constitution.⁹⁶

In *Attorney General of Bendel State v Attorney General of Federation and Ors.*,⁹⁷ the Court declared unconstitutional the procedure by which the appropriation bill was passed by the National Assembly. The supremacy of the Constitution was also upheld in the case of *Attorney General of Abia State & Ors v. Attorney General of Federation*⁹⁸ where the Court declared unconstitutional certain provisions of the Electoral Act made by the National Assembly. The Court held that where an Act of the National Assembly provides in an identical manner for issues already dealt with by the Constitution, such an Act becomes inoperable, null and void if not inconsistent.⁹⁹

Writing in the Federalist papers, Alexander Hamilton¹⁰⁰ made a strong case for the principle of judicial review as a process which upholds the supremacy of the Constitution. He wrote;

"Limitations can be preserved in no other way than through the Courts of justice whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this all the reservation of particular rights or privileges would amount to nothing... No legislative act therefore contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master ; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize but what they forbid... A Constitution is, in fact and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should appear to be any irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred or in other words the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both and that where the will of the legislature declared in its statutes stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."

The above illustrates that the purpose of judicial review of legislation is to establish the superiority and significance of the Constitution over other laws and also nullify any other one contrary to its provisions. The provisions of the Nigerian Constitution which would be particularly relevant in judging whether a statute conflicts with it or not are: Part I of the second schedule to the Constitution on the exercise of legislative powers over the Exclusive Legislative list and part II of the Constitution regarding the Concurrent Legislative list in deciding whether the National Assembly or State legislature possessed the power to legislate on a certain subject as provided by section 4 of the Constitution or whether the statute is repugnant to the Constitution.

⁹⁵ *Marbury v Madison*, supra, note 52

⁹⁶ *Mowoe*, K. M. Supra, note 45

⁹⁷ (1982) 3 NCLR, 1. See also *Rabiu v State* (1980) 2 SCR 117.

⁹⁸ (2002), 17, WRN, Per Uwai's J., pp. 97-110.

⁹⁹ See also *Attorney General of Federation v. Attorney General of Abia State*, (2002) 16 WRN 1 at 111-112, 279-280 where the Supreme Court declared unconstitutional and contrary to the provisions of section 162 of the 1999 constitution, the act of the federal government in charging certain special funds like that of the judiciary, settlement of external federal debt. Joint venture contracts and the Nigerian National Petroleum Corporation (NNPC) priority projects, special allocation to the Federal Capital Territory on the federation Account out of which all the various levels of government are to take a share.

¹⁰⁰ Hamilton, A. 'The Federalist Papers, No. 78 with an Introduction by Clinton Rossiter (New York: Mentor, 1961) 466-468 in *Judicial review- An update*, by Charles, Partner, Minter Ellison Rudd Watts, 'Historical Trends and key principles in Judicial Review.' www.conferenz.co.nz/home/whitepapers retrieved on 15/10/2013

Some other grounds upon which judicial review can be called in are;

- i. When there is dominance of executive influence over legislative process. Oyovbaire¹⁰¹ asserted that the dominance of the executive in legislative process in Nigeria is overwhelming as 95% of bills (public bills) are proposed by the executive branch while the remaining small (5%) emanate from the legislature (Private bills). He also posited that the executive powers to veto bills are usually abused. It is therefore left to the judiciary to interpret the Constitution and discover the harmony or lack of it.
- ii. Want of legislative competence would also warrant judicial review of legislation. Most of our legislative houses including the National Assembly lack the insightful capacity to scrutinize and appreciate the basic content and the resultant effects of most of the draft legislations forwarded to them from the executive arm.¹⁰² The technical details and underlying executive strategies and requirement of most of these bills are hardly known to our legislature. The dearth of legal drafting and legislative procedure experts throughout the country also deepens these national woes.¹⁰³ All the above justify the necessity for judicial review of legislation.

5. Conclusion

This article, so far expresses that judicial review is a requirement of the Constitution rather than the exercise of supremacy over the legislature.

Judicial review is largely a product of democratization and an expression of political diffusion.¹⁰⁴ The restriction of legislative power through judicial review enhances a given regimes international credibility and prevent large scale 'capital flight'.¹⁰⁵ It may also prevent excessive centralization of power. The establishment of independent judiciary which function as a check on state action have long been viewed by international economic bodies such as the World Bank and International Monetary Fund as primary indicators of successful markets and sustained economic growth.¹⁰⁶

It is therefore suggested that for Nigeria's democracy to be meaningful, radical judicial review as practiced in the US¹⁰⁷ should be allowed with limited executive interference (to the extent permitted by the Constitution) over the exercise of legislative powers especially the law making process.

The judiciary should be given the necessary independence to exercise the power of judicial review although with caution that same cannot be exercised arbitrarily. The judiciary can interpret and invalidate laws but they can not assume the law making function nor can they confer that function on any person.¹⁰⁸ The courts should carry out their reviews on the basis of the principles that are neutrally derived, defined and applied so as to assure fairness as an unbiased umpire. Sovereignty is located neither in the legislature nor in the judiciary but in the Constitution itself which is the express will of the people.

The judiciary therefore has the obligation to uphold the supremacy of the Constitution, defend and interpret it based on its original intent.

¹⁰¹ Oyovbaire, S. (2007) 'Executive Legislative Relations in D. Guobadia and E. Azinge (eds) Current Themes in the 1999 Constitution (NIALS, Abuja) p. 176.

¹⁰² Anyaegbunam, E. Supra, note 34.

¹⁰³ Ibid. Anyaegbunam further asserts that the basic requirement for verification of existing legislations and appreciation of other important factors and primary area of improvement which a new legislature ought to proffer is rarely achieved by most of the hasty executive bills that have ran through our legislative houses as clearing houses.

¹⁰⁴ Ginsburg, T., (2003) 'Judicial review in New Democracies: Constitutional Courts in Asian Cases' New York, Cambridge University press.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid

¹⁰⁷ See note 64.

¹⁰⁸ This derives from the principle of separation of powers as enunciated in sections 4,5 and 6, 1999 Constitution of the Federal Republic of Nigeria.