

JUDICIAL REVIEW AND JUDICIAL SUPREMACY: A PARADIGM OF CONSTITUTIONALISM IN NIGERIA

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Abstract: This paper examines judicial review and judicial power in Nigeria under the 1999 Constitution in relation to the constitution itself and in relation to the political branches of government. This is essentially to locate where lays supremacy between the branches and the judiciary particularly the Supreme Court with its final appellate jurisdiction. Judicial review and supremacy of the judiciary had been of recurring academic discuss in some jurisdictions with written Constitutions, particularly the United States from where Nigeria largely borrowed its presidential constitutionalism. This thus suggests that there is a need to examine the controversy within the context of Nigeria's experience; is it really in the Constitution that creates branches of the government and that is proclaimed to be supreme over all authorities including the judiciary? Is it in the judiciary whose oversight function cuts across the political branches and whose interpretative decisions are binding on the constitution itself and the other branches? Is it in the executive that appoints and removes Justices of the court subject to confirmation by the Senate, or is it in the legislature? The paper argues that the overriding effect of the judicial power of the Supreme Court over all persons and authorities including the Constitution puts the judiciary in supreme position, that being the natural consequence of the power so vested in the judiciary by the "People Themselves."

Keywords: Constitution, judicial review, separation of judicial powers, judicial supremacy, Supreme court, Nigeria

I. Introduction

The Constitution is a document ordained usually by the people setting out the relationship between the people and the three organs of government on the one hand and between the organs themselves on the other hand. It is important

to note from the outset that the constitution, in a normal constitutional setting,¹ reflects the wishes and aspirations of the donors of the constitutional powers as contained in the document. The constitution, pursuant to the aspirations and wishes of the donors of its powers, creates the structures of government for the actualization of those goals.² The structures with their substructures are political and therefore represent the constitutional arrangement put in place to ensure peace, order and good government.³ The document thus is the positivisation of the ideas, norms and normative concepts that the people, either directly or indirectly through their representatives or delegates at the appropriate or designated forum for that purpose, have adopted as the guiding rules between themselves, themselves and their government and between them and the external world.⁴ It may not be possible, at least in modern societies, for all adults to gather together at a forum for deliberations on the outlook of what they intend to be their constitution.⁵ For this reason, there may be no direct constitution, but an indirect constitution as distinct from an imposed type. This is typical of a written constitution that must also be distinguished from a formal constitution.

There is a marked distinction between a positive and a formal constitution.⁶ The formality of a written or a positive constitution does not depend on the

- 1 By this it is meant to differentiate between a situation where the constitutional document does not reflect the actual intention, wishes and aspirations of the people. The people, in a normal constitutional setting, must be free to determine the nature and contents of the constitution. This marks the distinction between when the constitution is imposed as in the case of Iraq after Saddam and post-Taliban Afghanistan, and the Constitution of Nigeria, 1999. The Constitution was imposed on the people by the Military. The people were never allowed any impute in the constitution-making, but the preamble to the Constitution makes a blatant and treasonable misrepresentation of the source of the Constitution as the People.
- 2 see the Preamble to the Constitution of Nigeria, 1999 (henceforth referred to as the Constitution)
- 3 The essence of the arrangement is to accomplish the objectives of governance as are contained in the preamble, and as could be observed in Chapter II of the Constitution.
- 4 see, Anje Wiener, "Evolving Norms of Constitutionalism in Europe: From 'Treaty Language' to 'Constitution'". In Weiler and Eysgruber, eds., *Altneuland: The EU Constitution in Contextual Perspective*, Jean Monnet Working Paper 5/04 (<http://www.jeanmonnetprogram.org/papers/04/040501-06.html>); Ese Malemi, *THE NIGERIAN CONSTITUTIONAL LAW* 10–22 (PRINCETON PUBLISHING CO., 2006); Augustine Nnamani, *Towards a Constitutional Blueprint for Nigeria*, 1&2 Univ. Ife L.J. 1, 2 (1996)
- 5 Usually, delegates are sent to the deliberation by the different interest groups. Good examples of this were the American Philadelphia Convention of 1787, May 25 where the American Constitution was debated and adopted and the various Nigerian Constitutional Conferences both during and after the colonial era.
- 6 The distinction lies in the fact that the positive constitution is the product of ideas, norms or the normative concepts that are formally written and codified in the written constitution. These political imputes are usually the rules, which the people intend to govern their affairs. Indeed, they are not independent of principles of natural law. These are not ordinary constitutional conventions as in Dicey's writing because once they formed the integral basis of the written constitution they become obligatory and thus enforceable by the

fact that it is written or that it is positive constitution. It all depends on the fact whether the constitution is or not subject to a superior or higher authority. The authority is not among the ones created by the constitution, it is superior to the constitution itself and it can be located outside the constitution, but its impact must as of necessity be felt in the constitution. That is, all organs created by the constitution must be guided in the exercise of the powers positively granted them by the principles of the superior, higher law or authority.⁷ That is the principles of natural law; justice, equity and fairness. These again translate to reasonableness, legality, good conscience, good administration etc. These principles of natural law predate man; they had been there in the hearts of man through generations. They are thus not preclusive or exclusive to any particular race, tribe or nation.

The question then arises as to where actually lay the supremacy⁸ among the organs of government that are created by the positive constitution. Is it also in the constitution that ascribes supremacy to itself or that the people themselves have vested with superiority?⁹ Superiority must be understood in its normative nature and therefore be categorized into two; that is political and legal. It is political if it does not have finality of authority and legal if it has finality of authority. This may for proper understanding be further characterized into general in the sense that it has the final authority and specific because its authority can be called to question by the overriding authority. This paper addresses these questions and others and argues that supremacy, especially legal and general, is a complex matter and can not be located in the Constitution alone or in any organ other than the judiciary that has the final authority as far as interpretation of the laws and the constitution is concerned. The Constitution is nothing, like any statute, but whatever the court makes of it by its (court) interpretation; whatever the court says the Constitution is; it is and nothing more.

courts. It should be noted that the distinction drawn by Dicey between "laws of the constitution" and "conventions of the constitution" is only tenable with unwritten constitution and perhaps in parliamentary system as in England. see Dicey, A.V. AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 417–438, 417 418 (Macmillan Press Limited, 10th ed., 1959)

- 7 This is in contradistinction with Sir Edward Coke's idea of "Common right and reason", which is intrinsically linked to the common law unless it can be argued forcefully that what Coke meant in Dr. Bonham's case is essentially a form of "shorthand for natural law..." For variety of intellectual discussions on this, see generally, Gary L. McDowell, *Coke, Corwin and the Constitution: The "Higher Law Background" Reconsidered* 55:3 *The Review of Politics* 393, 420 (1993), Leslie Friedman Goldstein, *Popular Sovereignty, the Origin of Judicial Review, and the Revival of Unwritten law* 48:1 *The Journal of Politics* 51,71(1986)
- 8 By this it is meant the organ with overriding or unquestionable power, whose power in the scheme, is not subject to the authority of any other organ.
- 9 Most written constitutions are vested with the toga of superiority, not as an organ of state, but as the organic source of powers of the organs. See examples, Constitution of Nigeria 1999, section 1 (henceforth referred to as "the Constitution"), S.2, Constitution of South Africa, S. 3 Constitution of Zimbabwe.

Although the judiciary is a creation of the constitution and positively granted powers, which in the end transcend the constitution itself,¹⁰ It through its power of review or the interpretative adjudication assumes, inadvertently, superiority over all other organs and the constitution. When the courts exercise their interpretative jurisdiction particularly in the matters relating to the exercise of power by a political organ they most often determine the legality or otherwise of such exercise or its mode. And as in any other adjudicatory matter, the decisions of the courts are final and binding on all parties in the dispute.¹¹ Constitutional democracy or constitutionalism presupposes that the laws that govern, including the constitution, must be interpreted by the courts that are created for that purpose, and that the decisions of the courts must bind all those who are directly or indirectly concerned or affected by the decisions.¹² In that sphere the courts become fons et origo, and their decisions faith accompli unless set aside by a superior court. It is further argued that even when decision of a court is set aside by a superior court, the setting aside by the superior court is still a judicial decision epitomizing act of judicial superiomacism or supremacism.

This paper is not unaware that there are some democracies without written constitutions and in which case the Parliament may be sovereign in the sense that the courts lack power to set aside or void any law made by it.¹³ It also agrees that courts in some democracies with written constitutions do not have power to review and declare an act of the Parliament void.¹⁴ In such democracies, the search for general or legal supremacy must take a different approach. Nigeria is a constitutional democracy¹⁵ with a written constitution vesting in the judiciary the power of review of both executive and legislative acts and its decisions are binding on all persons and authorities within the Federation.¹⁶

10 By the clear provisions of the Constitution, section 235, "no appeal shall lie to any other body or person from any determination of the Supreme Court." As the highest court of the land, it enjoys finality of authority, subject only to principles of natural justice, as are embedded in the rules of interpretation, which must constantly guide the court in its determination of matters brought before it.

11 The Constitution, section 287

12 Ben O. Nwabueze, *CONSTITUTIONALISM IN THE EMERGENT STATES* 14 (Associated University Press, 1973)

13 England is a good example of these countries.

14 The third republic of France, and Canada are with written constitutions, but without the courts having power of review; Malaysia and Swiss both have written constitutions, but with limited power of review vested in the courts

15 This is so because it has satisfied some conditions: a written constitution that enshrines principles of democracy; popular and periodic election, legislature with members that are directly elected by the people themselves, the doctrine of recall of legislators etc. See also preamble to the constitution.

16 The Constitution, section 287

II. Constitution and power allocation

Democracy has now gained ground in most countries of the world, the military having lost tempo. This has been the result of many factors ranging from increase in political awareness at domestic level and efforts of international community and organizations to the awareness by the military itself that the primary function of the military is the protection of the sovereignty and territorial integrity of the nation, which essentially subordinates the military to the elected government of the day. Democracy entails learning process for it to take root and should therefore not be terminated at the very least misbehaviors or shortcomings of the political leaders.¹⁷

One of the fundamental elements of democracy is the enthronement of a constitutional government. This is a marked distinction between a constitutional and a military or any form of arbitrary government. Thus, a government is constitutional when all the structures are put in place by a constitution, which regulates the affairs and relationship between the structures.¹⁸ This involves the creation of those structures and allocation of functions to each of them. These functions marked the areas of competencies of the organs. This is most evident with written constitutions like America, Nigeria, and India etc. This does not suggest that those democracies with unwritten constitution do not have structures with identifiable functions; they do have, but are seldom separable and distinct.

Today, the world over has experienced three forms of constitutional democracies or governments; the presidential as in America, Ghana and Nigeria, etc, parliamentary as in England and the hybrid system of the fifth republic of France. Notable with the presidential system is separation of powers¹⁹ between the three departments of government in such a way that the power to make laws is allocated to the legislature, the execution and maintenance of the laws vested in the executive while the interpretation of those laws is vested in the judiciary. This is a fundamental departure from the parliamentary system where even if lawmaking is for the Parliament, yet members of the executive are at one and the same time members of the legislature.

17 Leaders of Military Coups in Nigeria and elsewhere in Africa have always hidden under this to overthrow democratically elected governments. See generally, Madiebo A. Alexernda, *THE NIGERIAN REVOLUTION AND THE BIAFRAN WAR*. 4-14 (Fourth Dimension Publishing Co., 1980) Ademoyega, A. *WHY WE STRUCK: THE STORY OF THE FIRST NIGERIAN COUP* 1 22(Evans Brothers Publishers,1983)

18 Nwabueze, *supra* note.12, at 2

19 The separation is not absolute in that the functions allocated to the organs are overlapping; the executive sometimes set-up Administrative Tribunals that perform quasi-judicial functions. The legislature also performs some sort of judicial functions as in the case of confirming judicial appointments and in impeachment proceedings. For a critique of the doctrine, see Geoffrey Marshall, *Constitutional Theory*. 113-124(Oxford University Press, 1971)

A. Legislative Competence

Two factors are important in discussing division of powers between levels of legislature. The first is the mode of division that may be “double” model or the “single” model.²⁰ This may seem a matter of style because it does not in any sense affect the extent of the power granted or the mode of exercising the power; all it shows is that in the double model, the areas of legislative competency of legislative authorities are enumerated so that the areas of competence of each legislative authority are clearly separated and identifiable. This is the approach in Nigeria where, being a federation, the legislative powers of the federation are shared between the three levels of legislative authorities: national, states and the local councils.²¹

As stated above, the exclusive list enumerated 68 items over which only the National Assembly is competent;²² the concurrent list enumerated 30 items over which both the National Assembly and State Houses of Assembly are competent, and 2 items over which a local governments has competence²³ in addition to other functions that may be conferred on the Council by a law passed by the State House of Assembly in accordance with the Constitution.²⁴ No other authority except the local councils can legislate on the matters constitutionally allocated to them and no other authority except the national legislature is competent over the exclusive list. In the case of the concurrent list, if any law made by a State House of Assembly is in conflict with that made by the National Assembly, the state law is null and void.²⁵ If however there is no conflict except that the National Assembly has made a law on that subject matter the state law would be in abeyance, not being null and void, but solely because the central authority has legislated on the matter.²⁶ The “single” model is perhaps the fancy of countries with unitary system as in Ghana, Zambia, England; etc²⁷. The approach with this model is that the areas of competence of only a level are enumerated while the areas of competence of the other level of legislative authority are unenumerated thus making them residual. The importance of this division is that the competence of each level of legislative authority is expressly identifiable in the Constitution and this reduces possibilities of encroachment by one authority into the areas of

20 Paul Craig and Mark Walters, *The Courts, Devolution and Judicial Review*, Public Law 293, 293–299 (Spring, 1999)

21 The Constitution, sections 4 and 7

22 see, The Constitution, Part I Second Schedule

23 see, The Constitution, Part II Second Schedule

24 The Constitution, Section 7 and the Fourth Schedule

25 A.G. *Abia State & 35ors. v A.G. Federation* (2000) 3 S.C. 106 at 151–152

26 This is based on the principle of “covering the field” as enunciated by Dixon, J., in the Australian case *Ex parte Mc Lean* (1930) 43 CLR 472, at 483, and approved in *Lakami v. A.G. Western Region* (1971) 1 UILR 201, at 209

27 There is usually no power devolution in Unitary Countries except between the National legislative and the Local Councils in which case the unenumerated powers are reserved for the Councils.

competence of the other and it provides the basis for test of validity of exercise of powers. Where the competence of an authority is clearly enumerated or unenumerated in the Constitution, it presupposes that that authority has no other competence beyond those enumerated or the residue; meaning that the powers of that authority are circumscribed to the extent of those enumerated powers or the residue.²⁸ This is the second fundamental issue in the distribution of powers between the various legislative authorities in that it provides the extent of powers allocated to each authority. However, there may be situations where the extent of powers is not enumerated, but only the prohibited areas are mentioned. In such situations, the legislative authority has competence over all matters not included in the prohibited list.²⁹

Federalism entails, among other things, devolution of powers between the federating units and a written constitution. By its very nature, federalism, according to Schmitt³⁰ involves the coming together of different entities “in lasting but limited unions, in such a way as to provide for the energetic pursuit of common goals while maintaining the respective integrities of all parties.” There is no much difference, if any at all, between Schmitt and Ekeh,³¹ who defines the concept as a form of voluntary political union, whether temporary or permanent, of independent authorities for common purposes such as “defense, trade and communication or for other reasons.” One apparent difference between the two approaches is that while Ekeh appreciates that in most case the federating units are hitherto autonomous and have decided to join the union, Schmitt seems not to recognize this all important factor that is often at the background of devolution; interestingly, they both reorganize the place of common “goal” or “purpose” in federalizing. From this however, it is clear that devolution of power is essential to federalism and the devolution model is determined by many factors which include defense of the territorial integrity of the federation. This presupposes a strong centre, charged with foreign affairs on behalf of all, with a strong army that is centrally put together, sustained and controlled. These are for the common “goal” and “purpose” of all the units which also determine what other powers are necessary to be assigned to the central authority and what should be left for the units bearing in mind the need for equality of units, competitive development needs, and autonomy in certain sphere.

In Nigeria, the lawmaking power is vested in the National Assembly at the federal level with two chambers; the Senate and the House of Representatives.³² The power is for “peace, order and good government” of the Federal Republic

28 A. G. Abia State & 35ors.V. A.G. Federation (2000) 3 S.C. 106 at 149

29 Paul Craig et al. *supra* note 20 at 293–294

30 Nicholas Schmitt, *History of Constitution Making-European & Australasian Experience*, in *CONSTITUTION AND FEDERALISM*, Ajomo, M.A. et al (ed.) 21(FOP Press, 1997)

31 Cited by Nuhu O. Yaqub, *State Creation and the Federal Principle*, in *CONSTITUTION AND FEDERALISM*, id. at 186, 197

32 The Constitution, section 4

of Nigeria. At the States level is the Houses of Assembly and also “for peace, order and good government”³³. As a federation, the lawmaking power is shared between the National and States Legislatures. The power of national legislature covers all matters in the exclusive legislative list³⁴ while those on the concurrent list are shared with the State Houses of Assembly.³⁵ All other matters not contained in either the exclusive or concurrent list are vested in the local government.³⁶

Incidental to the lawmaking power is the oversight functions.³⁷ This is the area of legislative control and supervision of the executive. The legislature, being the representatives of the people has the duty to ensure that the powers exercised by the executive are in strict compliance with the provisions of the statute and or the constitution. This power necessitates the involvement of the legislatures in the day to day administration of the federation and the states. By implication, therefore, the legislature is involved in policy formulation and implementation.³⁸ It may however be argued that policy formulation and implementation are outside lawmaking. The question must then arise as to what law is all about.

Basically, law is about the regulation of conduct of affairs and relationships within the society, whether at individual level, group or at the level of government.³⁹ Also, the laws that are made by the legislature, being representatives of the people, are in a way to give legitimacy to the programmes and policies of the executive.⁴⁰ This presupposes that the legislature must be abreast of the programmes and policies of the government. Most of the Bills being passed into laws

33 Id.

34 see, The Constitution, Part I Second Schedule

35 see, The Constitution, Part II Second Schedule

36 The Constitution, Section 7 and the Fourth Schedule

37 see, for example, The Constitution, sections 86, 88, 126, 128, 143, 147 and 153

38 see, Bello-Imam, I.B. *The Legislature; Its Role, Performance, Problems and Prospect in Nigeria*, in DEMOCRATIC GOVERNANCE & DEVELOPMENT MANAGEMENT IN NIGERIA'S FOURTH REPUBLIC 1999–2003, Bello-Imam, I.B. et al. (eds.) 409–423 (JODAD Publishers, 2004)

39 Joseph Omoregbe, AN INTRODUCTION TO PHILOSOPHICAL JURISPRUDENCE, viii (Joja Educational Research and Publishers Ltd., 1994), the Author points out to this attribute of law when he says “...I believe, is obligation. The obligation is of a moral nature...law is sacred and it imposes an obligation on all those subject to it.”

40 For example, the executive needs money to execute the laws made by the legislature, but that the executive can not just appropriate the fund without the approval of the legislature in the form of appropriation law. The legislative approval gives legitimacy to executive action, otherwise the action may be without the appropriate sanction. See *Governor of Kaduna State v House of Assembly* (1982) 3 NCLR 635, at 641 where the High Court of Kaduna State, Mohammed, CJ, held that the exercise of executive power of the Governor is subject “firstly to the provisions of the Constitution and, secondly and equally important also subject to the provisions of any law made by the House of Assembly of the State.” Kaduna State is one of the States of the Federation and indeed has the misfortune of being the first state to have its Governor impeached by the State House of Assembly in 1982.

are usually executive Bills seeking legitimacy for executive policies of administration and while they are being considered, the legislature must of necessity engage in thorough analysis of such Bills. This process entails in-depth studies and appraisal of the social, economic, political and financial implications of the Bills sought to be passed into law to confer legitimacy.

The traditional function of the parliament or legislature is to make laws for the society. From Traditional African Societies to the modern and complex world, the traditional function of the legislature has remained that of making laws. All other functions that are performed by the parliament all over the world are fundamentally to assist the parliament in its lawmaking functions. Certainly, no other authorities, by whatever name, rival the parliament in legislative business. However, the legislature may think it fit, in certain circumstances, to delegate certain aspects of its functions to a ministerial department.⁴¹ This delegated legislation must itself conform to the prescribed rules or conditions made by the parliament. So where the parliament has delegated powers to a body, the question of vires may arise. Although the court may not look into the validity of an Act of Parliament where the contention is not an issue of jurisdiction or breach of a constitutional provision, the court would look into the validity of a delegated legislation especially when the question is whether or not it has exceeded the limits set by the legislature. So, where a ministerial regulation made pursuant to an Act has failed to conform to the limits set in that Act, that ministerial regulation would be declared null and invalid.⁴²

The nature of power of the parliament to make laws engendered the questionable doctrine of parliamentary sovereignty. What the doctrine means is that when it comes to legislation, the parliament has unlimited power to make and unmake any law. Dicey states that it means that only the parliament has the right to make or to unmake any law. And that no one except the parliament itself can set aside the laws.⁴³ A close look at the doctrine would show a clear indication of an impetus, at least one, of legal positivism. Austin, theorizing under the influence of English constitution; opines that: ... Law established or posited in an independent political community by the express or tacit authority of the sovereign or supreme government ... if a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in the society; and the society... is a society political and independent.⁴⁴

In practice, there is hardly any authority, whether single, group or assemblage that wields unquestionable powers to do anything. The contemporary world sit-

41 Ese Malemi, *THE NIGERIAN CONSTITUTIONAL LAW 170* (Princeton Publishing Co., 2006)

42 Id., 193

43 Dicey, A.V., *supra* note 6 at 39–40

44 Adaramola Funsho, *BASIC JURISPRUDENCE* 85–88 (Rahamat Printing Press, 1995)

uation does not even support absolutism in governance. Austinian conception of law is not different from that of Jeremy Bentham (1748–1792) who posits that law ... as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power...⁴⁵

It must be stated that the positions held by Bentham and Austin are generalizations on the sovereignty of parliament instead of talking about supremacy of the parliament as far as lawmaking is concerned. It is beyond any spell of doubt that the parliament makes the law. It is also true that the lawmaking procedure or the internal organization of the parliament is entirely its exclusive privilege,⁴⁶ yet the parliament must operate within certain norms acceptable to the society in which it operates. These norms must be understood not in a sociological sense, but most certainly in an organic sense, the constitution. Thus, even if we agree to parliamentary sovereignty in England, the position is markedly different in Nigeria and the United States.⁴⁷ The Constitutions of both Countries have clearly delimited the powers of the parliament and nowhere has it been accorded any sovereignty or supremacy in the Constitution. The Nigerian Constitution 1999 provides that it is supreme (this is also questionable) and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. The Constitution yet declares that sovereignty belongs to the people.⁴⁸

Apparently, the notion of parliamentary sovereignty, if at all accepted with peculiar constraints, is not contemplated by the constitution in Nigeria. Supremacy of the parliament is also limited to its internal organization and legislative procedure. This is a privilege accorded the legislature, as done in the United States, by the makers of the constitution to ensure the independence of the law-making body. It is the norm that the legislature be given that privilege of determining its own structural organization and powers to determine the rules for its legislative function; the court would not even look into procedural matter of the legislature unless the procedure is patently in conflict with any provision of the Constitution.⁴⁹

It should therefore be noted that, except in matters aforesaid, the legislature in Nigeria is not supreme and does not enjoy any sovereignty. The Courts have the inherent powers to determine whether or not an Act of the legislature is ultra vires the Constitution. Simply put, the powers of the legislature, at least in

45 Lord Llyod, INTRODUCTION TO JURISPRUDENCE 114, 116 (Stevens, 1979); Riiddall, J.G JURISPRUDENCE 21–22 (Butterworth, 1991)

46 *Hon. Edwin Ume Ezeoke v Alhaji Isa Aliyu Makarfi* (1982) 3N.C.L.R.633, at 674

47 Constitution of Nigeria 1999, section 1. It appears there are no equivalent provisions in the US Constitution, but, see *US v Brewster* 1972, 408 U.S.501

48 Constitution of Nigeria 1999, section 14 (2) (a)

49 *Id.* section 60 See , *Ezeoke v Makarfi* (1982) 3 NCLR 663, at 675

Nigeria, like in most democracies with written Constitution, are circumscribed by some limitations, namely, the constitutional limitations, International Conventions, public opinion etc.

Firstly, the extent of powers of the legislature for “peace, order and good government” is limited to legislative power over all matters contained in the constitution. It provides:

(2) The National Assembly shall have power to make Laws for ...with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution.

(4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make Laws with respect to the following matters, That is to say-

(a) any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and

(b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.⁵⁰

From the above, therefore, it is clear that beyond those provisions, the legislature cannot make any law, otherwise such law shall be inconsistent with the constitution,⁵¹ and it would be *ultra vires*. In *Uzodima V COP*,⁵² the appellant was tried and convicted of stealing by an Area Court which refused to allow him a counsel to defend him because section 390 by the Criminal Procedure Code denies a right of Lawyers in the Area Court. On appeal, the High Court of Benue State declared section 390 of the CPC as null and void on the ground that it is inconsistent with section 33 (6) (c) of the 1979 Constitution which provides that any person charged with a criminal offence shall be entitled to defense by a counsel of his choice.⁵³ Similarly, in *INEC & Anor V Balarabe Musa & Ors*,⁵⁴ the National Assembly passed the Electoral Act 2001, which set out additional conditions, apart from those already prescribed by section 222 of the 1999 Constitution. The respondent not being satisfied instituted an action in the Court of Appeal.

The Court declared certain sections of the Act unconstitutional, null and void. Not being satisfied, the defendants appealed to the Supreme Court. The Court held, in part that:

50 The Constitution, section 4 See also Constitution of Nigeria, s. 4, 1979 and 1989 respectively.

51 The Constitution, section 1, (3), it provides for the doctrine of inconsistency that any law made by the legislature which is inconsistent with the constitution shall be declared null.

52 (1982) 3 NCLR 325

53 see The Constitution, s. 33 (6) (c)

54 (2003) 13 NSCQR 39

Section 79 (2) (c) of the Act was invalid because it was inconsistent with section 40 of the Constitution. In terms of section 45 (1) (a) of the Constitution, there is nothing reasonably justifiable in a democratic society in the interest of defence... The submission that the restriction is a valid derogation from section 40 by virtue of section 45 (1) (a) of the Constitution was erroneous.⁵⁵

Also, in *A.G. Ondo State V.A.G Federation & 35 ORS*, the Supreme Court declared sections 26 (3) and 35 of the Independent Corrupt Practices And Other Related Offences Act 2000 unconstitutional, null and void.⁵⁶

Secondly, International Conventions and opinions are very strong limitations on the legislative powers of the Legislature. It may be argued that Nigeria is an independent, sovereign nation, yet she dare not embark on legislations that would offend sensitivities of the international community. There are certain standards to which a nation must conform to remain a responsible member of the international community. Any derogation from those standards or norms may certainly be resisted. Also, in International Law, once a country is a signatory to certain conventions, such become binding on that country and can therefore not make legislation that would run in conflict to such conventions. What is more important to note is that by ratifying a convention at the international level makes such a convention superior to municipal legislation! Therefore, by implication, the legislature would have only two options, that is, to allow the country to remain within the confines of such convention and avoid some unpleasant consequences, or legislate against such conventions, damn and face the unpleasant consequences.

The decision of the Supreme Court *in Abacha V. Fawehinmi*⁵⁷ is very illuminating and instructive on this. Men of the State Security Services and Policemen arrested the respondent, Chief Gani Fawehinmi at his residence without a warrant, and he was detained at Shangisha. At the time of his arrest he was neither informed of nor was he charged with any offence. He then applied to the Lagos Division of the Federal High Court for the enforcement of his fundamental rights both under sections 31 and 38 of the 1999 Constitution and Articles 4, 5, 6, and 12 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria, 1990.

The Federal High Court struck out the suit on the ground of ouster clause in Decree 2 of 1984 as amended and Decree 12 of 1994. The Respondent was dissatisfied and appealed to the Court of Appeal. However, both parties were dissatisfied by the decision of the Court of Appeal, and cross-appealed to the Supreme Court. It is important to note that one of the issues before their Lordships was the Status of the African Charter in Nigeria. It should also be noted that the

⁵⁵ Id. at 75–76

⁵⁶ (2002) 10 NSCQR 1036, 1083–1084.

⁵⁷ (2000) 4.S.C. (pt.) 1

African Charter has been domesticated and is now part of Nigeria's municipal Law. However, delivering the judgment of the Court, Ogundare, JSC pointed out that International Statutes, once signed by a country, has "a greater vigor and strength" than other domestic statute.⁵⁸ All authorities and persons exercising legislative, executive or judicial powers in Nigeria are enjoined to give full recognition and effect to the African Charter.⁵⁹

The effect of the Supreme Court decision in the case is that an International Treaty or Convention to which Nigeria or any country for that matter is a Signatory is superior to municipal legislation. This, essentially, is a limitation on the legislative power of the parliament. It is argued that it does not matter that Nigeria, or any country, is a voluntary signatory; once signed, it is binding because it becomes an international obligation that must be effectuated. It is further argued that once a signatory has acquired a benefit under such statute, to pull-out of it would amount to disrespect for and disloyalty to an international obligation such that other signatories to that international statute have the right to demand for specific performance or sanction against the disrespectful and disloyal state. The truth is that, once a signatory, it is a tacit submission of a part of the country's sovereignty and parliamentary supremacy. Other limitations to supremacy of the legislature include the collective will of the people, public opinion and activities of pressure groups. There are yet self-imposed limitations. Because of the social contract between the electors and the legislators, the legislature would not make any law that would offend the sensibilities of the Electors.

B. Execution and Maintenance

As usual with presidential system, the Constitution of Nigeria, as in the United States of America, established for the country a President who is the Head of State and at the same time the Chief Executive⁶⁰ with the power to execute and maintain the constitution and all laws made by the legislature. Also, in consonance with federalism, there is established for each state an Executive Governor who is the Chief Executive of the State in who it is vested the executive power of the state.⁶¹ The executive power clause is couched in a clumsy style that it becomes difficult to determine the actual extent of the executive powers.⁶²

58 Id. at 21–7

59 Id. at 25–26

60 The Constitution, section 130

61 Id. section 176

62 This is the position in America where Article II of the Constitution vests the executive power in the President that "he shall take care that the Laws be faithfully executed", without defining what is meant by "... executive power"; whether it is the power to ensure that the laws passed by the Congress are "faithfully executed" or otherwise. This lapse has made many Presidents to determine for themselves the extent of the executive power. See, Frederic A. and P. Orman Ray, INTRODUCTION TO AMERICAN GOVERNMENT, 398–415, 398–402 (Appleton-Century-Crofts, Inc., Tenth Edition, 1951); Edward S. Corwin, THE CONSTITUTION AND WHAT IT MEANS TODAY, 191–197

Apart from the fact that the word “executive” is not defined by the constitution, the powers further extend to execution and maintenance of all matters over which the National Assembly has power to make law but has not made any:

Subject to the provisions of this Constitution, the executive powers of the Federation shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.⁶³

It would be observed that the provisions on the extent of executive powers of the Federation and, of the states, start with the word “shall extend to” without laying any foundation as to what powers preceded the extended ones. This makes it somewhat impossible or rather difficult to determine with mathematical accuracy the actual powers that are squarely vested in the President (and the Governors) or the extent of the executive powers. Ordinarily, one would expect that the powers so vested in the chief executive officers shall be limited to the execution of the Constitution and to all matters with respect to which the legislature(s) has powers to make laws for the time being. This would be in consonance with the idea of limited government in which case the powers are clearly defined by the Constitution, and not left to mere matter of academic or judicial conjectures.

The draftsmen or makers of the Constitution closed their eyes to the implication of imprecision in the definition and or the delimitations of such important aspect of the Constitution. I shall however return to this soonest, suffice it to say that to understand the different phrases that are put together in the provisions on the executive powers would require a thorough understanding of their linguistic and conceptual formalism in so far as this is the only way to enhance the understanding of its legal or constitutional formalism. Commenting on the executive and executive powers, Benjamin posits the definitive and descriptive picture of the term. He defines it as the “the person or the persons in whom the power of the state is vested,” adopting the definition put forward by Selassie.⁶⁴ He again points out that the term connotes, in modern democracies, the powers and functions performed by the government.⁶⁵ In other words, executive, according to him, could mean either of two things; the person in whom the powers of the state is vested including all the persons through whom he performs all the executive functions or the actual functions performed by that person, and further pointing out that the word is “widely referred to as the whole branch of political system responsible for implementing the will of the state, and as such charged with the execution of laws.”⁶⁶

(Princeton University Press, 14th Ed., 1978)

63 The Constitution, section 4

64 Solomon, A. Benjamin, *The Executive in Democratic Nigeria: Problems and Prospect*, in *DEMOCRATIC GOVERNANCE & DEVELOPMENT MANAGEMENT IN NIGERIA'S FOURTH REPUBLIC, 1999–2003*. Bello-Imam, I.B. et al. (eds.) supra note 38, 383–386

65 Id. at 388

66 Id. at 389

The positions held by Benjamin can only be appreciated if only resort is made to the constitutional provisions prescribing that the President shall be the chief executive in whom the executive powers of the federation are vested. Thus, the constitution creates two perspectives of the term executive; the first being the President who incidentally is crowned the “Chief Executive”, meaning that there are many people who are the executive and that the president is their overall head. Thus conceptualized, one must agree with Benjamin when he says that the executive includes the president and all those who partake in the affairs of the public sector from the vice-president, ministers, advisers (their counter-parts at states level) and all those who in one way or the other assist in actualizing the executive functions.⁶⁷

The second perspective is in the use of the phrase “executive powers of the Federation” as in the case of the President or “executive powers of the State” as in the case of the Governors. This can only mean, as pointed out by Benjamin, the powers or functions of state or government that are vested in the President or the Governor as the Chief Executive. Traditionally, one would argue or assume that the executive powers or functions are all in the parameters of policies formulation, seeking approval for the policies and the eventual implementation of the policies in line with the Constitution and the laws. This argument or assumption is in contradistinction with the express provisions of the Constitution relating to the executive powers. This thus necessitates a careful appraisal of the constitutional provisions on the executive powers to enable a proper fixation of the extent of the powers so conferred.

The executive powers can be divided into two broad categories: the extended unidentifiables and the identifiables, or the extended unenumerated and enumerated powers. In the first category are those powers that though extended, they are not specifically identifiable or enumerated. This is so because all the Constitution states is that the executive powers “shall extend to”, meaning that there are other powers that are being extended to the extended ones without them being mentioned. In the second category is the execution and maintenance of: the Constitution, all laws made by the National Assembly and all matters with respect to which the National Assembly has, for the time being, power to make laws. In this second category again are there clearly expressed specific grants, and the other being “all the matters with respect to which the National Assembly... has power to make laws”, but on which the legislature has, for the time being, not made any laws. This third leg of the powers is pregnant with interpretative problems and thus necessitates an appraisal of the whole stratum of executive powers to see what this category of power actually entails.

Executive power is usually discussed under three theories: the specific power theory, the inherent power theory and the theory of necessity or stewardship theory. The specific power theory contends that apart from the powers that are

⁶⁷ Id.

ostensibly conferred on the chief executive officer or the head of state by the Constitution and Acts of the parliament, there are no other powers exercisable by the incumbent.⁶⁸ The Constitution conferred on President the powers to and that are necessary for the execution and maintenance of provisions of the Constitution and of other statutes made by the parliament. It should be observed that the provisions on the powers are preceded with "Subject to the provisions of this Constitution"⁶⁹ to show that the powers so vested in the President and or their execution are not independent of the other provisions of the Constitution.

The purport of the opening phrase is to subject the entire provisions to other provisions of the Constitution making the operation of the provisions conditional upon other provisions in the Constitution. Thus in a case, *Uwais, J.*, while adopting *Black's Law Dictionary* definition of the phrase, added that the phrase introduces condition, a restriction, a limitation, a proviso; that what the provision is subject to shall control, govern and prevail over the subject section.⁷⁰ In other words, the provisions on "executive powers" are inferior and subordinate to the entire provisions of the Constitution. The provisions presuppose a limited and not an absolute President whose executive powers may know no limits notwithstanding that the Constitution does not define what "executive powers" are.

It is rather curious and incomprehensible that what extends to what is not even mentioned. The framers of the 1999 Constitution, and their 1979 and 1989 predecessors did not do better either. "Executive powers shall extend to..." is rather ambiguous. It could be conceded that the extensions are known, but those that are extended to them are not so clear if at all they are clear. Nor can it be argued that apart from those extended powers, the president, being the Chief Executive, Head of State and Commander in-Chief of the Armed forces of Nigeria do possess some constitutional powers which are not specified by the Constitution. If this is so, such powers must belong to the inherent realm.

Certainly, the powers vested in the President extend to the execution and maintenance of all laws made by the National Assembly and the provisions of the Constitution in the first instance, and in the second, to all matters in the exclusive legislative list, and those meant for the National Assembly in the concurrent legislative list irrespective of whether or not the National Assembly has made laws in respect thereof. The distinction between the two clauses is clear and important because it indicates two different set of powers; execution of the constitution and the laws of the legislature, and acting on matters over which the legislature has, for the time being, power to make laws, but in respect of which laws have not being made by the legislature. It is argued that legislatures do not legislate in vacuum, there is therefore compelling reason for granting unspeci-

68 E. Michael Joye & Kingsley, I. INTRODUCTION TO THE 1979 NIGERIA CONSTITUTION, 221–223 (Macmillan Press Ltd., 1982)

69 The Constitution, section 5

70 *NDIC V Nkem Ltd.* (2004) 18 NSCQR 42, at 90–91

fied power in respect of the matters over which the legislature could make but has not made any law. It is further argued that the framers of the constitution may intend well by the provision, unless well guided, it is capable of creating tension between the executive and the legislature. This is simply because that power element is very wide and portends no limitation contrary to the culture of limited government that is the main goal of the spirit of the constitution.

The President is the Chief Executive, Head of State and Commander-in – Chief of the Armed Forces of the Federal Republic of Nigeria. These make it compelling to confer on him powers that are beyond execution of the laws made by the National Assembly and provisions of the Constitution. As the chief administrative officer, head of state and chief defense officer, the overall wellbeing and stability of the nation depends on him; his ability to act promptly in time of peace and during emergencies. He is the symbol of unity, sovereignty and integrity of the nation that he represents the nation at international level taking major and far reaching decisions on behalf of the entire nation. All these place on the office of the president more responsibilities that could have been possibly envisaged during deliberation on the form of constitution.

Consequently, there is a need for some level of discretionary power if the President must carry out the mandate that the people have given to him.⁷¹ No reasonable person or any person with his senses expects the President to look elsewhere when there is a need for prompt attention to a matter simply because there is no extant law on such situation. By the very political mandate vested in him, he must act promptly. This was made clear by Chief Justice Marshall in *Marbury v Madison* 1 Cranch 137 (1803).⁷² The people's mandate being the real source of the powers of the president presupposes that though the president must source legitimacy for his actions in either the constitution or the statutes; this would not mean that the president would not act pre-emptively when the need arises or when the interest of the nation so demands, particularly in emergency situations.

C. The Judicial Competence

This is usually the third arm in any modern government, whether in the countries with or without written constitutions, be it federal or unitary. The nature of human societies demanded that there should be a body, impartial and independent in nature⁷³, and well groomed in the science of the law, charged

71 Section 14 (1) (b), Fundamental Objectives and Directive Principles of State Policy. Although it has often been argued that objectives and principles are merely directory and therefore not justiciable, the Supreme Court of Nigeria has decided that some of the directive principles are justiciable. see Attorney General, Ondo State v A.G. Federation (2002) 10 NSCQR1036, at 1079

72 see Edward S. Corwin, PRESIDENT POWER AND THE CONSTITUTION, 122 (Cornell University Press, 1977)

73 These are requirements for ensuring justice; any court or any person called upon to act in

with the duty of settling disputes amongst the people or in the sphere of public life. In other words, the function of the judiciary is tripartite; settling between people in their private affairs, between people and the authorities and between the various arms of the government. This essentially entails the interpretation of the laws and the constitution.

One striking, but often overlooked nature of the judiciary is the fact that it is ordained by God and Himself is the first Judge ever known on earth dispensing justice according to the laws He set for mankind. When He created the heavens, He created Adams, made and appointed for him a wife in the garden of eve. Then passed the law setting the limits of their existence in the garden. When, as usual, men violated the limits set for them, God called them, listen to their evidences and pleas and consequently passed judgment on them. The origin of the judiciary thus indicates the special or prime position it occupies or that it ought to occupy in the affairs of men, whether private or public. It may be argued therefore that the establishment of judiciary by modern constitutions is nothing, but the furtherance of the act of God. Even if we agree that separation of powers had its origin with God we must equally agree that all with Him were subordinate and over them He assumed supreme jurisdiction in all matters including adjudication.

The most apparent purpose of the divine origin of judiciary is to ensure justice⁷⁴ among man for with that comes the peace that man need for the fulfillment of their very existence on earth. Human existence and its quality, for all purposes, require that there be peace in the environment to allow for social, economic, political and spiritual development. Justice, therefore, is an essential requirement for peace; with justice there is certainly the possibility of peace and the absence of it (justice) makes crisis and conflicts inevitable.⁷⁵ To therefore ensure peace, men have, throughout history and generations to generations, continuously search for means of ensuring justice. Thus in the process ordained law to regulate and direct their affairs and this entails the establishment of the judiciary to apply and ensure compliance with the law. The recent developments at international level⁷⁶ do not only support but points perfectly to this historical perspective and

adjudicatory capacity requires some independence not only from those who appointed him, but also from the parties and those other members of their immediate environment. This is to ensure that justice is delivered without fair or favor and ensuring impartiality. See generally for historical perspective, The Hon. Justice Mohammad L. Uwais, *The Court – An Instrument of Justice and Democracy*, in ALL NIGERIA JUDGES CONFERENCE PAPERS, 1995, 7–13 (MIJ Professional Publishers Ltd., 1996)

74 For meaning of justice in its contemporary view, see Niki Tobi. *Law, Justice and Democracy*, in All Nigeria Judges Conference Papers, 1995, 61 (MIJ Professional Publishers Ltd., 1996)

75 see also, M.T. Ladan, *INTRODUCTION TO JURISPRUDENCE CLASSICAL AND ISLAMIC*. 77–84 (Malthouse Press Limited, 2006)

76 The developments leading to the establishment of International Court of Justice and the International Criminal Court are good examples of this point from the League of Nation

the systemic growth of that branch of government to the present, contemporary enviable, but not all satisfactory position.⁷⁷ It is this quest for justice that has necessitated, in all Countries, the establishment of judiciary either by the Constitution or Acts of Parliament, and charged with the power to adjudicate between persons, persons and authorities, and between authorities.⁷⁸

The Constitution of the Federal Republic of Nigeria established the judiciary⁷⁹ which consists, for the whole nation, the Supreme Court, Court of Appeal and Federal High Court. Established for the Federal Capital Territory are the High Court, the Sharia Court of Appeal and the Customary Court of Appeal. The Constitution also established for each State of the Federation High Court, and Sharia Court of Appeal or Customary Court of Appeal, for any State that requires it.⁸⁰ Apart from these courts, the National and State Houses of Assembly may establish for their respective domain such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which could make law.⁸¹ The powers vested in the judiciary extend, notwithstanding any thing to the contrary in the Constitution, “to all inherent powers and sanctions of a court of law”, and to:

...all matters between persons, or between government or authority and to 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;⁸²

The power thus granted the judiciary extends to all the inherent powers and sanctions of courts of law. If the sanctions of a court can be determined with exactness, what about the inherent powers? Could this be power to review the activities of the other arms of the government without more or the power to review the activities and declare any infraction illegal or unconstitutional?

to the present day. Also, the most recent development at regional level leading to the establishment of the ECWAS Commission to try case of human rights violations is another example.

77 The situation in many countries today is that the judiciary is not constitutionally made directly answerable to the people, who are the real sovereign, but to either the executive or the legislature or to both. Also, it should be realized that the organ in whose hand is the control of the nation's purse is superior to others in that hierarchy. Not until the judiciary is financially autonomy can it be said to have independence.

78 The difference in the two approaches is fundamentally that while those courts created by the Constitution can only be abolished through constitutional amendment, those created by Legislative Acts can be abolished by the same Legislative Acts. The necessary implication in this latter approach is that the independence of judiciary may be dangerously jeopardized particularly in this era of judicial review as a cornerstone of democratic constitutionalism.

79 The Constitution, section 6

80 *Id.* sections 275 and 280

81 *Id.* section 6 (5) (j) (k)

82 *Id.* section 6 (6)

III. Judicial review

A constitutional government is such that all powers of the various apparatus of governance have limited powers to the extent allowed by the constitution.⁸³ Therefore, inherent powers granted the judiciary would mean all powers incidental to attainment of justice in the society. This power would include power to grant injunction or make any declaration against any arm of the government or against any person or authority in the process of doing justice to any matter brought before the court. To argue generally, however, that inherent power includes review may be absurd because not all constitutions allow or grant the judiciary the power to review legislation; it would depend on the nature of constitutionalism in each jurisdiction.⁸⁴ In some jurisdictions, the Parliament is “supreme” to the extent that its Act can not be struck down by the judiciary.⁸⁵

Provisions of section 6 of the Constitution of Nigeria 1999 confer generally the judicial powers of the nation in the judiciary to mark the separation of judicial power from the other powers of the nation; the section “concern itself with the delimitation of the separation of powers between the judiciary and the other departments of the Constitution.”⁸⁶ The competence vested generally in the courts thus includes power to adjudicate on matters relating to civil rights and obligations of a person.⁸⁷ It is the existence of rights and obligations that eventually determines the justiciability of the matters brought before the courts.⁸⁸ In other words, where there is no right or obligation known to the law there is no competence to invoke the power of the court. Besides, the Constitution prescribed the areas of competence of the courts so established.⁸⁹ Also, courts that are established by statutes have their areas of competence prescribed by such statutes.

More important to this paper at the present is the power of judicial review of acts of the sitting legislature and the executive,⁹⁰ which power it would appear is not specifically or expressly prescribed by the Constitution, but yet has hitherto been exercised by the judiciary. It is extant that the Constitution is “supreme”

83 see Niki Tobi, *supra* note 74 at 63–64

84 It should be realized that once a matter is not expressly denied the judiciary by the Constitution, but not itemized as such falling within the jurisdiction of the Court, it may fall under the inherent powers of the Courts or that which has become a traditional power of the Courts the world over. Apparently, the courts determine what the Constitution and the laws say; whatever they say is within the ambit of their inherent or traditional powers, be so it.

85 Dicey, A.V. *supra* note 43 at 39–40

86 see the concurring judgment of Karibi-whyte, J. in *Amadi v Nigerian National Petroleum Corporation* (2000) 6S.C. (pt.1) 66, 95.

87 *Okitiupupa Oil Palm Co. Ltd. v Hon. J.E. Jegede* (1982) 3 NCLR 494, at 500

88 *Hon. Edwin Ume Ezeoke v Alhaji Isa Aliyu Makarfi* (1982) 3 NCLR 663, at 672

89 see generally, *The Judicature*, Chapter VII of the Constitution.

90 The use of “sitting” here is to distinguish between the acts of the previous and present legislature and executive in order to give effect to the provisions of section 315(3) of the Constitution

and any law that is found inconsistent with any of its provision, the Constitution “shall prevail, and that other law shall to the extent of the inconsistency be void.”⁹¹ Unfortunately, the power to declare such other law inconsistent is nowhere in the Constitution expressly conferred on the judiciary; it may therefore be said that the power is incidental or inherent. However, the judiciary is vested with the power “to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law, that is to say – (a) any other existing law; (b) a law of a House of Assembly; (c) an Act of the National Assembly; or (d) any provision of this Constitution.”⁹² The phrase “an existing law” in this provision means:

any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date...⁹³

Thus “an existing law” within the context of the provision simply means a law that has been in existence before the 29th May, 1999 when the present Constitution came into force. Therefore, a liberal construction of the provision will tend towards a limited reviewability of legislation, but this is not so because the judiciary has often engaged in blanket review of both legislative and executive acts; a power the judiciary has actively defended as incidental to the spirit of separation of powers that had been associated with the presidential democracy and the rule of law. This position has also been fortified by the paramount position the judiciary occupies under the Constitution; the decisions of the courts have binding force on all authorities, persons and courts of subordinate jurisdictions, and those of the Supreme Court being the final authority on all.⁹⁴ The word authorities include the other arms of the government over which the judiciary has exercised power of review since the coming of presidential system in the country. A few examples would prove this point.

A. Recent Review of Legislative Action

Judicial review of legislation or legislative actions has generated consistent or rather persistent controversy in some jurisdictions⁹⁵, but it has certainly not in

91 The Constitution, section 1 (3)

92 The Constitution, section 315 (3)

93 Id. section 315 (4) (b)

94 Id. section 287

95 The debate is multifaceted. On the one hand is the controversy over the real foundation of judicial review. On another hand is the scope of review; whether it covers jurisdictional and non-jurisdictional errors. Also, it has now assumed another dimension in America; whether or not *Marbury V Madison* is rightly the origin of judicial review. For scholarly discussions, see generally; Andrew Halpin, *The Theoretical Controversy Concerning Judicial Review*, 64:3 *The Modern Law Review* 500, 511 (2001), Brabley Selway, QC, *The Principle behind Common Law Judicial Review of Administrative Action-The Search Contin-*

Nigeria, particularly under the presidential system, which has been the constitutional order since 1979. It is not however the intention in this part of this paper to generate the controversy, (it may however be a necessary development); it is rather to discuss the doctrine in the light of the position the judiciary occupies in the Nigerian constitutionalism since the adoption of American type of presidential system with modification under the 1979 Constitution. Certainly, the Constitution did not expressly provide that the judiciary shall have the power to “review” legislative and executive actions, yet the judiciary has assumed the power without any cry from the other arms, meaning that the judiciary is right or that the other arms have taken it so because there is no court to appeal to or simply because the legislature has no power to make any law that would oust or purport to oust the power of the courts from looking into the validity of any acts of the legislature including legislation, or is it because the Constitutions subject the exercise of legislative powers to the judiciary. What can not be denied is that the judiciary has exercised the power of review without any huff, and a few examples would suffice.

The Supreme Court asserted the power in *Attorney-General of Bendel State v Attorney-General of Federation & Others*⁹⁶. The plaintiff in this suit was one of the States of the Federation who was entitled to share from the Federation Account.⁹⁷ The President, on the 28th October, 1980 presented to the National Assembly a Bill on the formula for the distribution of the money standing to the credit of the account among the three level of government as provided by section 149 of the 1979 Constitution. The Bill was passed by the Senate on the 15th January, 1981 with amendments, while the House of Representatives also passed the Bill with different sets of amendment on the 22nd January, 1981. There was controversy between the Senate and the House of Representatives on the passage of the Bill, and the Senate President, in line with provision of section 55(2) of the Constitution arranged and convened a meeting of the joint finance committee of the National Assembly to examine the Bill with a view to resolving the differences between the two houses of the National Assembly. The committee met and finally adopted the Senate's amendments with certain modification. The Committee's approved version was, without recourse to the National Assembly⁹⁸, presented to the Clerk of the National Assembly who in turn presented same to the President

ues, 8 Federal Law Review 1, 22 (2002), Naomi Sidebothan, Judicial Review: Is There Still a Role for Unreasonableness?, 8:1 Murdoch University Electronic Journal of Law 1,13(2008) see also, that import research paper 06/44 of the House of Commons: “Judicial Review” A Short guide to claims in the Administrative Court, 28 September, 2006, 1–54; Gary L. McDowell. Coke, Corwin and the Constitution: “The Higher Law Background” Reconsidered, 55:3 The Review of Politics 393, 420 (1993)

96 (1982) 3 NCLR 1

97 see Constitution of Nigeria,1979, section 149

98 That was done in clear disregard for provisions of sections 55and 58 of the 1979 Constitution.

of the Federal Republic of Nigeria, for assent in line with the Constitution.⁹⁹ The President gave assent to the Bill on the 3rd February, 1981 in so far as it was not his duty to find-out whether or not a Bill has been properly passed into law by the National Assembly, and it became the Allocation of Revenue (Federation Account etc.) Act 1981. The plaintiff, dissatisfied with the mode and manner of passage and presentation of the Bill to the President for assent, filed an originating summons in the Supreme Court challenging the constitutionality of the Act. Delivering the judgment of the court, Fatai-Williams, J. held as follows:

...various provisions of the Constitution to which I have earlier referred clearly indicate a different Legislative process from that followed by the National Assembly in this case. Since this legislative process has not been followed in the passing of the Allocation of Revenue (Federation Account, etc) Act, 1981, the Act, to my mind, is not a valid ...¹⁰⁰

The ground upon which the court struck-down the Act is what can be referred to, for the purpose of categorization, as procedural (irregularity) inconsistency. This is because one, the Legislature had power to enact the Act, and two, there was no infraction pointed against the Act itself, only that the Legislature failed to comply with the procedure laid down by the Constitution for passing such a Bill into law:

(3) The Senate and the House of representatives shall appoint a joint committee on Finance consisting of an equal number of persons appointed by each House and may appoint any other joint committee under the provisions of the section.

(4) Nothing in this section shall be construed as authorizing such house to delegate to a committee the power to decide whether a bill shall be passed into law or to determine any matter which it is empowered to determine by resolution under the provisions of this Constitution, but the committee may be authorized to make recommendations to the House on any such matter.¹⁰¹

Procedurally, the joint finance committee was only empowered to look into the areas of differences between the Senate and the House of Representatives on the Bill, and to recommend to the National Assembly as found appropriate in the circumstance instead of passing the Bill into law. No committee of the National Assembly is empowered to pass any Bill into law. On this ground, the Supreme Court was perfectly in order declaring the Act invalid, it not being an Act of the National Assembly. However, this ground of review does not take care of the source of the power of the court to declare the Act invalid. Fatai-William, J. was mindful of this and declared that:

⁹⁹ see Constitution of Nigeria 1979, section 54(1)

¹⁰⁰ *supra* note 96 at 40

¹⁰¹ Constitution of Nigeria 1979, section 58

By virtue of section 4 (8) of the Constitution, the Courts of Law in Nigeria have the power ..., the duty to see to it that there is no infraction of the exercise of Legislative power, whether substantive or procedural, as laid down in the relevant provisions of the Constitution. If there is any such infraction, the courts will declare any Legislation passed pursuant to it unconstitutional and invalid.¹⁰²

Expressly, the provisions of section 4 (8) referred to by His Lordship subject the exercise of legislative powers by the National Assembly or by a State House of Assembly to the judiciary and prohibit the making of any law that would oust the supervisory jurisdiction of the courts. The combined effect of the provisions and those of section 1(3) of the 1979 Constitution as those of the 1999, without any doubt, point to a conclusion that in Nigerian constitutionalism the source of the power of review is the written Constitution. This is unlike in America where there is power of review the source of which is not express, but inferred and has been a subject of persistent controversy.¹⁰³

In yet another case, *A.G. Abia State & 35 others v A.G. Federation*,¹⁰⁴ the Electoral Act, 2001 (herein referred to as the Act) was the subject of contention before the Supreme Court. The Plaintiffs, all the component States of the Federation, contended that some of the provisions of the Act are *ultra vires* the constitutional powers of the National Assembly and they urged the Court to accordingly declare the provisions invalid and unconstitutional. Their claims as contained in paragraph 12 of their amended statement of claim, briefly stated, were particularly that; (1) the National Assembly lacks power to enact a law extending or otherwise alter the tenure of office of elected officials of local government councils in Nigeria against the clear provisions of Section 7(1) of the 1999 Constitution, (2) the National Assembly lacks power to make laws with respect to the conduct of election into the office of Chairman, Vice Chairman or Councilors of a local government Council, (3) Section 25 of the Act has the effect of amending the relevant provisions of the Constitution relating to qualification and disqualification of persons seeking election into the public offices without first complying with the provisions of Section 9 of the Constitution on amendment of the Constitution, consequently (4) that Sections 15 to 73 and 110 to 122 of the Act are null, void and inoperative, and finally, (5) that the Act "is rendered null and void and inoperative in its entirety."¹⁰⁵

Delivering the judgment of the apex Court, Kutigi, J., on the first, second and third claims found for the plaintiffs and declared that the National Assembly lacks powers; (1) to make laws to increase or otherwise alter the tenure of office of elected officers or councilors of local government councils except in relation

102 Id. at 40

103 see, *supra* note 95

104 (2002) 3S.C. 106

105 Id. at 112–114

to the Federal Capital Territory,¹⁰⁶ (2) to make laws with respect to matters relating to or connected with elections to the office of the Chairman or Vice Chairman of Local Government Council or to the office of Councilors¹⁰⁷ and (3) to make laws with respect to the qualification or disqualification of candidates for elections “without first of all complying with the requirements of section 9 of the Constitution.”¹⁰⁸ Consequently, sections 15, 17 – 25, 110–115(1)–(6), 116–118(1)–(8) and 121–122 of the Act were struck down for “duplication, inconsistency and lack of legislative competence.”¹⁰⁹ It should be noted that “duplication” as a ground of review arose here because the Constitution has already covered the area and in such a situation, under the doctrine of “covering the field”, the legislation becomes void or inoperative.¹¹⁰

B. Recent Review of Executive Action

Earlier, judicial review of legislative actions was looked into with the view to see where the judiciary stands in the order of the organs of the government. In the process, exercise of power of review was espoused and the grounds upon which certain Acts were struck down by the courts were also identified. Interestingly, the decisions of the Supreme Court in those instances have been final; no other court to appeal to and no law in the aftermath passed by the legislature to reverse the demolishing decisions of the court. It may however be that in one of the cases, the grounds for sticking out the legislation or a provision of it was found directly in the Constitution, the grounds in another appear to be a product of judicial interpretative approach. This is particularly with “duplication” as a ground that the court did not aver to any constitutional authority other than the approach in another jurisdiction even though the constitution in that jurisdiction is not the same with the Nigeria’s.

This part looks into the power of the judiciary to review executive actions. It would be observed that while the Constitution subjects the exercise of legislative powers to the jurisdiction of the Courts, no such supervisory role on the executive is expressly accorded the judiciary. In spite of this apparent omission, the judiciary assumed that power over the executive. It may however be argued that since the Constitution does not expressly provide for such power, it could not have being the intention of the Constitution to subject the exercise of executive powers to the supervisory jurisdiction of the courts. This assumption would be corollary and antithetical to the spirit and one of the fundamental objectives of separation of powers and constitutionalism. While separation of powers dictates institutional constraints, constitutionalism presupposes limited powers of state

106 Id. at 124–125

107 Id. at 126

108 Id. at 127

109 Id. at 129–132

110 see the concurring judgment of Ogundare, J. *supra* note 104 at 198

apparatus to the extent that powers of each organ of government are properly sourced from the constitution.

In *A.G. Lagos V A.G. Federation*,¹¹¹ the plaintiff, Lagos State¹¹² by originating summons instituted an action in the Supreme Court to determine whether, among things, the Federal Government (or the President) has power under the Constitution to withhold, for any reason, any statutory allocation due to the State from the Federation Account.¹¹³ This action was precipitated by a circular letter from the Minister of State for Finance and addressed to all State Governors and Chairmen of Local Government Councils in the Federation. The circular letter drew attention to an earlier letter from the President raising three fundamental constitutional issues, namely: (1) that some States have created new and conducted election into the New Local Government Councils; (2) that though the States are constitutionally empowered to create such Local Government Councils, but with the consequential confirmatory Act of the National Assembly, which the States have not secured; and (3) that some States have not complied with the requirements of section 162 (6) (7) of the Constitution the provisions of which require each state of the Federation to maintain a special account “state joint Local Government Account,” and to pay to each Local Government in the State certain percentage of its total revenue as may be prescribed by an Act of the National Assembly. It was on the second issue, non-compliance with the provisions of Section 8 (3) (5) that the President ordered that no allocation from the Federal Account should be released to those states mentioned in the letter.¹¹⁴

111 (2004) 20 NSCQR 99

112 Section 3 of the 1999 Constitution created thirty-six (Lagos State inclusive) states and seven hundred and sixty-eight local government areas in Nigeria. See parts I & II of first schedule to the Constitution.

113 Section 162 (1) provides that these shall be for the federation a special account to be called “the federation Account.” All revenues accruing to the federation, with certain exceptions, are to be paid into this Account subsection 3 provides that any amount standing to the credit of the Federation Account shall be distributed among the Federal, State and local governments on such term and in such manner as may be prescribed by the National Assembly subsection 5 provides the amount standing to the credit of local government councils in the Federation Account shall be allocated to the states for the benefit of their local government councils on such term and in such manner as may be prescribed by the National Assembly. A close scrutiny of these provisions would show a clear creation of trusteeship model between the Federal and State Government and the Local Government Councils on the one hand, and another between the States and their Local Government Council. The trust is that the Federal Government as the central authority collects all revenues accruing to the federation and deposits same in “the federation Account. This amount standing to the credit of the Account is neither for the central authority nor for its own benefit. The account is kept and maintained by the central authority for and on behalf of all Nigerians, and all level of governments for distribution. Also, the state governments collect from the federal authority any amount standing to the credit of the local government areas.

114 *supra* note 111 at 117–120

The defendant counter-claimed and asked the Court to declare, among others, that the plaintiff has no power under the Constitution to abolish Local Government Areas created by the Constitution unless in compliance with the provisions of Section 8 (5) of the Constitution. He also sought, *inter alia*, a declaration that the creation of additional Local Government Areas without compliance with provisions of the said section 8 (5) of the Constitution was illegal, unconstitutional, null and void.¹¹⁵ The provision of section 8 (5) of the Constitution is to the effect that the National Assembly shall pass a consequential Act effecting necessary amendment to the provisions of section 3 of the Constitution. To enable the National Assembly carry out its constitutional role in this regard, the House of Assembly of the state that has created additional Local Government Areas must duly inform the National Assembly.¹¹⁶

The plaintiff's argument was that the President has no right to withhold the payment of fund due to the Local Government Councils from the Federation Account under Section 162 subsection 3 of the 1999 Constitution. It also argued that the power of the President in that regard is purely executive, mandatory and not discretionary.¹¹⁷

The defendant also argued, *inter alia*, that since the plaintiff has created additional local government councils in the state, from 20 to 57, the defendant has no obligation under the Constitution to pay to the plaintiff the statutory allocation. It was further argued for the President that he has subscribed to the Oath of Allegiance; he is obliged to "preserve, protect and defend the Constitution of the Federal Republic of Nigeria." Also argued was the fact that the executive powers of the Federation are vested in the President and that by section 5 (6) of the Constitution "the executive powers extend to the execution and maintenance of the Constitution." It would be observed that the fundamental question of constitutional dimension was whether or not the President has express or implied power to so withhold or suspend statutory allocation that was due or payable to a State Government for the benefit of her Local Government Areas.

In his judgment, Chief Justice Uwais conceded that the President by the Oath he has taken on assumption of office the President has a duty "to protect and defend the Constitution and that the "executive powers" constitutionally extend to the execution and maintenance of the Constitution. The Lord Justice however asked, "does such power extend to the President committing an illegality?"¹¹⁸ It was pointed out that the attention of the Court was not drawn to any provision of the Constitution which empowers the President to exercise the power of withholding or suspending any payment of allocation from the Federation Account to Local Government Councils or to State Government on behalf of the Local Government

115 Id. at 121–122

116 The Constitution, section 8 (6)

117 supra note 111 at 123

118 Id. at 147

Councils as provided by section 162 subsection (3) and (5) of the Constitution. The Court finally held, *inter alia*, that the President has no power vested in him (by executive or administrative action) to suspend or withhold for any reason whatsoever the statutory allocation due and payable to Lagos state pursuant to section 162 (5) of the Constitution.¹¹⁹

The concurring judgment of Justice Kutigi, presently the Chief Justice,¹²⁰ emphasized that “nowhere in the constitution is the President expressly or impliedly authorized to withhold the Statutory Allocation payable to Lagos State...” The Supreme Court rightly decided that the action of the Mr. President lacks constitutional backing. Although the court did not categorically use the word “illegal” to describe the action of the President, that is the only conclusion that could be drawn from the answer: “...the Constitution does not and could not have intended that”¹²¹ provided for the question: “does such power extend to the President committing an illegality?” and thus illegal, where there is, on the one hand, no specific grant of power the President can not act merely upon his own discretion especially where the situation or the event is properly governed by an express provision in either the Constitution or an Act of the National Assembly. Nothing in section 162 or section 8 (5) of the Constitution suggests that the President could for whatever reason withhold or suspend statutory allocations due to a state from the Federation Account.

It must be recalled that the powers of each organ in a constitutional democracy like Nigeria must be traceable to the organic law of the country otherwise the exercise of those powers become illegal, unconstitutional, null and void. Thus far, the power of judicial review of the exercise of executive powers could not expressly be traced to the Constitution and yet the power is being exercised. Can it be regarded as “inherent”, if so, what does it portend bearing in mind that no other institution enjoys such inherent power? What is the extent of that power and whether exercised rightly or wrongly could any one questions the court, particularly where the power is exercised by the highest court? These are some of the likely issues for the future, but suffice for now to say that only the court, especially the highest court determines the extent of that inherent power and whether it has been exercised rightly or wrongly is its preserve subject only to the sovereign will of the people who may subsequently call for the removal of the red herring judge.

IV. Conclusion

The Constitution in most Countries of the world is declared as the supreme law of the land¹²², indeed the organic law that regulates the relationship between

119 Id.

120 Id. at 152–157

121 Id. at 147

122 see, for example, Constitution of Republic of Zambia, Article 1; Constitution of Japan,

the people and the government, between the organs and even between the country and other nations of the world. What then is the extent of that superiority? Is it over all other norms in the hierarchy of norms? Or is it over the organs of government that derive their existence and powers from the very Constitution? The superiority from within the circle of norms does not present any difficulty to determine. This is certainly because the people have, through the Constitution, subordinated all other laws to the forms and limits dictated by the Constitution. The lawmaking powers whether substantive, procedural, or even the delegated legislation all have the sources of their very existence and enforceability right from the Constitution epitomizing the will, desire and aspiration of the people in whom lies the sovereignty. It is the power conferred on the Constitution that makes it the superior law over all other forms of law, otherwise the constitution would have ranked equal with other laws. This means there is nothing special about the power except as the people have decided in their political reasoning and wisdom to accord the Constitution that special status so that it is not subject to the political forces that often dictates the course and direction of and the majority dictatorship characteristic of legislation or made a mere moral obligation the obedience to which may be a matter of mere choice or convenience.

Imperatively, a cursory look at the provision on status of the constitution wherever they are expressed would show clearly that the nature of the status and although it is the basis of other constitutional competences, it does not provide for ranking between the three departments of government. This suggests that a Constitution does address the issue of supremacy only between itself and the departments of government, but it is to be found necessary the ranking in this era of judicial review and the dwindling or decaying theory of parliamentary sovereignty. Today, the British membership of the European Community has thrown pebbles in the eyes of parliamentary sovereignty; any Act of the Parliament that is inconsistent with the Community Act is null and void.¹²³ The question of superiority between the Constitution and the Judiciary is not strange in legal writings. Corwin is perhaps the contemporary advocate of supremacism of the judiciary for he writes that the real Constitution is the Constitution as interpreted by the judiciary and that since the positive constitution is supreme the judicial version of it must equally be supreme.¹²⁴ The interpretative power of

Article 98; Constitution of Ghana, section 2 and Constitution of South Africa, section 2.

123 see, Lord Bingham, *Dicey Revisited*, 39 Public Law 44, 45–46 (2002); T.R.S. Allan, *Parliamentary Sovereignty: Law, Politics and Revolution*, 113 L.Q.R. 442, 443 (1997); Mark Elliot, one of the traditional defenders of parliamentary sovereignty has agreed in principle that British membership of the EU is capable of whittling down the omnicompetence of the Parliament. see, Mark Elliot, *The Demise of Parliamentary Sovereignty? The Implication for Justifying Judicial Review*, 115 L.Q.R.: 119, 125–130 (1999)

124 Edward S. Corwin, *Judicial Review in Action*, 74:7 University of Pennsylvania Law Review 639, 651–652(1926). This idea of judicial version of the Constitution has been markedly attacked certainly on grounds not really of concern presently, but suffices to say for now that what appears in the critique of Corwin's scholarship as “internal tension” is really

the Court gives it a latitude which makes it a distinct institution with the overriding power when it comes to law in action. This overriding power may be in America “an act of faith” as Corwin puts it, it is in Nigeria a demand of the Constitution as in other democracies where the Constitutions clothed the judiciary with the power of finality of decisions. This presupposes that the Constitution advertently creates dual supremacy as between itself and the judiciary¹²⁵ or that it unconsciously abdicates its superiority in favor of the Judiciary. The implicit new paradigm in this abdication is that the hitherto supremacy of the positive Constitution over the institutions is now a metaphor for the supremacy of the judiciary over all the other institutions. The explicit idea in the scheme is simply that if the real Constitution is the judicial version that is equally supreme as the positive Constitution, it logically follows that the judiciary with its finality of decisions is in a temple higher than the other institutions whose decisions or acts are subject to review by the judiciary. The judges' mode of appointment or removal has nothing to do in this affair save as has been ordained by the will of the sovereign people to make the institution answerable to the representatives of the people, ensure uniformity in the structural organization of the department and to ensure unity of purpose of governance. This has necessitated the institution of independence of the judiciary as a way of insulating the department from political forces and the partisan politicians that often characterize decision-making process in the executive and the legislature. This does not suggest that political consideration does not have any role to play or that it does not play any role in the interpretative process by the courts. This is important in so far as the courts also must look at the political spirit of the positive Constitution to determine and pronounce on the contents of the real, judicial version of the Constitution the legality of which is supreme and binding on all. This is certainly the demand of democracy and the new constitutionalism. The apprehension expressed by Elliot while criticizing Sir John Laws on the basis of grounds of judicial review by the courts in England that it is indeed a “trailer for a constitutional theory of judicial supremacy”¹²⁶ notwithstanding, though reasonably “demands the closest inspection”; the field is now clearer than before for judicial supremacy. Certainly, the judiciary in Nigeria with its power of finality of decisions on interpretative and adjudicatory jurisdictions cannot be on the same constitutional hierarchy with the other organs whose actions, inactions, omissions, decisions or interpretations of the law and the constitution may be call to question before the judiciary. The legislature though enjoys legislative supremacy while the executive also

intellectual blend between dogma and reality. see, Gary I. McDowell, Coke, Corwin and the Constitution, 55:3 *The Review of Politics* 393, 401–408 (1993)

125 Sedley, J. captured the true position of the situation in what His Lordship referred to as “mutuality of respect between two constitutional sovereignties”. see, Lord Harry Woolf, *Judicial Review-the tensions between the Executive and the Judiciary*, 114 L.Q.R 579, 581(1998)

126 Mark Elliot, *The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law* , 58:1 C. L. J. 121, 132 (1999)

has the same supremacy, the fact is still that their supremacies are still subject to the constitutional supervision by the judiciary to ensure that the will of the people of Nigeria as enshrined in the Constitution is strictly complied with by the organs, and that is the constitutionalism; the overriding judicial oversight of the political branches of government.