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JUDICIAL ACTIVISM AND DEMOCRATIZATION

NIGERIA IN A COMPARATIVE SETTING

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JUDICIAL ACTIVISM AND DEMOCRATIZATION
NIGERIA IN A COMPARATIVE SETTING

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About The Electoral Hub

The Electoral Hub, an affiliate of the Initiative for Research, Innovation and Advocacy in Development (IRIAD), is a multidisciplinary strategic think-tank which seeks to provide solutions to improve the credibility and integrity of the electoral process. The Electoral Hub complements the roles and activities of the different institutions, stakeholders and drivers of the electoral process and governance. The Electoral Hub aims to strengthen electoral governance and accountability in Nigeria through research, documentation, electoral education, policy and legal influencing and impact advocacy. We believe that the integrity of the electoral process is crucial in improving electoral governance and sustaining democracy in Nigeria. We also believe in solutions rooted in the principles of justice and equity.

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"A polity that seeks judicial answers to political questions runs the risk of undermining its judiciary while simultaneously perpetuating the underdevelopment of its political process."

[Ladipo Adamolekun, "Courts and Politics: a poisonous relationship." The Vanguard, February 11, 2019]

"…while the courts have discharged this important responsibility [election dispute adjudication] creditably, care should be taken not to drag the judiciary into the political arena too often as this can affect its credibility." [*Report of the Electoral Reform Committee,* 2008, p. 110, Section 3.6.3

1.1 Opening Reflections

These reflections on the connection between judicial activism and democratization in Nigeria begins with a sketch of the theoretical underpinnings of democratization in Nigeria, as it evolved through heightened and more vigorous opposition to colonial rule by Nigerian nationalists between the mid-1940s and the country's independence in 1960. The outcome of the anti-colonial struggle, described by some as "false decolonization," compacted with the country's 1960 Independence Constitution, was a constitutional and political architecture of liberal democracy and ethnofederalism. In what follows I shall paint a large picture, within which to situate and reflect on the role the judiciary is expected to play and has been playing in advancing liberal democratic and federal politics in the country since independence. The struggle for and with it the evolution of democracy in the country have flowed through several epochs. Starting from precolonial times, as political and social anthropologists of the rise and fall of precolonial empires and alien rule in the country have detailed,[1] the struggle continued through opposition to colonial rule, and other forms of alien rule, as exemplified in the development of both proto or peasant nationalism and modern nationalisms. It has continued since independence in 1960 with the struggle against so-called democratic but authoritarian single party or dominant- single-party civilian rule and military rule. The development passed through changing historical conjunctures and were characterized by hanging notions of democracy[2] and its constitutional and political representations.

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[1] See M.G. Smith, *Government in Zazzau, 1880-1950*, Oxford University Press, 1960; Robert S. Smith, *Kingdoms of the Yoruba,* University of Wisconsin Press, 3rd Edition, 2010; K. Onwuka Dike, *Trade and Politics in the Niger Delta, 1830-1835,* Oxford University Press, 1966

[2] On democracy and its various representations, e.g., liberal, social, populist, Schumpeterian, participatory, deliberative democracy etc. ,and as an "essentially contested concept," see Amy Gutmann, "Democracy," Chapter 19, in Robert E. Goodin and Philip Pettit (eds.), *A Companion to Contemporary Political Philosophy*, Oxford, England: Blackwell Publishing Ltd., 1995 On "essentially contested concepts, see W.B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society, New Series, Vol. 56 (1955-1956), pp.167-198)_*

My point of departure, however, is the 1947 Richards Constitution which provided the mould that framed not only the transmutation of regionalism into ethnoregionalism under the 1951 Constitution but also the transmutation of ethnoregionalism into ethnofederalism under the 1954, 1960, 1963, 1979, 1987 and 1999 constitutions of the country. There have been further transformations, since the 1979 Constitution from parliamentary to presidential form of government, alongside attempts to achieve some balance in the country's inherited lopsided federal structure. This was done through the creation of more states under military-civilian brokered constitutional and political reforms between 1967and 1999 to advance the transparency, inclusion, and accountability and related theoretical underpinnings of liberal democracy and ethnofederalism in the country.

The several processes of constitutional and political reform since the Richards Constitution, and the contradictions they spawned, must, therefore, be viewed as outcomes of the ups and downs, the ebb and flow of the struggle for democratic rule and its guardrails, including federalism in the country. Central to this struggle was the post-1947 Richards Constitution development of competitive party and electoral politics from its rudimentary beginnings with limited franchise in the mid-1920s to full-blown universal adult suffrage[3]. This was followed by party and electoral system reform to protect and advance electoral integrity and the electoral mandate by entrenched constitutional provisions to a) mute the winner-takes-all effect of the first-past-the post- electoral system with the spread requirement for the election of the country's president and state governors, beginning with the 1979 constitution; b) limit the tenure of the country's president and state governors, beginning with the 1979 Constitution, to two consecutive fixed terms of four years each; and c) enhance the independence of the country's national electoral management body under the 1989 and the 1999 Constitutions.

A common thread in the tapestry woven by the country's complex nationalist struggle for independence is the creation of a democratic state, designed as constitutional or limited government, whose core element is the rule of law, under an ethnofederal system of government to drive the county's intertwined nation-building and state-formation processes. The rule of law is the doctrine that law, properly understood as the rule of law and not rule by men, should rule. It, provides a defining characteristic of limited or constitutional government, not monarchical or tyrannical or totalitarian rule, with provisions for separation of powers, including checks and balance, civil and political rights of citizens, competitive party and electoral politics. It is, therefore, a compound doctrine housing a complex system of political

[3] See Tamuno Tekena, *Nigeria and Elective Representation, 1923-1947*, Heinemann, 1966; T.O. Elias, *Nigeria: The Development of Its Laws and Constitution*, Stevens and Sons, 1967

morality (the spirit of the law) and its derivate constitutional provisions (the letter of the law) set out to guide and assess the operation of public institutions, public policy, and the governance processes of democratic government and in the case of Nigeria, federalism. It provides normative rules to regulate the behaviour of public authorities, individual and social interactions generally and to serve as guardrails to insulate them from degenerating into the rule of the powerful 'the rule of man' in a hypothetical "State of Nature," where life would, otherwise, be "brutish, nasty and short." In the architecture of democracy and federalism thus designed, a significant guardrail role is assigned in Nigeria to the judiciary and the judicial process, with provisions to insulate the judiciary from partisan control for personal and political advantage. It is in this sense that, under a species of democratic rule, the judiciary is said to be the last hope of the ordinary citizen[4].

1.2. Normative Pillars of Judicial Activism in Nigeria

Among the normative and constitutional pillars of liberal democracy and federalism so described, under Nigeria's constitutions since the 1979 Constitution, are the following:

a) the separation of powers, moderated by the notion of checks and balances, under a system of countervailing but partial fusion of powers intended to prevent and check arbitrariness and abuse in the exercise of power, particularly by executive, legislative and judicial officeholders, and ensure accountability and transparency in the official behaviour and conduct of public authorities;

b) the division of entrenched constitutional and political power, by means of a legislative list, between the federal and unit level governments;

c) constitutional judicial review;[5]

[4] Lord Bingham, "The Rule of Law," Cambridge Law Journal, Vol. 66, No. 1, March 2007, pp67-87, where, although he admits that "the meaning of the concept has to some extent evolved over time, and is no doubt likely to continue to do so,"(p.69] tracing the origins of the principle A.V. Dicey's Introduction to the Study of the Law of the Constitution: An Introduction, he asserts that "the core of the existing principle is, I suggest, that all persons and authorities in the state, whether public or private, should be bound by and entitled to the benefits of law publicly and prospectively promulgated and publicly administered in the courts."[p.69],

[5] Constitutional judicial review, with the adjectival "constitutional" is used deliberately to distinguish it from judicial review ordinarily understood as judicial review of actions of public administrative agencies that do not involve declaration by the courts that they are unconstitutional. Thus, constitutional judicial review is used here in the sense of the entrenched powers of the judiciary to review and/or declare unconstitutional or invalid laws passed by parliament and actions by the executive branch at the federal and state levels.

d) democratic political succession with fixed presidential term limits within the framework of credible competitive party and electoral politics, managed and conducted by an independent electoral commission and subject to judicial adjudication of electoral disputes;

e) recognition, promotion and protection of positive rights such as cultural, economic and social rights, in addition to customary civil and political rights;

f) pursuit of affirmative action-type public policy to promote and protect cultural, ethno-regional, gender, religious and other identity-based diversities, especially of historically marginalized groups;

g) deconcentration of political power through entrenched provisions of legislative powers between federal and subnational levels of government;

h) political party reform to promote internal democracy and diversity within the political parties; and

i) establishment of horizontal, democracy-promoting governance institutions, such as human rights commission, electoral commission, anti-corruption agencies, public complaints commission, collectively envisioned and designed to serve as a fourth branch of government to ensure accountability and transparency in public political life by insulating them from partisan political control and influence.

It is within the constitutional and political framework of liberal democracy and federalism, so defined, that the role of the judiciary in Nigeria's political process must be contextualized. But this is only a broad sketch. For liberal democracy and federalism as theory, as ideal types and contested concepts, must be separated from their practice, their various representations, and the contradictions they spawn. Without elaboration, this point draws on Plato's Theory of Forms[6] to suggest that any discussion of the judicial role in Nigeria is intricately bound up with the ambiguities and contradictions inherent in existential representations of the Ideal Form of Democracy and Federalism that are subject to and shaped by their domestic and external economic, political, and sociocultural environment.

[6] Plato, *The Republic*, Books III-VII, IK, X

Contextualizing Nigeria's Struggle for Democracy and Federalism

2.1 Core Elements of Democracy and Federalism in Nigeria

Defining, explaining, and understanding the role of the judiciary and judicial review in the development of liberal democratic politics and federalism in Nigeria, therefore, require contextualization within three salient elements of Nigeria's constitutional and political history. The first element, already referred to, is the transmutation of the regionalism of the 1947 Richards Constitution first into ethnoregionalism under the 1951 Constitution and into ethnofederalism under the country's 1954 and 1960 constitutions. The transmutation into ethnofederalism under the 1960 Constitution diminished the notion of parliamentary supremacy[7] in the inherited British notion of liberal democracy by entrenching constitutional judicial review in the adjudication of constitutional disputes or conflict of laws between regional/state and federal jurisdictions, and between regional/state jurisdictions, with the Privy Council in London at the apex of the judicial branch, under the 1960 Constitution. Under the country's 1963 Republican Constitution, the Supreme Court of Nigeria replaced the Privy Council as the country's apex court.

The second element is the modification of the inherited notion of democracy that framed the architecture of the 1960 Constitution, along social democratic lines, with the provisions of Chapter II of the country's 1979 Constitution. The modification is partly due to Nigeria's variant of federalism as ethnofederalism in its recognition and accommodation of collective ethnic and other group rights, which liberal democratic theory does not typically recognize.[8] But, Chapter II of the 1979 Constitution, unlike the country's 1960 and 1963 constitutions explicitly recognizes group rights as core elements in its enumeration of the "fundamental objectives and directive principles of state policy, "[9]including notably its federal character clauses. Additionally, Nigeria's accession to some international, including African codes and standards, such as the *African Charter of Human and Peoples Rights*, the *African Peer Review Mechanism*, the *Millennium Development Goals*, and the *Sustainable Development Goals*, has since committed the country to domesticate them in

[7]This is the notion that the parliament has the power to enact or repeal any law.

[8] See Vernon Van Dyke, "The Individual, the State, and Ethnic Communities in Political Theory, *World Politics*, Volume 29, Issue 3, April 1977, pp. 343-369 which points to problems that group/collective rights pose for liberal democratic theory founded on the theory of possessive individualism. For modifications of liberal democratic theory, in this respect, by a "liberal theory of minority rights" that agues for the accommodation of fractured citizenship rights of historically marginalized groups such as racial, linguistic, women, children and ethno-cultural and religious groups , in the liberal democratic state, such as those enumerated under Chapter II of Nigeria's 1999 Constitution, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: Clarendon Press, 1995

[9] It is noteworthy in this respect that the 1960 and 1963 Constitutions of Nigeria only provided for the customary civil and political rights which are individual rights.

national legislation and to pursue public policy to promote collective group rights, such as child, ethnic, women's and other marginalized groups' rights.

The evolution of the country's ethnofederalism between 1951 and 1960 was driven by a notion of collective group rights, specifically ethnic group rights and positive socioeconomic rights that radically modified the underlying theory of individual rights that remains at the core of the liberal democratic state.[10] Although the 1960 Constitution entrenched a Bill of Rights, intended to mute the country's ethnic minority groups' fears of marginalization, which the 1958 Report of the Willink Commission of Inquiry[11] found justifiable, the Bill of Rights was an enumeration of civil and political rights of the individual. On the other hand, Chapter II of the 1979 Constitution recognized and provided for positive human development (cultural and socioeconomic) rights as group rights which public authorities are enjoined to secure through public policy and the allocation and distribution of social surplus by the state.

There is a conflict between the common citizenship rights, essentially a Bill of Rights, framed as individual, i.e. civil and political rights of the citizen *per se*, under Chapter IV provisions of the 1979 and 1999 Constitutions, and Chapter II of both constitutions, framed as collective and socioeconomic group rights. The socioeconomic group rights are not justiciable under Section 6(6)(c) of the1979 Constitution as civil and political rights are. However, some of the socioeconomic group rights have been held enforceable by courts in other jurisdictions, e.g., the ECOWAS Court, in view of Nigeria's accession to and domestication of the *African Charter on Human and Peoples' Rights* and related African regional and continental codes and standards. For example in a landmark ruling delivered in October 2010 in response to a petition instituted before it by the Lagos-based NGO, the Socio-Economic Rights and Accountability Project (SERAP), the ECOWAS Court ordered the Federal Government of Nigeria to provide, as of right, free and compulsory education to every Nigerian child to quality education, the right to dignity, the right of people to their wealth and natural resources, and the right to economic and social development which the provisions of the African Charter on Human and People's Rights guarantee.[12]

[10] See footnote 6 above

[11] The Willink Commission was set up by the colonial administration in 1957 to look into the fears of domination of ethnic minorities and their demand for the creation of new regions in their ethnic homelands in each of the 3 regions in the country at the time. See

[12] Bunmi Awolusi, ECOWAS Court Orders Federal Government of Nigeria to Provide Free Education, October 1, 2010; See, also Falana, Femi [2010], *ECOWAS Court: Law and Practice*, Lagos: Legaltext Publishing Company Limited; and L. Adele Jinadu, "African Constitutional Jurisdictions and Regional Integration: Brief Intervention,"

The third element is the structural character of the Nigerian state, as the site for "nurture" or "booty" capitalism," where the political class, the country's proxy petit-bourgeoisie, exhibits "the tendency to apply force ubiquitously in political and economic competition and also to appropriate surplus by force." [13] The political and legal culture spawned by the political economy of booty capitalism in the country provides a hostile environment for strengthening the country's democratization process and the faithful pursuit of the "fundamental objectives and directive principles of state policy," by "all organs of government, and by all authorities and persons exercising legislative, executive and judicial power" in the country, as provided under Section 13 of the 1999 Constitution. But Nigeria's massive structural and human development deficits make it difficult for the judiciary to serve as the last hope of the ordinary citizen, the protector of even the civil and political rights of the citizen, such as those guaranteed under Chapter IV of Nigeria's Constitution.

The protection of civil and political rights, including the right to vote and be voted for, and the protection of electoral mandate is but a myth without the guarantees and the enabling policy measures and facilities to enable citizens enjoy socioeconomic and cultural rights, provided under Chapter II of the Constitution. That it is a myth, an expression of "repressive tolerance," is well-captured in the following critique of the "ideology of Advanced Industrial Society" in the Western Liberal Capitalist state and in the Communist state by Marcuse: "Under the rule of a repressive whole, liberty can be made into a powerful instrument of domination. The range of choice open to the individual is not the decisive factor in determining the range of human freedom, but what *can* be chosen and what *is* chosen by the individual. The criterion for free choice can never be an absolute one, but neither is it entirely relative. Free elections of masters do not abolish the masters or the slaves. Free choice among a wide variety of goods and services does not signify freedom if these goods and services sustain social controls over a life of toil and fear---that is, if they sustain alienation…."[14]

Prepared at the Conference of Constitutional Jurisdictions of Africa (CCJA), 2nd Congress, "Constitutional Justice in Africa: Current Situation and Outlook, "at Cotonou, 9, 10 and 11 May 2013

[13] See Sayre Schatz, *Economics, Politics and Administration in Government Lending: The Regional Boards of Nigeria*, Ibadan: Oxford University Press, 1970; Sayre Schatz, *Nigerian Capitalism,* Berkeley: University of California Press, 1977; Claude Ake, "Explaining Political Instability in New States," *The Journal of Modern African Studies*, Vol. 11, No. 3, September 1973, p. 357; See also, *A Political Economy of Africa*, Ibadan: Longmans Press, 1984.

[14] Herbert Marcuse, One-Dimensional Man, Boston: Beacon Press, 1964, pp.7-8.

2.2 Public Perceptions of the Political Embeddedness of the Judiciary

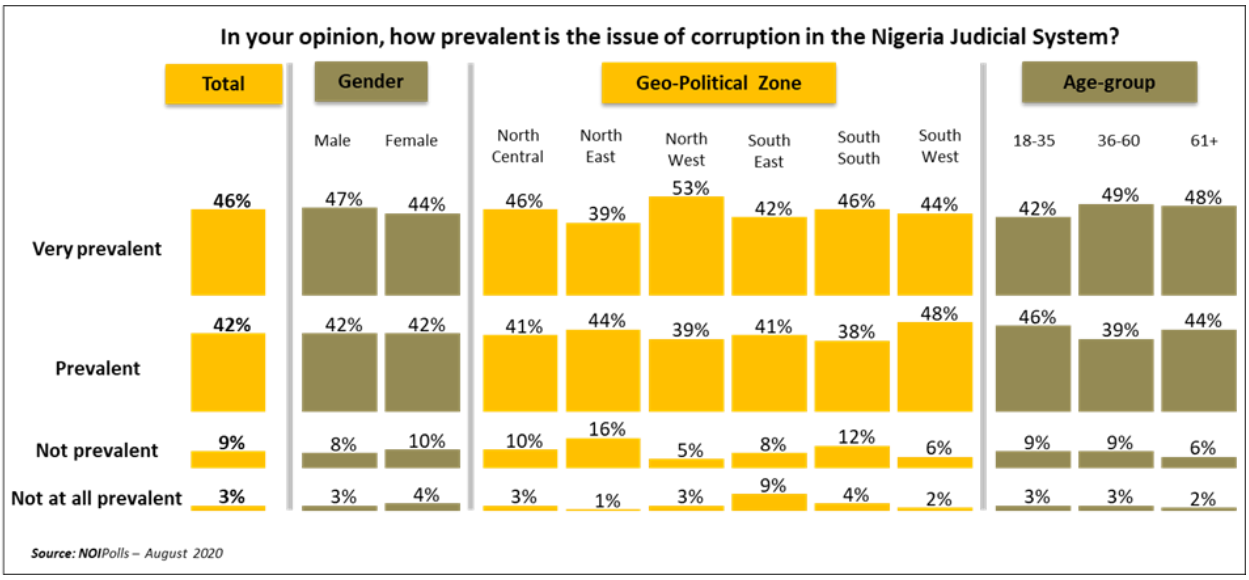
In the democratic state worldwide, there is now serious concern over the political embeddedness of the judiciary through the failure of politicians and of the legislative process to resolve political questions, particularly economic, ethnocommunal, including racial ones and social questions over the role of the state as a partisan in managing diversity. The embeddedness has led Lord Jonathan Sumpton, who served as a Justice of the U.K. Supreme Court (2012-2018) to question whether, "as the cynics have suggested," the rule of law is "really no more than a euphemism for the rule of lawyers."[15] In Kenya, Onyoyo observes that, "political disputes, with high stakes in the society, involve more than the province of the law…the law does not work with mathematical axioms and precision, but is affected *inter alia* by other pertinent opinions of the judge *in persona* based on experience."[16] In Nigeria "the expanding empire of law" has not only significantly embedded and enmeshed the judiciary in the country's party and electoral politics, it has also tended to undermine the credibility of the judiciary in the perception of the citizen.

To illustrate, a 2020 Nigerian Corruption System Perception Poll was conducted by the NOI across the country's six geo-political zones [Northcentral, Northeast, Northwest, Southeast, South-South, and Southwest], with respondents randomly selected and stratified into Gender (Male/Female) and Age-Group (18-35/36-60, and 61+). The findings of the survey show that, in response to the question, "In your opinion, how prevalent is the issue of corruption in the Nigerian Judiciary?" 88% of the respondents, (made up of 46% very prevalent; and 42% prevalent), believed that corruption was rampant in the country's judiciary, while 12% percent (made up of 3% 'not at all prevalent, and 9 percent 'not prevalent') believed corruption was not prevalent in the judiciary [See Figure I]

[15] Jonathan Sumption, *The Trials of the State: Law and the Decline of Politics*, London: Profile Books Ltd., 2019, p.4

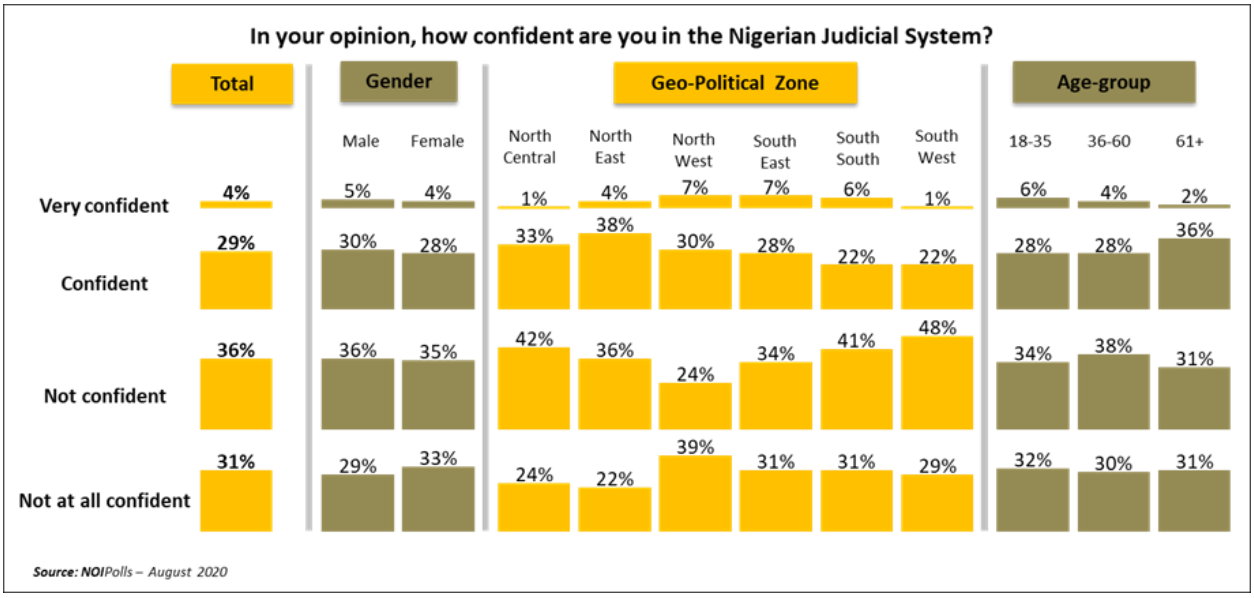
[16] Peter Onyango Onyoyo, Judicial Activism and Disenchantment of Legal Formalism in Kenya, in mimeo., p.5.

Figure I: Prevalence of Corruption in the Nigerian Judicia System



In response to the question, "…how confident are you in the Nigerian Judicial System 35% of the respondents, (made up of 4% very confident; and 31% confident), said they were confident in the country's judiciary, while 67% (made up of 36% 'not confident' and 31% 'not at all confident)') said they were "not confident" and "not at all confident" in the country's judiciary. [See Table II]

Figure II: Confidence in the Nigerian Judicial System



These findings show a serious rise in public perception of corruption, and lack of confidence in Nigeria's judiciary when compared with an earlier survey in 2003, which found that 43% of citizens believed that "most" or "all" of "judges and magistrates are

corrupt."[17] These negative perceptions also feed the perception that the judiciary is vicariously and objectively, if not deliberately, protecting and advancing the interest of the political class and their grand larceny of the public purse.

The perceptions are not unrelated to other concerns in the country over how (a) Supreme Court Justices are appointed; (b)the Chief Justice of the Supreme Court was removed from office in 2019, before the country's 2019 general elections on the basis of allegedly trumped up charges of corruption against him by the country's President, who was due for reelection that year,; and (c)the country's Chief Justice was "forced" to resign in June 2022, amidst allegations of a lack of transparency and accountability in the management and disbursement of the budget of the Supreme Court imputed to his leadership of the court in a leaked letter addressed to him by 14 other Justices of the Supreme Court.

2.3 The Effect of a Weak Public Interest Approach to Law

It is not insignificant, in this respect, that a public interest or social action approach to law remains on the fringes of the mainstream focus of Nigeria's legal education, legal profession and litigation. It is a weak link in the chain of legal education and practice in the country, with the public interest section of the Nigeria Bar Association consigned to the fringes of the Association. This has tended to encourage a technical, mechanical and judicial restraint approach, as opposed to a judicial activist one, to legal interpretation. Condemning excessive and uncritical application of such an approach, Udo Udoma, JSCN, argues that, "mere technical interpretation of statutes are to some extent inadmissible in a way so as to defeat the principle of governance enshrined in the constitution…I do not conceive it to be the duty of this court so to construe any of the provisions of the constitution as to defeat the obvious ends the constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends."[18]

Little wonder that the country's legal profession is generally indifferent to the public interest, people-centered provision of Section 13, Chapter II of Nigeria's Constitution on the economic, social and human development and security rights of the citizen. The indifference has dissociated the law in Nigeria from its contemporary material and political context, and from what should be the ethical-social purpose of law in promoting and

[17] Peter Lewis and Etannibi Alemika, *Seeking the Democratic Dividend: Public Attitudes and Attempted Reform in Nigeria,* Afrobarometer Working Paper No.52, 2005, p.37

[18] *Nafiu Rabiu v The State*, [1980]SC 198-149 and 326 respectively' Quoted in B. Obinna Okeke, "Judicial Activism v Judicial Passivity in Interpreting the Nigerian Constitution," *The International and Comparative Law Journal*, Vol. 36, No. 4, October 1987, p. 803.

advancing justice and social change, anchored on an overarching commitment to promoting what has been described as judicial fidelity to the law.[19] The mainstream indifference, for example, has tended to privilege a conservative focus on *locus standi* over one on *suo moto cognizance.* It has, thus, effectively prevented access to the courts by the citizen. As Fatayi-Williams, CJN puts it, "I take significant cognizance that Nigeria is a developing country…with a federal constitution…To deny any member of such a society …access to a court of law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a recipe for organized disenchantment with the judicial process…" [20]

What do these three elements indicate about the character of the nexus between judicial activism, and democracy and federalism in Nigeria? How do we untangle the nexus to explain how the three elements shape it? The answers to the questions take the form of reflections on (a)the meaning of judicial activism, particularly as enunciated by the sociological movement in jurisprudence,[21] illustrated with decisions on constitutional cases by courts in the U.S., the United Kingdom, and India, and (b) whether and, if so, how judicial activism, so understood and illustrated, has unfolded as an approach to the judicial decisions of the courts, particularly the Supreme Court, in Nigeria, in some landmark cases that overturned legislation and executive branch action, and in the adjudication of electoral disputes.

[19] See Emmett Macfarlane, "Review of Jeffrey Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging,* Oxford: Oxford University Press, 2010 "*Law and Politics Review*, Vol. 20, No. 11, November 2010, pp. 590-594.
[20] Quoted in Okeke, Judicial Activism and Judicial Passivity," p. 804
[21] See Alan Hunt, *The Sociological Movement in Law*, London: Palgrave Macmillan, 1978; Paul L. Rosen, The Supreme Court and Social Science, Urbana, Illinois: University of Illinois Press, 1972

What is Judicial Activism?

3.1 Theoretical Foundations

Scholars of legal theory, constitutional law, political science and the sociology of law disagree over how to characterize the approaches and factors that shape the determination of cases by judges.[22] The disagreement touches on the following, among other questions: Do or should judges mechanically apply the law? Do judges interpret or make, i.e., 'legislate' laws? What does it mean to apply the law "mechanically", or to "interpret," or to "legislate" it? These questions draw attention to concerns over the consequences or implications of what has been described as "Law's Expanding Empire,"[23] by which is meant the deepening embeddedness of the judiciary in the political thicket in several democracies, due to the "perpetual crises of democracy."[24] The embeddedness has tended to blur the doctrine of separation of powers, with judicial interpretation allegedly merging into judicial legislation in federal systems. In parliamentary systems, such as the United Kingdom and India, it has raised questions about the sovereignty of Parliament.

What explains the embeddedness? It is largely due to the courts' increasingly being called upon to adjudicate political problems, or to remove gaps, lacunas in legislation, and in unanticipated consequences or gaps revealed in the implementation of public policy, which the executive branch and the legislature, have the joint responsibility to address but which they have proved unable, incapable, or reluctant to do for reasons of strategic partisan competitive party and electoral advantage. Some of the unresolved political problems over policy issues end up in courts for determination, with judges confronted with competing arguments and options that cannot be resolved mechanically. In the words of the eminent U.S. jurist and Associate Justice of the U.S. Supreme Court, Benjamin Cardoso, "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."[25] As a result, the development has given rise to competing "theories of

[22] Cf the debate between Hart and Dworkin over whether judges have discretion or not in reaching their decisions. See, Robert J. Yanal, "Hart, Dworkin, Judges, and the New Law," *Monist*, Volume 68, No. 3, 1985, pp.388-402. Also, James A. Capurso, "How Judges Judge: Theories on Judicial Decision Making," *University of Baltimore Law Forum*, Vol. 29, No. 1, Fall 1988

[23] See Jonathan Sumption, *Trials of the State: The Law and the Decline of Politics*, Chapter I, Law's Expanding Empire, pp.3-19, London: Profile Books Ltd., 2019

[24] Guillermo O'Donnell, "The Perpetual Crises of Democracy," *Journal of Democracy*, Volume 18, Issue 1, January 207, pp5-11

[25] Benjamin N. Cardoso, *The Nature of the Judicial Process*, Yale University Press, 1927. Quoted in Timothy J. Capurso, "How Judges Judge: Theories on Judicial Decision Making*," University of Baltimore Law Forum*, Vol.29, Number 1, Article 2 Fall1998, p.5

interpretation, adjudication, and the law itself."[26] A dimension of the debate is the distinction drawn, notably in the United States, but increasingly in other jurisdictions between judicial activism and judicial strict constructionism or judicial originalism in the interpretation of constitutions and legislation by courts.

A useful statement of judicial activism describes it as "a ruling issued by a judge that overlooks legal precedents or past constitutional interpretations in favor of protecting individual rights or serving a broader political agenda."[27] On this view, judges do not 'mechanically' apply the law only but are also influenced by political and socio-cultural considerations, although it is also sometimes argued that activist conservative judges in the U.S. have tended to strike down federal laws and activist liberal ones likely to strike down state laws. Opposed to judicial activism is judicial strict constructionism or judicial originalism used to describe the approach of judges who deliver rulings based on the "original intent" of the Constitution, or who uphold precedents set by previous courts, under the principle of *stare decisis ("to stand by things previously decided").* Thus, judicial activism has been criticized in the U.S. and elsewhere for its departure from the Austinian, positivist view of law as the command of the sovereign, for its violation of the principle of *stare decisis,* and for overlooking or ignoring constitutional provisions for separation of powers, by "legislating from the bench."

Judicial activism, therefore, rejects an approach to judicial decision-making that has a general tendency to dissociate law from its cultural, economic, political and social environment; and its typically "mechanical" and "rigid" deductions of decisions from established principles without regard to their practical effect or consequences in standing in the way of social justice or social reform. To the question, "are judges morally obligated to adhere to the law? the answer of the sociological movement in jurisprudence is that "judges are not morally obligated to adhere to the law when they believe the legally required result is unjust, even in reasonably just legal systems."[28]

[26] Emmett Macfarlane Review of Jeffrey Brand-Ballard, "Limits of Legality: The Ethics of Lawless Judges," *Law and Politics Review*, Vol.20, No. 2, November 2010, pp.590.
[27] Eliana Spitzer, "What Is Judicial Activism?"
[28] Macfarlane, *Law and Politics Review*, Vol.20, No. 2, November 2010, pp.590.

3.2 The Nexus Between Judicial Activism and Democracy: U.S., U.K. and India

3.2.1 Judicial Activism Trends in the United States

The United States Supreme Court, under the leadership of Chief Justice Earl Warren (The Earl Warren Court,1953-1969), and the current one under the leadership of Justice John G. Roberts (2005), are generally viewed as the model judicial activist courts in recent U.S. constitutional history. But judicial activism and judicial restraint, as they have developed in the United States as approaches to judicial decision-making, have been reflected in the decisions of both liberal majority courts (e.g., the Earl Warren Court) and conservative majority courts (the John G. Roberts court) in the country. As Spitzer points out, "restraint is not exclusive to politically conservative judges. Restraint was favored by the liberals during the New Deal era because they didn't want progressive legislation overturned."[29] Thus, whether judicial activism or judicial restraint is espoused by either a liberal or conservative judge depends on prevailing conjunctures or "cyclical," epochal variations in the electoral politics and public policymaking process in the democratic state.

The following examples illustrate the "cyclical" variation in judicial activism and judicial restraint in judicial decision-making in the U.S. During the first-half of the Twentieth Century, the conservative majority on the U.S. Supreme Court, in an expression of judicial activism, struck down, based on their conservative, free-market capitalist ideology socially progressive 'welfare' legislation, enacted to back President Franklin Delano Roosevelt's New Deal programmes. The Court's judicial activism prompted President Roosevelt to threaten to "pack" the Court with judges who espoused and were willing to support and uphold President Roosevelt's New Deal programmes. However, during the second-half of the Twentieth Century (1953-1969), an activist Supreme Court (the Warren Court), with a liberal-inclined majority, under the leadership of Chief Justice Earl Warren, who was nominated by a Republican, President Dwight Eisenhower, expanded civil rights and civil liberties, as well as the powers of the judiciary and the federal government, in the following landmark decision on vexed political issues:

a) Racial Segregation: *Brown v. Board of Education* (1954*)*; and b) *Cooper v. Aaron (1958),* which paved the way for the *Civil Rights Act 1964,* and the *Voting Rights Act, 1965* by the U.S. Congress
b) Equal Representation—'One Man, One Vote': *Reynolds v. Sims (1964*)

[29] Elianna Spitzer, "What Is Judicial Activism?" *ThoughtCo*, Aug. 27, 2020, thoughtco.com/judicial-activism-definition-examples-4172436.

c) Due Process and Rights of Defendants*: Mapp v. Ohio (1961). Gideon v. Wainwright*; (1963; and *Miranda v. Arizona (1966).*
d) First Amendment Rights**:** *Engel v. Vitale (1962); and Griswold v. Connecticut (1965)*

But the Twenty-First Century has witnessed the resurgence of the dominance of conservative judges on the Supreme Court, with the striking down of campaign reform laws designed to reduce the influence of corporate campaign finance that tended to favour conservative candidates during state and federal elections; and the more recent decision of June 2022 in *Dobbs v. Jackson Women's Health Organization* that overturned the precedent set by the landmark ruling in Roe v. Wade (1973) and by Planned Parenthood v. Casey (1992), by abolishing the constitutional right to abortion in the U.S., and returning the power to define abortion or restrictions to the right to abortions to the states. As was the case during the time of President Roosevelt, there has been demand for "packing" the Supreme Court or to impose term limits on the tenure of the Chief Justice and Associate Justices of the Supreme Court. As a result of the public controversy surrounding landmark judgments by the Roberts Court, the U.S. President Joe Biden set up the bi-partisan Presidential Commission on the Supreme Court of the United States on April, 21, 2021, under Executive Order 14023. The remit of the Commission was "…to provide an analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals. The topics it will examine include the genesis of the reform debate; the Court's role in the Constitutional system; the length of service and turnover of justices on the Court; the membership and size of the Court; and the Court's case selection, rules, and practices."[30]

Concerns over the political ramifications and consequences of judicial activism and judicial restraint as approaches to judicial-decision-making by the U. S. Supreme Court explain to a large extent why the confirmation process by the U.S. Senate of nominations to fill vacant seats on the court has over several decades turned the searchlight on their judicial and political philosophies in a manner that has embedded the Supreme Court in the country's increasingly divisive and acrimonious ideological and political thicket, so much so that it has become a salient issue in the country's presidential and congressional elections in recent years. A casualty of the embeddedness is the integrity of the Supreme Court, which has sunk to very low levels in public opinion survey, following the Court's June 2022 ruling in Dobbs v. Jackson Women's Health Organization. A public opinion survey of the ruling conducted between July 5 and 12, 2022 by the Marquette Law School into how the country views the Supreme Court found that 61% of respondents said they disapproved of

[30] President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States". *whitehouse.gov*. April 9, 2021.

the nine justices and 38% said they approved, as opposed to 60 % approval and 39% disapproval in a similar survey conducted a year earlier in July 2021 by the same Marquette Law School.[31]

But it is now generally accepted that the dichotomy between text and context in the interpretation of constitutions needs not be overstretched because of the ambiguity of language as such and particularly of the language in which legal texts are typically written. Changes in meaning and context of constitutional texts and legislation over time leave room for disagreement over their interpretation and contemporary meaning. A dimension of the disagreement is that encapsulated in the notion of the "living constitution" as a living document, evolving over the years, and subject to reinterpretation under changing cultural, economic, political and social contexts.[32]

3.2.2 Judicial Activism Trends in the United Kingdom

In the United Kingdom, the joint landmark constitutional law cases on the limits of the power of royal prerogative to prorogue the U.K. Parliament, were decided in *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* ([2019] UKSC 41) by the U.K. Supreme Court on 24 September 2019. In a unanimous judgment by eleven justices, the court found that (a) the matter was justiciable; (b) Johnson's [the Prime Minister's] advice [to the Queen to prorogue Parliament] was unlawful; (c) the Order in Council permitting the prorogation was null and of no effect; and (d) Parliament had, in fact, not been prorogued.

The significance of the judgment as an example of judicial activism lies in "its treatment of the principle of justiciability, its interpretation of elements of the British constitution, and its potential implications for the separation of powers." While some praised the judgment as "of huge importance with major implications for our [the U.K.] system of government," in which the court set down a ruling to stop constitutional players "who don't play by the rules," and a legal landmark for transforming the principle of parliamentary sovereignty into "hard and novel limits on executive authority"; others condemned it as "a startling judgment," "badly mistaken," showing "a clear loss of faith in the political process"; "a historic mistake;" "a misuse of judicial power"; and a "constitutional coup."[33]

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[31] https://www.msn.com/en-us/news/politics/60-25-of-americans-approved-of-the-supreme-court-last-july-now-its-38-25-according-to-a-new-poll/ar-AAZMqi3

[32] See Kermit Roosevelt III, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions*, New Haven, CT: Yale University Press, 2008

[33] https://en.wikipedia.org/wiki/R_Miller_v_The_Prime_Minister_and_Cherry_vAdvocate_General_for_Scotland, accessed August 6, 2022

3.2.3 Judicial Activism Trends in India

At independence in August 1947, India's Supreme Court was vested with broad appellate jurisdiction over the interpretation of the country's constitution and it was at some point described as "the guardian of the [country's] social revolution" and the "guarantor of civil and minority rights,"[34] because of its broad approach to constitutional interpretation. Examples of the broad approach include the court's a) embrace of public interest litigation "to reach out directly to the public and take cognizance though the litigant may not be the victim, *suo moto cognizance* [allowing] the court to take up such cases on its own,"[35] and b) expansion of rights to include justiciable socioeconomic rights, such as the right to education; right to health; and right to shelter.

The highwater mark of the court's judicial activism was in the late 1970s and mid-1990s. During the period, the *Directive Principles* under Part IV of the *Constitution of India* were interpreted by the court "to supplement fundamental rights in achieving a Welfare State," to mean that (a) "Parliament can amend the fundamental rights for implementing the Directives, so long as it does not touch the [constitution's]basic features," and (b) "constitutional provisions (apart from fundamental human rights) may be construed in the light of the Directive Principles."[36] Thus, Article 37 of the Constitution of India, "Directive Principles of State Policy" has been given a "positive aspect" by decisions of the Supreme Court of India, in the following cases: *State of Kerala v. N.M. Thomas* (AIR, 1976SC496*; Laxmi Kant v. Union of India* AIR (1987 SC232); and *A.B.K. Singh v. Union of India* AIR 1981 SC298, 335) .

But Chowdry contends that the court's activism "did not last, while it did, it was by no means consistent…it was largely procedural and, *a fortiori*. The court never truly embraced the *Directive Principles* as a site for sustained activism. This failure is rooted in the nature of the court as a strategic political actor seeking public legitimation rather than a "rights revolution"."[37] Chowdry's argument is that there have been cyclical shifts in the court's activism, between a liberal judicial activism and a conservative judicial restraint that reflect

[34] Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy*, London: Pan Books, 2008, pp.108-109.
[35] Satbir Lochan Singh Chowdry, "Where did the 'revolution' go? The Supreme Court of India and socioeconomic rights since the end of Emergency rule," www.academia.edu
[36] The Constitution of India, with selective comments by P.M. Bakshi, Fifth Edition, Delhi: Universal Law Publishing Co. PVT. Ltd, 2002.
[37] Chowdry, "Where did the 'revolution' go? "www.academia.edu, p.1

power alternations between supporters of state-driven reform, on the one hand, and supporters of neo-liberal market-driven reform, on the other hand. [38]

3.3 Teasing out the notion of Judicial Activism in Nigeria

It is useful to provide the following context for teasing out trends in judicial activism in Nigeria since independence. Firstly, the country operated a parliamentary system between 1960 and 1966, followed by a long interregnum of military rule between 1966 and 1979, before a presidential system was introduced under civilian democratic regimes between 1979 and 1983, and another stretch of military rule between 1984 and 1999.

The federal system of government inherited at independence in 1960 contained specific constitutional clauses that entrenched constitutional judicial review, in a way that severely limited the notion of parliamentary sovereignty and entrenched the doctrine of separation of powers between the executive, legislative and judicial branches of government. Secondly, the political mobilization of ethnicity and with it the historically deep-rooted political salience of ethnicity as the driver of party and electoral competition at both the regional and federal levels have tended to confine ideological politics to the fringes of debate over party manifestoes and public policy in the country. This development diluted the importance of the differences between the major political parties along an ideological spectrum ranging from the social or liberal conservatism of the NPC, the social democratic tendencies of the AG and the NCNC, to the populist and socialist tendencies of the NEPU, in the country between 1960 and the military coup of January 1965.

The general trend towards weak ideological differentiation in the post-independence political and electoral history of the country partly explains why ideological considerations as opposed to ethicophilosophical ones have rarely featured in or influenced judicial adjudication of constitutional and political issues in the country's courts, such as have been the experiences of the U.S. and India. The weak ideological differentiation as a defining salience of Nigerian politics since independence has not been helped by constitutional provisions for, and the convention of drawing mainly from the pool of sitting judges on the Court of Appeal, for "promotion" to the Supreme Court,[39] whose composition has typically reflected ethno-regional representations since independence. In short, the practice has

[38] Ibid, pp.14-15.

[39] Prominent examples of justices appointed to the Supreme Court as Chief Justices from outside of the Supreme Court or Court of Appeal are Dr. Teslim Elias and Sir Darnley Alexander. In the case of Dr. Elias, he also never sat on the lower courts prior to his appointment as CJN

tended to mute consideration of ideological issues by the courts in landmark cases before them. For this reason, questions about the ideological considerations and orientations of judges, as expressed in their judgments or published work have rarely featured in the confirmation process for nominated judges for appointment, since the confirmation process was first introduced under the country's1979 Constitution; while the process is rarely subject to intense public scrutiny beyond the tepid routine of confirmation by state and federal legislatures. Where judges have made ideological pronouncements in the course of their decisions and judgments, they have tended to be philosophical in tone, mere *obiter dicta.*

Thirdly, and as earlier contended in this chapter, the pervasive influence of a legal culture, including legal education, that deemphasizes public interest law, has tended to encourage rigidity about not only the principle of *stare decisis* but also the principle of *locus standi* narrowly to limit and frustrate the recognition and application of *suo moto cognizance* to expand citizen access to the courts. This influence remains a major factor in constraining judicial activism and in encouraging judicial restraint as approaches to judicial decision-making in the country.

Yet, the country's Supreme Court has witnessed episodic flashes of judicial activism under the country's federal system since independence, under democratic parliamentary and presidential systems of government, and military rule. For instance, the country's Supreme Court, in navigating the nexus linking political questions and judicial power during the long unbroken stretch of military rule between 1980 and 1988, dared to speak truth to civilian and military power.[40] Since 1999 election-related litigation has reopened possibilities for flashes of judicial activism in the country's courts, enabling the courts to intercede in the political process to address the apparent incorrigible behaviour of political parties and politicians in violating both the spirit and the letter of the electoral law and the constitution by exploiting ambiguities in the letter of the law and the tendency for the courts to privilege technicalities over substantive issues of justice in deciding cases before them.

[40] Cf Itse Esanjumi Sagay, *Legacy for Posterity: The Work of the Supreme Court, 1980-1988* , Lagos: Nigerian Law Publications, 1988; Femi Falana, *Justice Aniagolu's contribution to human rights, political development*, in mimeo, Keynote Address at the 4th Justice Aniagolu Memorial Lecture, delivered at Godfrey Okoye University, Enugu, Nigeria, October 20, 20212

3.3.1 Trends in Judicial Activism in Nigeria: Overview of Some Landmark Cases

From independence, under various federal constitutions,[41] the country's courts at the regional and federal levels were vested with defined appellate and original jurisdictions to determine and decide cases pertaining to regional/state and federal laws and constitutions properly brought before the appropriate courts. In cases before it in the early years of the country's independence, the Supreme Court exercised its judicial power, in *T. Adebayo Doherty v. The Prime Minister* [see Table III], in an activist manner, to limit the powers of the federal legislature, while in two cases that arose out of the declaration of a state emergency in 1962 in the Western Region, *F.R.A. Williams v. M.A. Majekodunmi*, and *Adegbenro v. Akintola and Another* [see Table III], the court showed judicial restraint by deciding that it was within the bounds of the federal legislature, and not for the court, to decide that a state of public emergency exists in the country, an approach that apparently reflected the court's reticence to get entangled in the partisan 'political' controversies and the power play leading to the declaration of emergency in the Western Region.

Table I: Three important constitutional cases decided by the Supreme Court of Nigeria between 1961 and 1963

Year	Case	Major Issue for Determination	Decision
1961	Senator T. Adebayo Doherty v. The Prime Minister & Others, Federal Supreme Court 1961, All Nigeria Law Reports 604.	Power of federal legislature to authorize setting up of a tribunal or commission of inquiry, under the Tribunals and Commissions of Inquiry Act 1961 with compulsive powers beyond is legislative competence.	Both the Supreme Court and the Judicial Committee of the Privy Council decided the federal legislature lacked such competence, because, in so far as it applies to the whole of Nigeria, it exceeds the power of the federal legislature
1962	F.R.A. Williams v. M.A. Majekodunmi, (1962), Federal Supreme Court of Nigeria Law Report (SCNLR), 166/191	Whether the Emergency Powers Act 1962 or alternative section 3(1) thereof is unconstitutional and void.	It is within the bounds of Parliament, and not for the Court to decide that a state of public emergency exists in Nigeria;

[41] *The 1960 Independence Constitution*, *the 1963 Republican Constitution*, *the 1979 Constitution*, the partially implemented *1989 Constitution*, and *the 1999 Constitution (as amended*)

1963	Adegbenro v Akintola and Another – [1963] 3 All ER	Can the governor validly exercise power to remove the premier from office under section 33 subsection 10 of the constitution of western Nigeria without prior decision or resolution on the floor of the house of Assembly showing that the premier no longer commands the support of majority of the members of the house of Assembly?	the governor cannot validly exercise the power to remove the premier from office under section 33(10) of the constitution of western Nigeria, except in consequence of proceedings of the floor of the house, whether in shape of vote of no confidence or in defect of a major measure or a series of defeats on measure of some important showing that the premier no longer commands support of majority of the members of the house of Assembly.

Indeed, the decisions of the Supreme Court in exercising its power of judicial review, and the constitutional fall-out from the decision of the Judicial Committee of the Privy Council to overturn the Court's decision in *Adegbenro v. Akintola* raised early concerns about the politicization of the country's courts, so soon after the country's independence. But the court's decisions in the two declarations of emergency-related cases also had the effect of titling the federal balance of power towards the federal government. The decisions, so Mackintosh argues, "…had a profound effect on regional leaders. The possibility of federal intervention which had been discounted before 1962 was now ever-present. Thus when Eastern [Regional Government] leaders lost their battle with the Federal Prime Minister in December-January 1964-65 [over the Census controversy], they were well aware that if they went on resisting there were politicians ready to urge that an 'emergency' be discovered or created in the East and its government and leaders removed."[42] Thus, while the three cases in Table III showed instances of judicial activism (in *Doherty v. Tafawa Balewa* through limiting exercise of federal power)), and in *Adegbenro v. Akintola and Others)*, by looking beyond the language of the relevant clauses of the constitution to

[42] John P. Mackintosh, *Nigerian Politics and Government: Prelude to the Revolution*, Evanston, Illinois: Northwestern University Press, 1966, 1966, pp.62-63

consider the intention of the framers of the constitution), in *Williams v. Majekodunmi* its decision reflected a judicial restraint approach, by ruling that "it is within the bounds of Parliament, and not for the Court to decide that a state of public emergency exists in Nigeria."

Two unbroken long periods of military rule (1966-1979; and 1984-1999) in the country, during which the country's 1963 and 1979 constitutions were modified or parts of them suspended, brought new challenges for the judiciary. This was due fundamentally to the substitution of a democratically elected head of government and/or head of state at the regional/state and federal levels with an unelected one, and the dissolution of democratically elected state and federal legislatures and their substitution with a functional equivalent of the legislative branch within the military regime, such as the Supreme Military Council or the Armed Forces Ruling Council. With the judiciary the only branch of government neither dissolved nor reconstituted by military rule and with parts of the then subsisting 1963 constitution suspended or modified by Decree Number 1 of 1966 and later decrees[43] at the onset of military rule in 1966, was there or could there be any constitutional judicial review role for the courts under military rule?

The Supreme Court gave a positive answer to the question in *Lakanmi v A. G of Western Nigeria and Others (1970),* where it argued that what happened after the partially successful military coup in the country on January 15, 1966, was a transfer of power by the rump of the federal cabinet to "an interim government," in line with the country's 1963 constitution. In the lead judgment in the case, the country's Chief Justice rationalized the court's decision as follows: "What happened in Nigeria in January 1966 is unprecedented in history. Never before, as far as we are aware has any civilian government invited an army take over or the armed forces to form an interim government." The court, therefore, looked beyond the text of the decree in contention and turned the searchlight on the precipitating circumstances leading to the "hand-over," and came to the conclusion that the "interim government" was intended to preserve the 1963 constitution and constitutional government in the country. Taking these contextual factors into consideration, the court held that Decree No. 45 of 1968 was an unconstitutional exercise of judicial powers in violation of separation of powers established by the 1963 Constitution, and, for that reason, was *ultra vires* and void.

But this is a highly debatable claim to make. For example, Luckham, referring to "hurried consultations between Ironsi, two Northern People's Congress ministers," and two

[43] See, Okey Achike, *Groundwork of Military Law and Military Rule in Nigeria*, Enugu: Fourth Dimension Publishers, 1978

subsequent meetings Ironsi had with the "rump cabinet," concluded that "there is some controversy about Major-General Ironsi's motives for taking power… At the second meeting Ironsi asked that power be handed over to the armed forces. The ministers were by now divided and demoralized, and they abdicated authority without too much argument. The constitution had contained a set of emergency provisions which might have enabled them to deal with a situation like the one that had arisen by assuming extra powers and devolving some of them on the Commander in Chief. But apparently Ironsi insisted he could only deal with the situation if he were given complete power and the constitution abrogated."[44]

The significance of the judgment as an exercise in constitutional judicial review is that it asserted that, in view of the circumstances precipitating and surrounding the partially successful military coup on January 15, 1965, the ensuing military regime was not intended to be a totalitarian but an authoritarian regime that is subject to constitutional limits, including processes, which the military regime must respect, obey and comply with in making laws, although constitutional accountability under military regimes would generally and necessarily be more severely constricted or in abeyance than would be the case under a democratic civilian regime. As Okere argues, "by upholding the survival of the 1963 Constitution through reliance on the doctrine of necessity, *Lakanmi* must rank as one of the most salutary illustrations of judicial activism in the history of Nigeria's constitutional adjudication."[45] *Lakanmi*, thus, drew the red line in the battle the judiciary and pro-democracy forces would, henceforth, wage against the many decrees under various military administrations, that ousted the jurisdiction of courts of law from determining the validity of decrees, such as Section 5 of Decree No. 107 of 1993, which provided that, "no question as to the validity of this Decree or any other Decree made during the period 31 December 1983 to 26th August 1993 or made after the commencement of this Decree or of an Edict shall be entertained by any court of law in Nigeria." [See Box I for a partial list of such Decrees.]

[44] Robin Luckham, *The Nigerian Military: A Sociological Analysis of Authority and Revolt, 1960-1967*, Cambridge: Cambridge University Press, 1971, ppp24 and 25.
[45] Okere, "Judicial Activism or Judicial Passivity," p.799.

Box I: Partial List of Decrees with ouster clauses, 1984-1993

1. Decree No. 2 of 1984
2. Decree No. 13 of 1984
3. DecreeNo.18 of 1984
4. Decree No. 18 of 1984
5. Decree No. 22 of 1986
6. Decree No. 107 of 1993
7. Decree No. 11 of 1994

In determining some of such cases, notably *Sani Abacha and Others v Chief Gani Fawehinmi (*SC 45 of 1997), the *Supreme Court* based its judgment against the constitutionality of ouster clauses on the ground that such clauses ran counter to international treaties that Nigeria had ratified, such as the *African Charter of Human and People's Rights,* which was domesticated as *African Charter of Human of Human and People's Rights Ratification and Enforcement Act 1983 (CAP 10 Laws of the Federation of Nigeria, 1990)* [See Box II]

Box II: Extracts from Lead Judgment by M.E. Ogundare, JSC in Sani Abacha & Others v Gani Fawehinmi (SC 45 of 1997

Where, however, the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990 (hereinafter is referred to simply as Cap. 10), it becomes binding and our Courts must give effect to it like all other laws falling within the Judicial power of the Courts. By Cap. 10 the African Charter is now part of the laws of Nigeria and like all other laws the Courts must uphold it. The Charter gives to citizens of member states of the Organisation of African Unity rights and obligations, which rights and obligations are to be enforced by our Courts, if they must have any meaning. It is interesting to note that the rights and obligations contained in the Charter are not new to Nigeria as most of these rights and obligations are already enshrined in our Constitution. See Chapter IV of the 1979 and 1999 Constitutions.

Since the Charter has become part of our domestic laws, the enforcement of its provisions like all our other laws fall within the juridical powers of the courts as provided by the Constitution and all other laws relating thereto... It is apparent from the foregoing that the human and Peoples' Rights of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court.

Another landmark decision that reflected judicial activism was delivered by the High Court of Lagos. The decision by the court in *Bashorun M.K.O. Abiola and Ambassador*

Babagana Kingibe v The National Electoral Commission and The Attorney-General of the Federation (Suit No. M/573/93) declared the appointment of Chief Ernest Shonekan as the Head of the Interim National Government of the Federal Republic of Nigeria as "void and of no effect" on the ground that President Babangida had no legitimate power to sign the decree [establishing the Interim National Government] after he had left office in August 26, 1993. The decision probably precipitated the coup, led by General Sani Abacha against the Interim National Government which had been formed to assuage public outcry against the annulment of the result of the country's presidential elections of June 12, 1993.

Election Dispute Adjudication

Election dispute adjudication[46] has historically been controversial in Nigeria, even under military rule and more so in respect of presidential elections since the adoption of the presidential system under the country's 1979 Constitution. By one account, the courts heard 3479 election petitions arising from the general elections conducted in the country between 2007 and 2019. Although there was a reduction in election petitions from 1282 in 2007, to 727 in 2011; and also, from 727 in 2011 to 663 in 2015; there was a 21.7 per cent increase from 663 petitions in 2015 to 807 petitions in 2019. [Table IV]

Table II: Election Petitions in Nigeria, 2007-2019

Election Year	Number of Petitions	Per cent change
2007	1,282	N/A
2011	727	-43.30
2015	663	-8.80
2019	807	21.7

Source: Daily Trust, 3479 Election Petitions Filed in 4 Election Cycles, p. 1, January 3, 2020

The breakdown of the petitions by category of elections for the 2007 General Election is given in Table V.

Table III: Breakdown of 2011 General Election Petitions by Category of Elections

Category of Elections	Number of Petitions
Presidential	2
Governorship	53
Senatorial	90
House of Representatives	208
State House of Assembly	378
Total	**731**

Source: Independent National Electoral Commission, *Report on the 2011 General Elections*, Abuja, 2011, p.38

[46] For a summary of the legal framework and election litigation and their effect on the election process in Nigeria, see Adele Jinadu, "Nigeria," Chapter 5, especially pp.135-145, In Ismaila Madior Fall, Mathias Hounkpe, Adele L. Jinadu and Pascal Kambale (coauthors), *Election Management Bodies in West Africa: A comparative study of the contribution of electoral commissions to the strengthening of democracy*, Johannesburg and Dakar:Open Society Foundations and Open Society Initiative for West Africa,

4.1 Legal Provisions for Electoral Adjudication

As far as electoral adjudication by the courts is concerned, it should be pointed out that, since the introduction of primary elections for the election and nomination of party candidates for general elections in the country, under the party reform with emphasis on internal party democracy, under the military administration of General Ibrahim Babangida (1985-1993), the country has witnessed increased cases of unresolved intra-party election disputes ending up for adjudication by the country's courts. But, in adjudicating such intra-party election disputes, the courts have moved away from a position of non-interference in "purely internal affairs" of political parties [*Onuoha v Okafor* (1983)]; and *Dalhatu v Turaki* (2003)] to one accepting and deciding such cases (*Ugwu v Ararume* (2007); and *Amaechi v INEC* (2007)][47]

Another aspect of the country's election dispute adjudication that has raised concerns is the timeframe for, and the promptness in deciding pre-and post-election cases. Prior to recent amendments of the electoral act, adjudication of election disputes by the courts in Nigeria took interminably long. For example, it took the Supreme Court about 35 months, barely a year to the 2007 presidential election, to decide the case of *Buhari v. Obasanjo* over the 2003 presidential election. It took about 42 months, less than 6 months to the 2011 general election, for the Court of Appeal, to decide the governorship petitions in Ekiti and Osun States, pending before it since the 2007 elections. According to the country's Electoral Reform Committee (ERC), the record for delayed post-election dispute adjudication was the one challenging the election of Solomon Lar as the Governor of Plateau State, which was decided in 2004, 25 years after it was filed in 1979.[48]

The long delays in deciding presidential elections in the country have meant that the country's President-elect and Vice President-elect since 1999 could be sworn-in before the determination of cases challenging their election by the courts. When the legality of this possibility was raised and challenged in *Buhari, Okadigbo and ANPP v. Obasanjo and 26 Others*, (2003)17 NLWR(PT850)587, the Supreme Court held that there was "nothing wrong" with swearing in the respondents [Obasanjo and Atiku] as President and Vice President respectively, although the election in question was before the Court of Appeal.[49]

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[47] See, Festus Okoye, "Restorative Justice and the Defence of Peoples Mandate: The Judiciary in the Aftermath of the 2007 Elections in Nigeria, Chapter 5, In Jibrin Ibrahim and Okechukwu Ibeanu (Eds.),, *Direct Capture: The 2007 Nigerian Elections and the Subversion of Popular Sovereignty*, Abuja: Centre for Democracy & Development, 2009

[48] Electoral Reform Committee (ERC), Report of the Electoral Reform Committee, Abuja: ERC,2008, p. 110, Section 3.6.3

[49] In the Lead Judgment of the Supreme Court, Belgore JSC argued that, "the Constitution should never be read to say what it has not provided, even though it should be literally construed to giving meaning and effectiveness so as not to have embarrassing anomaly that can result in vacuum of any office or cause serious crisis in the polity."

The Constitution of the Federal Republic of Nigeria, 1999 (4th amendment/alteration, Section 285(5)(6)(7) now puts a time limit on the conclusion and determination of both pre- and post-election petitions. [Box IV]

Box III: Constitutional Provision for Time Limits in Determination of Election Petitions in Nigeria

(5) An election petition shall be filed within 21 days after the date of the declaration of result of the elections; (6) An election tribunal shall deliver its judgment in writing within 180 days from the date of filing of the petition; [The Marginal Note is substituted by the Constitution of Federal Republic of Nigeria (Fourth Alteration) Act 2017] [Section 285 is substituted by the Constitution of Federal Republic of Nigeria (Second Alteration Act) 2010] The Constitution of the Federal Republic of Nigeria Updated with the First, Second Third and Fourth Alterations 183 (7) An appeal from a decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal or Court of Appeal

However, the relevant provision of Nigeria's Electoral Act, 2022 does not foreclose the possibility of the country's President-elect being sworn-in despite pending litigation against his/her declaration by INEC as the winner of the presidential election [See Box V]

Box IV: Provision of Nigeria's Electoral Act, 2022 on swearing-in of the country's President-elect

Where the election is nullified by the Court and the notice of appeal against the decision is given within the stipulated period of appeal, the elected candidate shall, notwithstanding the contrary decision of the Court, remain in office and enjoy all the benefits that accrued to the office providing the determination of the appeal and shall not be sanctioned for the benefits derived while in office. [*Electoral Act, 2022,* Section 138(1)]

The amendment still falls short of the recommendation of the country's 2007-2008 Electoral Reform Committee [ERC] that, "no executive should be sworn in before the conclusion of the cases against him/her. In the case of legislators, no one should be sworn in before the determination of the case against him[/her]." [50] The ERC recommendation is in line with the provision of the *African Charter on Democracy, Elections and Governance,* Article 17(2), requiring State Parties to "establish and strengthen national mechanisms that address election-related disputes in a timely manner." It will also be in line with the provision in Kenya's Constitution that the county's President-elect shall be sworn-in after presidential election petitions disputes shall have been concluded by the country's Supreme Court. [Box VI]

[50] Ibid, p.58, Section 2.5(d).

Box V: Provision of the Constitution of Kenya on swearing-in of the country's President-elect

The President-elect shall be sworn in on the first Tuesday following—
(a) the fourteenth day after the date of the declaration of the result of the presidential election, if no petition has been filed under Article 140; or
(b) the seventh day following the date on which the court renders a decision declaring the election to be valid, if any petition has been filed under Article 140. [*Constitution of the Republic of Kenya, 2010*, Article 141(2) (a)(b

While some of the decisions of the courts in electoral disputes before them for determination can be described as activist, others have tended towards judicial restraint. But what has been the general character of the country's electoral jurisprudence and electoral legal framework? In a memorandum it submitted to the country's Electoral Reform Committee (ERC) in 2007, the Nigerian Bar Association (NBA) raised serious questions about the electoral jurisprudence and the legal framework for the conduct of elections in the country. The NBA claimed that the jurisprudence and legal framework have tended to encourage, and have on several occasions rewarded, impunity, in addition to placing the evidence of proof higher than that in civil cases, such as where election malpractices are alleged, on the petitioner. [See Box V II]

Box VI: Process of Obtaining Certificate of Return

The destruction of the electoral system has been achieved through a system by which the law has overtime elevated the Certificate of Return irrespective of how it is acquired into a prize with overwhelming significance in Nigeria's electoral system. The Certificate of Return is the document issued to the declared winner as evidence of their legitimacy to the office contested in the election. The process of issuing this certificate is administrative and has increasingly become divorced from the processes and legitimate outcomes of elections. In 2003, for instance, persons who were never candidates in the electoral contest, nevertheless, procured Certificates of Return enabling them to occupy high offices of state without having canvassed for office. Many of them survived the challenge to their elections to serve the offices to full time. In the absence of any requirement for the electoral umpire to prove substantial compliance with the electoral laws before issuing the Certificate of Return, the process of procuring this Certificate has increasingly been commercialized. Electoral jurisprudence in the period since 1983 has progressively created an almost insurmountable burden of proof for persons seeking to overturn a duly issued certificate of return…

Source: Nigerian Bar Association (NBA*), Memorandum to the Electoral Reform Committee*, January 2008, p4ff

Nothing more poignantly illustrated this lacuna in then subsisting Electoral Act No, 6 2010 than the controversy surrounding the declaration of the results for the Imo West Senatorial Constituency during the 2019 general elections in Imo State by the Returning Officer. From its own internal sources, including the Returning Officer for the Imo West Senatorial District, and from reports it received from the security personnel deployed to ensure the peaceful conduct of the collation of the election results, INEC had irrefutable evidence, that the candidate returned the winner had procured the return by pointing a gun at the head of the Returning Officer, whom he threatened to shoot in the head if the Returning Officer did not return him the winner.

On the basis of the irrefutable evidence, INEC declined to issue a Certificate of Return to the candidate whom the Returning Officer had returned the winner. The returned candidate appealed to the courts against INEC's refusal to issue him the Certificate of Return. The courts invalidated the decision of INEC as illegal and ordered the Commission to issue the Certificate of Return to the candidate, as the duly returned and elected winner of the Imo West Senatorial election.

The furore and public outrage over the decision of the courts directing INEC to issue the Certificate was a major factor in the subsequent review of the electoral law to fill the lacuna. Thus, the Electoral Act 2022, Section 61(1)(c) has now made the issue of the Certificate of Return subject to review of the declaration of the result by the Returning Officer by the Commission [See, Box VIII]

Box VII: Decision of returning officer on ballot paper

The decision of the returning officer shall be final on any question arising from or relating to---
(c)the declaration of scores of candidates and the return of a candidate:
Provided that the Commission shall have the power within seven days to review the declaration and return where the Commission determines that the said declaration and return was not made voluntarily or was made contrary to the provisions of the law, regulations and guidelines, and manual for the election. *[Electoral Act, 2022, (Section 65(1)(c)]*

Nine presidential elections have been held in Nigeria between 1979, when the presidential system was introduced in the country, and 2019. Petitions filed against the declaration and return of a candidate in each of the elections by the country's electoral commission went up to the country's Supreme Court, except the 1993 election, which the military regime annulled, the 1999 one which ended at the Court of Appeal and did not go on appeal to

Supreme Court, and the 2015 one against which there was no petition by the candidate declared the loser. [Table VI].

Table IV: Presidential Election Petitions in Nigeria 1979-2019

Presidential Election	Court Petition/Comments	Court Decision/Comment
1979	Obafemi Awolowo v Shehu Shagari & Others (SC62 of 12979 [1979]] NGSC 49 of September 26, 1979]	Chief Awolowo's petition dismissed by Supreme Court
1983	Waziri Ibrahim v Shehu Shagari 1983 LCN/2173SC	Alhaji Waziri Ibrahim's petition dismissed by Supreme Court
1993	No petition. Result not declared and no candidate returned by the National Electoral Commission. Candidates were M.K. Abiola (SDP) and Bashir Tofa (NRC);	a) Association for Better Nigeria (ABN) obtained court injunction on June 10, 1993, stopping the election; b) NEC ignored injunction and conducted the elections; on June 12, 1993 c) ABN obtained another injunction on June 15, 1993, halting counting, verification and declaration of the result; d) NEC complied with the court injunction and did not declare results of the elections.
1999	Chief Olu Falae v Chief Olusegun Obasanjo	Chief Falae's petition dismissed by Court of Appeal. No appeal to Supreme Court.
2003	Muhammadu Buhari (ANPP) v Olusegun Obasanjo (PDP	Muhammadu Buhari's petition dismissed by Supreme Court
2007	Muhammadu Buhari (ANPP) v INEC & 4 Others (SC51/2008)	Muhammadu Buhari's petition dismissed by Supreme Court
2011	Muhammadu Buhari (CPC) v Goodluck Jonathan (PDP	Muhammadu Buhari's petition dismissed by Supreme Court
2015	No petition	
2019	Atiku Abubakar (PDP) v Muhammadu Buhari (APC)	Atiku Abubakar's petition dismissed by the Supreme Court

As is clear from Table IV, no presidential election petition has been upheld and the election nullified in Nigeria, in what appears to be a judicial restraint, what some regard as an example of judicial pusillanimity or cowardly approach to the determination of the petitions by the Supreme Court, despite proven irregularities in the conduct of each of the

elections. However, petitions against the declaration and return of some candidates as governors by INEC have been upheld and the petitioners' declared winners and erstwhile winners, who have assumed office as governors were ordered to vacate the office of governor or reruns ordered [Table V].

Table V: Nullification of Governorship Election Results by the Supreme Court, 1999-2019

Governorship Election/Year	Cause of Action of Petition	Decision of Supreme Court
Rivers 2007	Challenge to candidacy of Governor Celestine Omehia as winner of primaries of PDP by Rotimi Amaechi of PDP	Nullification of declaration of Omehia as Governor, since he did not participate in the PDP primaries and declaration of Amaechi, winner of PDP primaries and consequently as the elected governor
Edo 2007	Challenge to declaration of Governor Osunbor of PDP as winner of governorship election in the state by Adams Oshiomhole, candidate of Action Congress Party	Nullification of election of Osunbor as Governor, with Oshiomole declared as winner and ordered to be sworn in as Governor.
Ondo 2007	Challenge to declaration of Governor Olusegun Agagu of PDP as winner of governorship election in the state by Segun Mimiko, candidate of the Labour Party	Petition upheld and Mimiko declared winner and ordered to be sworn in as Governor
Ekiti 2007	Challenge to declaration of Governor Segun Oni of PDP as winner of governorship election in the state by Kayode Fayemi, candidate of the Action Congress Party	Petition upheld and Fayemi declared winner and ordered to be sworn in as Governor
Osun 2007	Challenge to declaration of Governor Olagunsoye Oyinlola of PDP as winner of governorship election in the state by Rauf Aregbesola, candidate of the Action Congress Part.	Petition upheld and Aregbesola declared winner and ordered to be sworn in as Governor
Delta 2011	Challenge to declaration of Governor Emmanuel Uduaghan of PDP as winner of governorship election in	Nullification of election, with a rerun of the election ordered.

	the state by Great Ogboru, candidate of the Democratic Peoples' Party	
Zamfara 2019	Challenge to declaration of Governor Abdulaziz Yari Abubakar of the APC as winner by the governorship election by the candidate of the PDP, Bello Matawale on the ground that the APC did not hold valid primaries for the nomination of its candidate for the election.	Nullification of the election of Governor Yari because the APC did not hold valid primaries to nominate a candidate for the election, with the candidate of the party with the second highest valid votes cast and required spread declared winner of the election and ordered sworn in.
Bayelsa 20 19	Challenge to declaration of David Lyon of the APC as the winner of the governorship election in the state by Duoyo Diri of the PDP on the ground that the Deputy Governor candidate of the APC, Biobarakuma Diegi-Eremuenyo was unqualified to stand for election as deputy governor because he submitted forged certificates attesting to his educational qualifications.	Petition upheld; deputy-governor candidate of APC disqualified for presenting forged certificates about his educational qualifications. As a result of the disqualification, the court held that the candidacy of the governorship candidate of the APC was void and nul. The court declared the governorship candidate of the PDP, Duoye Diri duly elected and ordered his swearing-in. l and

In Africa, in what has been viewed as instances of judicial activism, petitions against presidential candidates declared and returned as presidents-elect have been voided, with reruns ordered by the courts in Cote d'Ivoire (2010), Kenya (2017), and Malawi (2020), before the declared winners were sworn-in.

Three elements of the judicial activist approach are reflected in the decisions of the Supreme Court in Nigeria's nine presidential election petitions since 1979. [Table VI] The first element is the practice of placing on the petitioner the legal burden of 'firm' and 'credible' proof, beyond reasonable doubt, that the conduct of the presidential election so gravely diminished the integrity of the election as free and fair that it should warrant the nullification of the elections. But this is a general problem with not only with the presidential but also governorship and legislative elections. It is due to "a system by which the law has over time elevated the Certificate of Return irrespective of how it is obtained into a prize with overwhelming significance in Nigeria's electoral system. …The process of issuing this certificate is administrative and has increasingly become divorced from the processes and legitimate outcomes of elections. …In the absence of any requirement for the electoral umpire to prove substantial compliance with the electoral laws before issuing

the Certificate of Return, the process of procuring this Certificate has increasingly become commercialized…Electoral jurisprudence [in Nigeria] in the period since 1983 has progressively created an almost insurmountable burden of proof for persons seeking to overturn a duly issued certificate of return." [51] [See Box VIII for provisions of the Electoral Act 2022, Section 65(1) (c), that now subjects the power of the Returning Officer to declare "scores and the return of a candidate" to review by INEC.

The second element, closely intertwined with the first element, is the substantial compliance standard and approach to determining presidential election petitions, which has generally influenced the decisions of the Supreme Court on the petitions. This approach has been criticized because in applying the standard, as Chidi Odinkalu contends in respect of the Supreme Court's decision in *Muhammadu Buhari v Olusegun Obasanjo*, "the Supreme Court does not decide whether or not elections are free and fair. It only decides whether allegation(s) of fraudulent elections have been proved as a matter of evidence. The Supreme Court by its decision [*Buhari v. Obasanjo]*ensured that it is now impossible to prove electoral fraud or manipulation certainly in a Presidential Election."[52] To take another criticism of the application of the substantial compliance standard: regarding the Uganda Presidential Petition in 2006, O'Brien Kabba faulted the decision of the Supreme Court of Uganda in *Kizza Bisigye v. Museveni, 2006*, as follows: "it is strange jurisprudence that, after adjudging the election not to have been transparent, free and fair, the majority of the court held [that] the irregularities were of no substantial effect…By overlooking serious electoral malpractices at the expense of numbers, a dangerous precedent for rewarding electoral cheating is entrenched with the full imprimatur of the court…."[53]

The third element derives from provisions of the country's electoral law, such as Section 147(2) of the Electoral Act 2006 (now Section 136(3) of the Electoral Act, 2022) [Box IX] that provides the basis for "mathematical calculation and recalculation in the determination of election disputes, rather than seeing them as a process,"[54] as was done in adjudicating disputed governorship elections in Edo, Ekiti, and Osun States, in 2007.

[51] Nigerian Bar Association, Memorandum to the Electoral Reform Committee, January 2008, pp 4-7
[52] Chidi Odinkalu, private email communication to the author, 12 December 2008.
[53] O'Brien Kaaba, "The Challenges of Adjudicating Presidential Elections in Africa, "*African Human Rights Law Journal* (2015)15, p.347.
[54] Festus Okoye, "Restorative Justice and the Defense of the People's Mandate in the Aftermath of the 2007 Elections in Nigeria," Chapter 5, in Jibrin Ibrahim and Okechukwu Ibeanu (eds.), *Direct Capture: The 2007 Nigerian Elections and Subversion of the Popular Sovereignty,* p.135, fn.17, Abuja: Centre for Democracy and Development,2009

Box VIII: Nullification of Election by Tribunal or Court

If the Tribunal or the Court determines that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the Election Tribunal or the Court, as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the election and satisfied the requirements of the Constitution and this Act.

Earlier, in the 1984 case of *Ojukwu v. Onwudiwe*, two Supreme Court Justices, Hon. Mr. Justice Anthony Aniagolu and Hon. Mr. Justice Ayo Irikefe criticized, in dissenting judgments, the use of the "mathematical" computation approach to resolve electoral disputes. Hon. Mr. Justice Aniagolu argued that, "…the arithmetical computation of votes cast only comes in when the electorate have been allowed to freely cast their votes. Once the atmosphere has been substantially befouled by violence and thuggery the election in the area where they occur must be cancelled and a fresh one, if possible, conducted."[55]

[55] Quoted in Okoye, "Restorative Justice," p. 136.

4.2 Carpet-Crossing and Election Dispute Adjudication

A feature of electoral politics and legislative behaviour, with deep roots dating back at least to the legislative elections to the regional houses of assembly under the country's1951 Constitution, is carpet-crossing from one party to another by members elected on the platform of one political party to another party in the legislature.[56]Notable examples of carpet-crossing since Nigeria's Fifth Republic in August 1999 include the following ones: At the inception of the country's Fifth Republic, Senator Adeseye Ogunlewe and Senator Wahab Dosunmu, elected under the platform of the Alliance for Democracy (AD) from Lagos State crossed the carpet in the Senate to the PDP, the majority party in the legislature. In 2014, fifteen years and four electoral cycles after the inception of the country's Fourth Republic in 1999, Aminu Tambuwal elected as a Member and, thereafter, the Speaker of the House Representatives under the platform of the PDP crossed the carpet to the APC, the minority party in the legislature. Four years later, in June 2018, Senator Bukola Saraki, President of the Senate, Yakubu Dogara, Speaker of the House of Representatives alongside 37 members of the House of Representatives and 14 Senators elected to the National Assembly under the APC platform defected to the PDP. Four other members of the House of Representatives defected from the APC to the African Democratic Congress at the same time, as the other members who defected to the PDP.

In September 2018, the Legal Defence and Assistance Project (LEDAP), instituted a case at the Federal High Court, requesting the court to order the President of the Senate, the Speaker of the House of Representatives, and the other members of the National Assembly who had crossed the carpet to vacate their membership of the National Assembly. The court held that the plaintiff, LEDAP, lacks the capacity and legal power, or locus standi to institute the case and is, therefore, "incompetent" to institute the case for the reasons that LEDAP, the plaintiff in the case is not a) a political party that sponsored the election of the lawmakers; b) a registered voter in Nigeria; and c) a member of the National Assembly. The court also struck out the case because the Independent National Electoral Commission (INEC) the agency that regulates the activities of political parties and monitor elections and the political parties on whose platform they were elected and from which they crossed the carpet in the National Assembly are not plaintiffs in the case.

In 2020, the Speaker and 19 members of the Cross River State House of Assembly, and the Speaker and 17 members of the Ebonyi House of Assembly crossed the carpet in their respective state houses of assembly from the majority party under which they were elected,

[56] See, L. Adele Jinadu, "Preliminary Notes on political carpet-crossing and defection," prepared for discussion at The Electoral Forum, March 30, 2022.

the PDP, to the APC. The common practice was for the members of state houses of assembly and the National Assembly who crossed the carpet from one party to another in the legislatures of which they were elected members to refuse to resign their membership of the legislature, claiming the consequence of resigning in such circumstances does not apply to them. They support their claim and refusal to resign membership of the legislature with reference to qualifications surrounding their loss of membership in the relevant provisions of the 1999 Constitution, although there was no division within the APC when the National Assembly lawmakers crossed the carpet to PDP in 2018 and the lawmakers in the Ebonyi State House of Assembly crossed the carpet from the PDP to APC in 2020.

In 2020 the Governor of Zamfara State, the Governor and Deputy Governor of Cross River State, and the Governor and Deputy Governor of Ebonyi State, all of whom were elected under the platform of the PDP during the 2019 general election defected to the APC and refused to leave office.[57]

The defection of the governors of Zamfara, Cross River, and Ebonyi States in 2020 followed earlier defections between 2013 and 2020 of some governors from the party under whose platform they were elected to another party. (See Table VIII]

Table VI: Defections of Governors from one party, while in office, to another party, 2013-2022

Governor/State	Year of Election/ Reelection	Party on Election	Year of Defection	Party Defected To
Rotimi Amaechi/ Rivers	2007/20011	PDP	2013	APC
Rabiu Kwankwaso/Kano	2007	PDP	2013	APC
Murtala Nyako /Adamawa	2008/2012 [	PDP	2013[58]	APC
Abdulfatah Ahmed/ Kwara	2007	PDP	2013	APC
Magatakarda Wamako/ Sokoto	2010	PDP	2012	APC
Samuel Ortom/Benue	2015	APC	2018	PDP
Godwin Obaseki/Edo	2016/2020	APC	2020]	PDP[59]
Ben Ayade/Cross River	2015/2019	APC	2020	PDP
David Umahi/Ebonyi	2015/2019	APC	2020	PDP
Bello Matawale/Zamfara	2019	PDP	2020	APC

[57] For Ebonyi State, see *Sen. Soni Ogbuoji & Ors v. David Umahi & Ors;* also https://guardian.ng/news/court-sacks-umahi-axes16-lawmakers-over-defection. For Cross River State see *FHC/ABJ/CS/975/2021*,

[58] Governor Nyako was impeached in 2014 but his impeachment was nullified on appeal by Court of Appeal in February 2016 In affirming the decision of the Appeal Court in voiding his impeachment, the Supreme Court, however, denied Governor Nyako's request for reinstatement as Governor because it was not part of his claim at the Court of Appeal.

[59] defected to PDP while APC Governor and won reelection as Governor as PDP candidate

The defection of Governor Ayade (Cross River State), Governor Umahi (Ebonyi State), and Governor Matawale (Zamfara State) from the PDP is interesting in that they are the only governors whose defection from one party to another was challenged in court among the defection by governors listed in Table VIII. Unlike the other governors who defected as a result of the division within the PDP in 2013 to join the newly registered All Progressives Congress, formed out of the merger of three major parties, including a faction of the PDP, the New PDP (nPDP) in the country, there was no such division within the PDP when the three governors (Ayade, Umahi, and Matawale) defected from the party to the APC in 2020.

The general perception following their defection was that Governor Ayade and Governor Umahi defected to the APC allegedly because of the promise held out to them by the APC, to nominate them to contest the 2023 presidential election under the platform of the party. It was also alleged that the two governors were induced to defect by the expectations that federal grants and projects to the two states from the APC-led federal government would be geometrically increased. The promise and inducement were allegedly offered as a *quid pro quo* for the governors' working to ensure that the APC capture majority votes in the presidential, governorship, national assembly and state houses of assembly during the 2023 general election in the country's South East geopolitical zone and, thereby, diminish the electoral strength of the PDP in the zone. The considerable number of PDP legislators who crossed over to the APC in the two state houses of assembly was central to the political horse-trading to solidify the alleged promises to the governors by ensuring that PDP majorities in both houses of assembly were emasculated to the point where the governors could not be impeached by PDP lawmakers in both state hoses of assembly.

While there has been no legislation against defection by governors, legislation against carpet-crossing by legislators under various electoral acts in Nigeria since 1999 have been crafted, deliberately perhaps, in ambiguity, more to defeat than to uphold the spirit and the underlying objective of the legislation, and consequently to frustrate any attempt to enforce the provisions of the legislation. In this respect, Nigeria's legislation against carpet-crossing, under Section 68(1)(g) and Section 68(2) of the country's 1999 Constitution (as amended) must be one among the few, if not the only such legislation in the world that is deliberately crafted and worded to frustrate attempts to discourage or enforce it. [See Box X]

Box IX: Laws Protecting Parties with Anti-Defection Provisions in the Constitution: Select Countries[60]

1. Belize: Article 5. Tenure of Office of Members

(2) A member of the House of Representatives shall also vacate his seat in the House—

(e) if, having been a candidate of a political party and elected to the House of Representatives as a candidate of that political party, he resigns from that political party or crosses the floor.

2. Namibia: Article 48. Vacation of Seats

(1) Members of the National Assembly shall vacate their seats:

(b) if the political party which nominated them to sit in the National Assembly informs the Speaker that such members are no longer members of such political party.

3. Nepal, Article 49. Vacation of Seats

(1) The seat of a member of Parliament shall become vacant in the following circumstances:

(f) if the party of which he was a member when elected provides notification in the manner set forth by law that he has abandoned the party.

4. Nigeria, Article 68. Tenure of Seat of Members [61]

(1) A member of the Senate or the House of Representatives shall vacate his seat in the House of which he is a member if-

(g) being a person whose election to the House was sponsored by a political party, he becomes a member of another political party before the expiration of the period for which that House was elected.

Provided that his membership of the latter political party is not as a result of a division in the political party of which he was previously a member or of a merger of two or more political parties or factions by one of which he was previously sponsored…

(2 The President of the Senate or the Speaker of the House of Representatives, as the case may be, shall give effect to the provisions of subsection (1) of this section, so however that the President of the Senate or the Speaker of the House of Representatives or a member shall first present evidence, satisfactory to the House concerned that any of the provisions of that subsection has become applicable in respect of that member.

5.Seychelles, Article 81. Vacation of Seats

A person ceases to be a member of the National Assembly and the seat occupied by that person in the Assembly shall become vacant—

27(h) if, in the case of a proportionally elected member—

[61] Nigeria's 1979 Constitution (original version) Section 64(1)(g) provides a broader, even more ambiguous exception for carpet-crossing in the legislature than does Section 68(1) of the 1999 Constitution in accepting cross-carpeting if it "is not as a result of a division in the political party of which he was previously a member or a merger of 2 or more political parties or factions by one of which he was previously elected. " But the 1979 Constitution does not include the provision of Section 68(2) of the 1999 Constitution, that "the President of the Senate or the Speaker of the House of Representatives, as the case may be, shall give effect to the provision…so however that the President of the Senate or the Speaker of the House of Representatives or a member shall first present evidence satisfactory of the House concerned that any of the provisions of that subsection has become applicable in respect of the member."

(i) the political party which nominated the person as member nominates another person as member in place of the first-mentioned person and notifies the Speaker in writing of the new nomination;
(ii) the person ceases to be a member of the political party of which that person was a member at the time of the election;
6. Sierra Leone, Article 77. Tenure of Seats of Members of Parliament
(1) A Member of Parliament shall vacate his seat in Parliament—
(k) if he ceases to be a member of the political party of which he was a member at the time of his election to Parliament and he so informs the Speaker, or the Speaker is so informed by the Leader of that political party;
7. Singapore, Article 46
(2) The seat of a Member of Parliament shall become vacant—
(b) if he ceases to be a member of, or is expelled or resigns from, the political party for which he stood in the election.
8. Zimbabwe, Article 41. Tenure of Seats of Members
Subject to the provisions of this section, the seat of a Member of Parliament shall become vacant only—
(e) if, being a member referred to in section 38 (1) (a) and having ceased to be a member of the political party of which he was a member at the date of his election to Parliament, the political party concerned, by written notice to the Speaker, declares that he has ceased to represent its interests in parliament.

Yet the underlying intention and objective of constitutional provision against carpet-crossing under Article 68 of the 1999 Constitution of Nigeria, as indeed it should also apply, though not provided under the Constitution, to defection by the country's President and State Governors to another political party from the one that sponsored their election, should be to promote not obfuscate the foundational democratic spirit and objective behind the protection of electoral mandate, under Section 14(1) of the Constitution of Nigeria, which provides that: "Sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority."[62] In the case of each set of state legislators, the courts embraced the doctrine of the "sovereignty" of electoral mandate protection and ruled that the legislators whose carpet-crossing was challenged in the petitions before the courts should vacate their seats in the legislature. The judge in the Cross River case observed that "a day must surely come when elected officials must either resign from their office or ask the people who voted for them before defecting

[62] The problem of "crossing carpet," is a vexed one in democratic theory: a) is a member of parliament a delegate or a representative? b) What control does or should a party have over its members of parliament? c) under what circumstances or what conditions, if any, is "crossing carpet" consistent with mandate protection? e) Does carpet crossing pose a threat to stable democratic government/politics?

to other political parties, instead of defecting to another party without recourse to the law and the citizens"[63]. The unwholesome effect of carpet-crossing in subverting the sovereignty of electoral mandate is well-captured in the observation by Dan Agbese[64] [See Box XI]

Box X: Reflections on Carpet-Crossing

Since we returned to civil rule in 1999, carpet crossing has become the rule rather than the exception. There is not one political party registered by the generals in 1998 that has remained the same and intact. Not many of the politicians have remained in one party since 1999. They have crossed the carpet back and forth. Not for ideological reasons but for reasons of what has been dubbed stomach infrastructure….

Ali Shinkafi of Zamfara and Isa Yuguda of Bauchi, showed the excesses of impunity and the untouchable when, along with the entire members of their respective state houses of assembly, crossed the carpet from NPP to PDP. The constitutional provision outlawing this sits there, a helpless, toothless bull dog. Using carpet crossing to breach the constitution is the ultimate excess in cheap political power play. Sadly, that is the way wind blows here.

The constitution says national and state legislators who cross the carpet must automatically lose their seats in parliament. PDP systematically ruined that provision because it faithfully observed it in the breach. Senators and others who crossed the carpet from the other political to find shelter under the umbrella, were protected from the harsh heat of the law.

It was allegedly because of the apparent subversion of their electoral mandate by Governor Matawale (Zamfara State), Governor Ayade (Cross River State), Governor Umahi (Eboyin State), the Deputy Governor of Cross River State and the Deputy Governor of Ebonyi State that, like the lawmakers who crossed the carpet in their state houses of assembly, petitions were brought in 2020 against each one of them for defecting from the PDP to the APC. The Zamfara High Court in Gusau, the Cross River State High Court in Calabar, and the Ebonyi High Court in Abakaliki, in separate but similar judgments in 2021, dismissed the petitions against the continued stay in office of the governors and of the deputy governors of Cross River State and Ebonyi State. In another case before the Federal High Court, Abuja, challenging the defection of the Governor and Deputy Governor of Ebonyi case, the court ruled that the Governor and Deputy Governor must vacate their office, having defected to the APC from the PDP on whose platform they were elected in 2019.

[63] See https://pulse.ng/news/local/court-sacks-cross-river-state-speaker-19-lawmakers-for defecting-to-apc/kfxt58/

[64] Dan Agbese, Cross carpeting, *The Guardian*, Lagos, 19 February 2017 available at https://guardian.ng/opinion/carpet-crossing/

In its judgment on the petition against the defection of Governor Matawale, the Zamfara State High Court struck out the petition on the ground that the court lacked the jurisdiction to entertain it, because the petition was neither a pre-election nor post-election matter and that neither the country's 1999 Constitution nor the constitution of the each of the PDP and APC has provisions against the defection of Governors and the Deputy Governors from their political party to another political party. The judgments of the Federal High Court, Abuja (in FHC/ABJ/CS/975) in the petition against Governor Ayade of Cross River State, and of the Ebonyi State High Court, Abakaliki, against Governor Umahi of Eboyin State dismissed the petitions against the two Governors and their deputies, on the same grounds used by the Zamfara State High Court to dismiss the petition against Governor Matawale.

The petition lodged before the Court Appeal, Enugu in *Soni Ogbuoji & Ors v. David Umahi & Ors. (CA*/E/53/2022), against the judgment of the Eboyin High Court, Abakaliki, asked the court to order Governor Umahi and the deputy governor, having defected from the PDP, on whose platform they were elected, to the APC, to vacate their respective office. In its judgment, the Court of Appeal held that there was no such consequence for defection by a Governor or Deputy Governor under the country's 1999 Constitution, which provides only for the a) tenure of office of governor (Section 180); b) removal of governor or deputy governor from office through impeachment (Section 188); c) removal of governor or deputy governor from office due to permanent; and d) incapacity (Section 189).

The observation in Box XII is extracted from the Lead Judgment of the Court of Appeal on the petition.

Box XI: Extracts from Court of Appeal Judgment in Soni Ogbuoji & Ors, *v. David Umahi & Ors. (CA*/E/53/2022)

The defection of an elected executive office holder is not novel to our jurisprudence as it formed the consideration of the Supreme Court in the case of A, G. of the Federation & Ors. and Ors v Abubakar & Ors….

Defection from one party to another may appear immoral or even improper……but it comes with attendant consequences Where a member of the legislature defects from the party on whose platform he was elected…without a division, the consequence is for him to vacate his seat…otherwise his seat shall be declared vacant…

The situation is different with holders of the executive offices of President, Vice President, Governor and Deputy Governor as the provisions for their removal do not include where such office holders defect from the political party under whose platform they were elected.

Once the final determination has been made by a Returning Officer and subsequently by the appropriate tribunal and courts, where the outcome of the election was challenged, the elected

office holder assumes office and their removal must be in accordance with the provisions of the Constitution….

The leaned trial judge must be commended for rejecting "the invitation [of the counsel for the petitioners to fill the lacuna by extrapolating the consequences for members of the legislature to" holders of executive offices], which would have done incalculable damage to the rule of law and constitutionalism. Judicial activism must be guided by the rule of law, otherwise it will degenerate into judicial rascality…

Even in the case of members of the legislature who must suffer the consequences of loss of their seat if found to have defected from the political party which sponsored them for election, the consequential order is for bye-election to be conducted and not for the vacated seat to be allocated to either the political party or the runners-up at the election" [p.41-42, 49]

But the Federal High Court, Abuja in suit number FHC/ABJ/CS/920/2022, filed by the PDP challenging the defection of Governor Umahi and the Deputy Governor of Ebonyi State decided that the continued stay in office of the governor and deputy governor was illegal, null and unconstitutional. The court held that valid votes cast in an election belong to political parties and cannot be transferred from one party to another. It follows, therefore, according to the court that votes cast for the governor and deputy governor as the PDP candidates in the Ebonyi governorship election in 2019, belonged to the PDP and cannot be transferred to the APC. The court therefore ruled that the governor and deputy governor should vacate their office; that the PDP present other candidates to fill the vacated office of governor and deputy governor of Ebonyi State; or, in the alternative that, INEC conduct a new election for governor and deputy governor of Ebonyi State within 90 days. The reasoning that informed the ruling is extracted from the judgment in Box XIII. The case remains pending on appeal by the defendants, the governor and deputy governor of Ebonyi State, to the Court of Appeal, Abuja.

Box XII: Reasoning behind judgment of the Federal High Court, Abuja in PDP v David Umahi & Ors (FHC/ABJ/CS/920/2022

The civil or criminal provisions envisaged under S.308 of the 1999 Constitution (as amended) are those cases whose causes can still be enforceable after the tenure of the persons mentioned therein. In this case the cause of action and the remedy thereof cannot wait till the 3rd and 4th Defendants [the Governor and the Deputy Governor respectively] leave office. Therefore, the immunity in S.308 of the 1999 Constitution as (amended) cannot be absolute. (p.55)….. It needs also to be said that the continued occupation of the 3rd and 4th Defendants as Governor and Deputy Governor of Ebonyi State is in breach of the provision of S. 179 (2) (a) and (b) of the 1999 Constitution (as amended) as there was no election held in the State by virtue of which they emerged duly elected as candidates of the 2nd Defendant with majority of votes cast at the

election and they had not less than one quarter of the votes cast at the election in each of at least two-thirds of all the Local Government Areas of the State.(p.59)…

The Constitution is put in jeopardy where the will of the electorate when they vote for a political party can be brazenly merchandized by candidates without consequence. The act of the 2nd, 3rd and 4th Defendants and the position of their respective Counsel in this case are directed at political dismantling of the 1999 Constitution (as amended). It must be stopped forthwith. p.64

Conclusion:
Understanding the Intersection of Morality, Politics and Judicial Fidelity to the Law

The two sets of different judgments by the three courts discussed in the preceding paragraphs on fundamentally the same cause of action, throw into sharp relief the differences between judicial restraint and judicial activism. They illustrate the more general and fundamental questions in legal, political, and sociological theory about the role of the judiciary as a guardrail of democracy. The differences are clearly laid out in the flourishes of *obiter dicta* in the judgment of the Court Appeal, which upheld the denial, on appeal from the Ebonyi State High Court, of the reliefs sought in the petition; and in the judgment of the Federal High Court, Abuja that granted the reliefs, in the two petitions that the Governor and the Deputy Governor of Ebonyi State vacate their office in view of their defection from the party on whose party they were elected to another political party .
In the case of the judgment of the Court Appeal, the Lead Judgment magisterially argued in support of the judgment dismissing the petition at the lower court as follows: "Defection from one party to another may appear immoral or improper …The learned trial judge must be commended for rejecting the invitation [of the counsel for the petitioners] to fill the lacuna by extrapolating the consequences for members of the legislature to holders of executive offices, which would have done incalculable damage to the rule of law and constitutionalism. Judicial activism must be guided by the rule of law, otherwise it will degenerate into judicial rascality…" [See extracted quotation in Box XII]

But, the broader question of the Morality and Law Nexus, in other words, of the "fidelity of the judiciary to the law,"[65] which the above observation fails to ask and, in fact, which it obscures, is the following: Would the "rule of law and constitutionalism" be preserved, if defection, described by the judgment as "immoral or even improper" were to be universalized? Was there any need or is it not philosophically questionable to assert baldly that "political activism…will degenerate into judicial rascality," when in all probability defection, as described in the petition, if universalized, would sound the death knell of competitive party and electoral politics, a major pillar of the rule of law and

[65] For the notion of "judicial fidelity to the law," see Jeffrey Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging*, New York & Oxford: Oxford University Press, 2010, in which Brand-Ballard argues that "…even in reasonably just legal systems judges are not morally obligated to adhere to the law when they believe the legally-required result is unjust. His argument is somewhat conditional: judicial deviation from the law is not limited only to exceptional cases that are viewed as "extremely" unjust; however, judges should nevertheless avoid deviating in all "suboptimal-result" cases or they risk damaging the rule of law." [Quotation is from Emmett Macfarlane's in the review of Brand-Ballard's *Limits of Legality*, in *Law and Politics Review*, Vol. 20, No. 11, November 2010, p.590.]

constitutionalism, under Nigeria's Constitution, which provides in the following sections that:
Section 13 "It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution.

Section 14 (1) "The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.
(2) It is hereby, accordingly, declared that-
(a) sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority...

This is the broader question of "judicial fidelity addressed in the judicial activist approach that underlies the moral indignation expressed in the following observations [extracted from Box XVIII] in the judgment in the Federal High Court, Abuja that upheld the petition and ordered the Governor and Deputy of Eboyin State to vacate their office: "The Constitution is put in jeopardy where the will of the electorate when they vote for a political party can be brazenly merchandized by candidates without consequence. The act of the 2nd, 3rd and 4th Defendants and the position of their respective Counsel in this case are directed at political dismantling of the 1999 Constitution (as amended). It must be stopped forthwith."

Hopefully, the Court of Appeal, before which the Governor and Deputy Governor of Ebonyi State have gone on appeal, and, should the case end up with it, the Supreme Court will both affirm the judgment of the Federal High Court, Abuja. Doing so, the Supreme Court will act out the historic role of the judiciary in defending the sovereign rights of Nigerians to choose their leaders democratically and live under the rule of law, protected and assured that "the will of the electorate when they vote for a political party can [not] be brazenly merchandized by candidates without consequence."

As the following observations by Hon (Mr.) Justice Udo Udoma of the Supreme Court of Nigeria puts it, in arguing that judges need not be morally obligated to adhere to the law when they believe the result of applying it will be unjust:
"The function of the Constitution is to establish a framework and principle of government…Mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defend and protect such ends as the principle of government enshrined in the Constitution…I do not conceive it to be the duty of this court to so construe

any of the provisions of the Constitution as to reject the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends."[66]

[66] *Nafiu Rabiu v The State* (1981) 2 NCLR 293, p.326

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The Electoral Hub is an affiliate of IRIAD. It is committed to promoting electoral knowledge, integrity, and accountability in Nigeria. Our aim is to strengthen electoral governance and accountability in Nigeria through the provision of data, critical and contextualized analysis, and solutions to improve the credibility and integrity of the electoral process. The Electoral Hub is conceptualized to complement the roles and activities of the different institutions, stakeholders, and drivers of the electoral process and governance by providing back-end support services to stakeholders and institutions of the electoral process.

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