

**JUDICIAL REVIEW OF LEGISLATIVE ACTIONS UNDER THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999 (AS AMENDED) \***

**Abstract**

*In any serious and responsible constitutional democracy, the most powerful branch of government that exercises control over the other two branches of government is the judiciary. This is because courts have the power of examining actions or inactions of both executive and legislature in order to determine their legality or otherwise. In this vein, this paper aimed at examining the power of judicial review of legislative action in Nigeria and same was achieved by using doctrinal research methodology. Based on the examination, the paper found out that locus standi constitutes a great hindrance to the citizens for initiating action by way of judicial review of legislative action in Nigeria. The paper also found that some constitutional provisions are contradictory to themselves and finally the paper discovered that there is no constitutional law court in Nigeria because even the matters that border on constitutional jurisprudence are being handled by normal conventional courts. The paper recommended that the principle of locus standi in respect of judicial review of legislative action be relaxed to a reasonable extent so that citizens can have the opportunity of challenging legislative actions in their individual capacities. It is further recommended that the contradictory constitutional provisions be reconciled by way of amendment. Finally, the paper recommended that specialist court-constitutional court be established and professional judges/jurists be appointed to handle issues of constitutional jurisprudence.*

**Keywords:** Judicial Review, Legislative Actions, Nigerian Constitution, Court's Procedure

**1. Introduction**

The principle of separation of powers<sup>1</sup> is a regulatory doctrine contained in the constitutional understanding of governmental powers in Nigeria through the instrumentality of which three different institutions of government have their own different powers to the exercise.<sup>2</sup> The principle of separation of powers deals with reciprocal relationships amongst the 3 [three] arms of government namely; legislature, executive and judiciary.<sup>3</sup> The doctrine of separation of powers commands the different arms of the government to act within the limit of their respective powers and restrains each from intervening in affairs that are restrictedly bestowed to others.<sup>4</sup> Separation of powers functions to prevent the concentration of too much power in the hand of a single institution of government. The partition of the legislature from the executive, and the subsistence of an independent and impartial judiciary compose the required conditions to obtain liberty and freedom of Nigerians which can be attained through judicial instrumentality.<sup>5</sup> The Constitution of Nigeria<sup>6</sup> and almost all of African countries include remarkable instrument for inspecting and controlling the exercise of legislative powers.<sup>7</sup> By way of judicial review of legislative action, the judicial institution of the state exercises a measure of control and check over the legislature.<sup>8</sup> The principle of judicial review becomes an important attribute of written constitutions of many countries- Nigeria inclusive.

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\* **By Ahmad Haruna DANMAIGAUTA, LLB, LLM, BL, PDE (in view)**, Public and Private Law Department, Faculty of Law, Umaru Musa Yar'adua University Katsina, Katsina State Email: ahmad.danmaigauta@umyu.edu.ng. Phone No.: +234803-634-8068; and

\* **Mohammed Bashir TANKO, LLB, MBCL, LLM, PhD (in view), BL**, Department of General Studies, School of Liberal Studies, Nuhu Bamalli Polytechnic Zaria, Kaduna State. Email: tbaashir2007@gmail.com. Phone No.: +2348038593284

<sup>1</sup> Sections 4, 5, 6 of the Constitution of The Federal Republic of Nigeria 1999 [as altered 2011]

<sup>2</sup> Ayodele, G. A. and Olasunkanmi, A. J. 'Judicial Review of Legislation In Nigeria: A Constitutional Imperative' [2015] [2] [1] *Joseph Ayo Babalola University Law Journal* [JABU] p. 2

<academia.edu/23606690/Judicial\_Review\_of\_Legislation\_in\_Nigeria\_A\_Constitutional\_Imperative.pdf> accessed on 8<sup>th</sup> April, 2020 30:00pm

<sup>3</sup> Taiwar, A. 'Separation of Powers And Judicial Activism In Indian'[2015] *Academike Articles On Legal Issues* p 4 <<https://www.lawctopus.com/academike/separation-of-powers-and-judicial-activism-in-india>> accessed on 8<sup>th</sup> April, 2020 @ 4:30pm

<sup>4</sup> Yohannes, A. and Michael, D. G 'Grounds of Judicial Review' p. 1 <<https://abyssinialaw.com/about-us/item/318-grounds-of-judicial-review>> accessed on 8<sup>th</sup> April, 2020 @ 4:40pm

<sup>5</sup> Olayinka, O. 'Judicial Review of Ouster Clause Provisions in the 1999 Constitution: Lessons for Nigeria' p. 148 <[ajol.info/index.php/naulij/article/view/168813](http://ajol.info/index.php/naulij/article/view/168813) pdf> accessed on 8<sup>th</sup> April, 2020 @ 1:30 pm

<sup>6</sup> Constitution of The Federal Republic of Nigeria 1999 [as altered 2011]

<sup>7</sup> Udofa, I. J. 'The Power of Judicial Review in The Promotion of Constitutionalism in Nigeria: Challenges and Prospects' [2015] [40] *Journal Of Law, Policy and Globalization*. 192 <[iiste.org/journals/index.php/JLPG/article/view/24853](http://iiste.org/journals/index.php/JLPG/article/view/24853) pdf> accessed on 8<sup>th</sup> April, 2020 @ 1:38pm

<sup>8</sup> Udofa, I. J. *Op.Citp.* 194

Judicial review boomed in English legal system in the belief that there is always a superior institution to which the legislature must be submissive, during its developmental period; the principle of Judicial Review proceeded on the belief that Natural Law is supreme and any action by parliament (legislature) must obey the orders of this supreme law-judicial review.<sup>9</sup>The principle of judicial review as contained in the doctrine of separation of powers the major idea of which is to establish a checks and balances as an instrument at the disposal of judiciary with view to controlling the legislative action in Nigeria.<sup>10</sup>The principle of Judicial Review is significant as an effectual way of attaining lawful control of legislative action. It is a great and effective restraint to legislative excesses and abuses.<sup>11</sup> Judicial control emerges to be the most efficient way of commanding and implementing demand of the constitution on the legislature.<sup>12</sup> Judicial review as a major control which the legislature must respect should be viewed as obedience for controlling legislative action in Nigeria.<sup>13</sup>

In light of the above, this paper addresses; meaning, nature and scope of judicial review of legislative action, legislative powers, judicial powers with more emphasis on judicial review of legislative actions as one of the judicial powers in Nigerian, grounds of judicial review, limitations of Judicial review of legislative action and possible reliefs of successful judicial review of legislative action.

## 2. Meaning, Nature and Scope of Judicial Review of Legislative Action

The phrase 'Judicial Review' has been differently defined mostly according to the context in which it is being put in use. It received many contextual definitions from different authors. This paper explored some of the definitions. Judicial Review has been defined as "the power of courts to view decisions of another department or level of government".<sup>14</sup> This definition tallies with the issue of Judicial Review of legislative action. This is because 'power to review decision of another department or level of government' has been mentioned. Legislative decision- law making activities of the legislature is subject to the power of the court- Judicial Review. It has also been defined as the power of the court in proper proceeding before it, to proclaim a legislative action either in accordance with or contrary to the constitution, with consequence of rendering the action valid or invalid; if valid; same will be beyond challenge in the future.<sup>15</sup> This definition is considered by the authors of this paper as direct and specific definition as regards Judicial Review of Legislative Action. Another author defined Judicial Review of Legislative Action as the power of the court to examine the legislative action. It is the power of the court to analyse the legality of any law in order to determine its validity or otherwise.<sup>16</sup>This definition is almost similar to the preceding definition as regards relevance and specification. In the same development, Judicial Review has been defined as the power of the Supreme Court or High Court to analyse legislative conduct and to invalidate that conduct if is contrary to the constitutional principles.<sup>17</sup>Judicial review basically is a part of judicial power of the government which is exercised by the courts to establish the validity of a law.<sup>18</sup>Judicial Review is the court's support or overturn of the action of legislature. It also defined as the power of the court to scrutinise and declare any type of legislation unconstitutional that offends the provisions of the constitution.<sup>19</sup> Judicial review can be

<sup>9</sup> Bang, S. S. 'Judicial Review of Legislative Action; A Tool To Balance The Supremacy Of The Constitution' p. 1 <internationalseminar.org/XIV\_AIS/TS%20/12.%20SanJay%20Salyanayaran%20Bang.pdf> accessed on 8<sup>th</sup> April, 2020 @ 3:45pm

<sup>10</sup>Ayodele, G. A. and Olanakanmi, A. J. Op. Cit. p 13

<sup>11</sup>Ogbuabor, C. A. 'Expanding The Frontier Of Judicial Review In Nigeria: The Gathering Storm' [2011-2012] [10] *The Nigerian Juridical Review*, p. 1

<Researchgate.net/Publication/282134548\_Expanding\_the\_Frontiers\_of\_Judicial\_Review\_in\_Nigeria\_The\_Gathering\_Storm.pdf> accessed on 8<sup>th</sup> April, 2020 @2:35pm

<sup>12</sup>Ogbuabor, C. A. Op.Cit pp 1-2

<sup>13</sup> Danmaigauta, H. A. 'An Overview of Judicial Review of Administrative Action in Nigeria' [2019] [2][1] *Yobe State University Law Review* [YSUnivLR] P.146

<sup>14</sup>Henry Campbell Black. M. A. and others. '*Black's Law Dictionary*' [6<sup>th</sup>edn, St. Paul Minn. West Publishing Co. 1990] p. 849

<sup>15</sup>Udofa, I. J. Op.Cit p. 193

<sup>16</sup> Sharma, M. 'Judicial Review: A Comparative Study' [2017] *Indian Constitutional Review* p. 43<www.iclrq.in/editions/jan/5.pdf>accessed on 8th April, 2020 @ 3:00pm

<sup>17</sup>Duggal, S. 'Grounds Of Judicial Review' [2014] *Academike Articles On Legal Issues* p. 1

<https://www.lawctopus.com/academike/grounds-of-judicial-review123/> accessed on 8<sup>th</sup> April, 2020 @ 1:37pm

<sup>18</sup> Bang, S. S. Op. Cit. p. 2

<sup>19</sup> Olayinka, O. Op. Cit p. 142

considered as a power or process. It is the power of the court to declare process constitutional or otherwise by which the court exercises its supervisory jurisdiction over the act of legislative institution of government.<sup>20</sup> In general terms, Judicial Review refers to the judicial control of the other arms of government. In its technical sense, it refers to judicial control of legislative action by superior courts of records typified by the high court.<sup>21</sup>

Judicial Review has an area of coverage, in essence, it is not without scope. This means there is boundary which courts cannot cross by way of its activism through judicial review of legislative action. It should be understood that judicial authority can only invalidate the offending provisions of a particular enactment. By this, it means the offending provisions will not affect other provisions of the same enactment that did not offend the constitutional provision.<sup>22</sup> Current jurisdiction of the court in judicial review of legislative action restricts the doctrine to the determination of the lawfulness of a legislative action but not the significance or acumen of such action.<sup>23</sup> A court under judicial review is to either authenticate legislative action or set same aside but cannot do otherwise.<sup>24</sup> The power necessarily includes the authority to proclaim any legislative action *ultra vires* which offends the constitutional provision.<sup>25</sup> The Supreme Court of Nigeria in a detailed verdict highlighted the scope of judicial review of legislative action; "...every public functionary performs his function according to law including the constitution..."<sup>26</sup> by this quoted Apex Court authority, courts can only review legislative action in order to determine its constitutionality or otherwise. They must recognise that the statutory authority for making law belongs to legislature no any other arm of government that can exercise same and hence the courts cannot substitute legislative action with its judgment.<sup>27</sup>

### **3. Judicial Review of Legislative Action Differentiated from other Court's Procedures**

Judicial review is quite dissimilar and must be distinguished from "appeal" or a normal adjudicatory proceeding. In the exercise of its normal constitutional function of adjudication, the court has to entertain all actions, make all the necessary determinations involving law and facts, and see that each party gets his due according to the law of the land. In the case of an appeal, the courts may have to go into the merits as well the weight of evidence sustaining the decision; it may have to hear again all or some aspects of the case and find support or justification for the decision given by the lower court; it may have to quash the decision appealed against and replace it with its own decision or do whatever the justice of the matter demands<sup>28</sup>. In judicial review of legislative action, on the other hand, the courts must and generally do recognise that statutory responsibility for performing a given legislative task belongs first and foremost to the legislature concerned and that no other person or authority is competent under the enabling enactment to exercise that function. Therefore, the courts can only review the action taken by the legislature solely for the purpose of determining whether or not the legislature has acted within the limit of the enabling enactment. The court cannot go into the merit or set aside the legislative action merely because the court would have come to a different legislation. In other words, the courts' view on the merits of the case should be disregarded and attention focused on whether the express and implied requirements of the enabling enactment have been met – whether the legislature has kept within the limit of its jurisdiction, whether it has applied the proper procedures in all concerns. Where the above requirements are not met, the requirements of the enabling enactment have been disregarded, the court can only quash what has been done or proclaim it invalid and leave the legislature free to exercise the function once again if need be.<sup>29</sup>

### **4. Legislative and Judicial Powers**

As provided by the constitution of Nigeria, by virtue of the principle of separation of powers,<sup>30</sup> there are legislative powers as well as judicial powers in which the later exercises control over the former by way of judicial review of legislative action.

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<sup>20</sup>Ogbuabor, C. A. Op. Cit p. 3

<sup>21</sup> Danmaigauta, H. A. Op.Cit. p. 146

<sup>22</sup>Ayodele, G. A. and Olasunkanmi, A. J. Op. Cit. p. 12

<sup>23</sup>Ogbuabor, C. A. Op. Cit p. 2

<sup>24</sup> Olayinka, O. Op. Cit p. 142

<sup>25</sup> Bang, S. S. op. cit. p. 5

<sup>26</sup>Abdulkarim v Incar Nig. Ltd. [1992] [7] NWLR [pt. 251] p. 1

<sup>27</sup> Danmaigauta, H. A. Op.Cit. p 147 and Sections 4, 5, 6 of the Constitution of the Federal Republic of Nigeria 1999 [as altered 2011]

<sup>28</sup>Ogbuabor, C. A. Op Cit. p. 12

<sup>29</sup>Ogbuabor, C. A. Op. Cit. P. 12

<sup>30</sup> Sections 4, and 6 Of the Constitution Of The Federal Republic Of Nigeria 1999 [as altered 2011]

#### 4.1. Legislative Powers

The legislature in Nigeria at the Federal level is National Assembly which consists of both Senate and House of Representatives of the Federal Republic of Nigeria.<sup>31</sup>The National Assembly has power to make laws for peace, order and good governance of the entire federation as regards any matter included in the exclusive legislative list.<sup>32</sup> The National Assembly shall also have the power to make laws as regards any matter included in concurrent legislative list and any other matter with respect to which it is empowered to make laws in accordance with provision of the constitution.<sup>33</sup>Under the integrated or interlocking model of sharing legislative powers, the powers to make laws on most of the identified subject matter are mutually shared by the Federal and State Governments.<sup>34</sup>The legislative power in any true federalism more often than not entails the sharing and limitation of governmental power; it implies the democratic pluralism and decentralised governance as well as decentralised policies and decisions in presidential system of constitutional democracy.<sup>35</sup> There are many of legislative powers; law making powers, oversight power of legislature, legislative power of controlling and supervising public fund and legislative power of confirmation of presidential appointments or gubernatorial appointments as the case may be. The most relevant power of legislature to this paper is the law-making power.

The major function of legislature in Nigeria and any other country around the world is enactment of laws.<sup>36</sup> In this situation, the constitution provides that the legislature shall have power to make laws for the peace, order and good government of the Federation or State.<sup>37</sup> The phrase peace, order and good government considered in relation to the power of legislature in Nigeria does not demarcate the reason of which the power is granted, such that a law should be for peace, order and good government in order to be valid. The phrase is preferably considered as a legal formula for expressing unreserved completeness of legislative power exercisable by a sovereign legislature subject to limitation arising from the devolution of powers between central and regional government in a federal and presidential constitutional democracy in Nigeria.<sup>38</sup> This is the legislative power that is most importantly has good relation with judicial power as regards power of Judicial Review of Legislative Action. This led this paper to consider judicial powers out of which judicial review of legislative action is emphatically considered.

#### 4.2 Judicial Powers

Judicial power is the authority being exercised by that branch of government which is saddled with proclamation of what law is and its edifice. The authority is vested in the courts and judges as differentiated from executive and legislative powers. Courts have general powers to decide and pronounce a judgment and carry it into effect between two persons and parties who bring a case before it for decision; and also such specific powers as contempt power, power to control admission and disbarment of attorneys and power to apply rules of court.<sup>39</sup>The power granted to the judiciary is extended to all inherent powers and sanctions of court of law. In the Nigerian constitutional democracy, constitution provides judicial powers which are vested in the courts.<sup>40</sup> Judiciary is the third arm in any modern government whether a country has written or unwritten constitution, be it federal or unitary. The provision of section 6 of the Constitution of Nigeria 1999 confers generally the judicial powers of Nigeria in the judiciary to mark the separation of judicial power from the other powers of the country. The section considers separation of powers between the judiciary and other institutions of the constitution.<sup>41</sup>There are many

<sup>31</sup> Section 47 of the Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011]

<sup>32</sup>Section 4 [2] Of The Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011]

<sup>33</sup> Section 4 [4] Of The Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011] and Obidimma, A. E and Obidimma F. E. C. 'The Legislative-Executive Relations In Nigeria's Presidential Democracy' [2015] [3][1] *International Journal Of Business And Law Research* [Seahi Publications] p. 74<<https://seahipaj.org/journals-ci/mar-2015/IJBLR/full/IJBRL-M-82015.pdf>> accessed on 14<sup>th</sup>April, 2020

<sup>34</sup>Jacob, A. O. 'Techniques For Division Of Legislative Powers Under Federal Constitution'[2015][1][4] Babcock University Socio-Legal Journal P. 122

<sup>35</sup>Oluyede, P. A. O *Constitutional Law In Nigeria* [1992] Nigeria Publishers Limited p. 179

<sup>36</sup>Obidimma, A. E and Obidimma F. E. C 74

<sup>37</sup> Section 4 of the Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011]

<sup>38</sup> Section 4 [2] Of The Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011] and Danmaigauta, A. H. 'Examination Of Legislative Involvement In Presidential Power Of Appointments Under The Nigerian Constitution' [2018] [5] [1] *Unimaid Journal Of Public Law* p.81

<sup>39</sup> Henry Campbell Black. M. A. and others Op.Citp. 849

<sup>40</sup> Section 6 Of The Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011]

<sup>41</sup> Taiwo, S. A. 'Judicial Review And Judicial supremacy: Paradigm Of Constitutionalism In Nigeria' [2011] [11][1] *International And Comparative Law Review* p.

powers conferred by the constitution on the Nigerian judiciary such as power to make rules, power of the courts to hear and determine a matter initiated by writ, power to hear and determine and appeal, power of judicial review of judicial action, power of review of administrative action and power of review legislative action. The last-mentioned power-judicial review of legislative action is the power that concerns this paper the most which is of course the crux of the paper. This led this paper to consider judicial review of legislative action separately.

### **4.3 Judicial Review of Legislative Actions**

Under the current system of constitutional democracy in Nigeria, a proposed law may be advantageous and still held to be unconstitutional and therefore null and void as a result of being initiated by a wrong body or being introduced through an unconstitutionally inappropriate method or both.<sup>42</sup> The Nigerian constitution is a legal document asserted to be the basis of all valid laws and the very idea of legislation assumes that the operative national constitution could be followed to the letters in the process of enacting law if the basic normative features of all modern law; explicitly, legitimacy, validity and enforceability are to be made available.<sup>43</sup> Despite the fact that the judiciary is an establishment of the constitution and positively granted powers,<sup>44</sup> which in the end surpass the constitution itself, it is by means of its power of review or interpretive adjudication assumes unintentionally superiority over all other organs of government and constitution.<sup>45</sup> When the courts exercise interpretive jurisdiction particularly in the power in connection with exercise of power by legislature, they most over and over again establish the legality or otherwise of such exercise or its mode. And as in any adjudicatory matter, the judgments of the court finalised the situation and also are binding on all the parties in the litigation.<sup>46</sup> By the provision of the constitution of Nigeria, the judiciary has come to exert power of review from which judicial review of the legislative action is recognised.<sup>47</sup> The judiciary as represented by the courts also interprets the laws enacted by the legislature and also has final decision as regards the legality or otherwise of any legislative action of the state. It is established by the constitution that legislative actions are subject of judicial intervention and the constitution prohibits the legislature from making any law that ousts the jurisdiction of the court.<sup>48</sup> Therefore, it is apt for the courts to intervene against legislative irregularity of the constitution at least while reviewing a legislation.<sup>49</sup> It is by way of judicial review of legislative action, the judicial organ of government exercises a measure of control over legislature. To support this controlling and checking function of the judiciary, the constitution provides that the constitutional powers of National Assembly or State Houses Assembly shall be subject to the jurisdiction of courts and of tribunals established by law and accordingly the legislative assemblies shall not make any law that remove the jurisdiction of a court of law or of a judicial tribunal established by law.<sup>50</sup> The power of the courts to illegalise a law enacted by the legislature in case it contravenes the mandate of the constitution emanates from other part of juristic nature of the constitution-supremacy of the constitution.<sup>51</sup> Judicial review of legislative action serves as powerful arm for preventing an unconstitutional exercise of legislative powers.<sup>52</sup> Through the judicial review, the court has to analyse whether the legislature has exercised its powers within the frame work of the constitution, this is the avenue by which constitution has enabled the courts to determine the state legislations by examining whether they are in conformity with the constitution. The judiciary has been assigned a superior position as regards legislature. The constitution endowed the judiciary with power of declaring the law as unconstitutional if it is outside the capacity of the legislature according to the division of

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64 <[researchgate.net/publication/228126335\\_Judicial\\_Review\\_And\\_Supremacy\\_A-Paradigm\\_Of\\_Constitutionalism\\_In\\_Nigeria.pdf](https://www.researchgate.net/publication/228126335_Judicial_Review_And_Supremacy_A-Paradigm_Of_Constitutionalism_In_Nigeria.pdf)> accessed on 8<sup>th</sup> April, 2020 @ 5:00pm

<sup>42</sup> Ayodele, G. A. and Olanikanmi, A. J. Op.Citp.2

<sup>43</sup> Ayodele, G. A. and Olanikanmi, A. J. Op.Citp. 2

<sup>44</sup> Section 6 Of The Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011]

<sup>45</sup> Taiwo, S. A. p. 84

<sup>46</sup> Taiwo, S. A. p. 84

<sup>47</sup> Section 6 [6] Of The Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011] and Imam, I. 'Judicial Activism In Nigeria: Delineating The Extended Of Legislative-Judicial Engagement In Law Making' [2015][15][1] *International And Comparative Law Review* p. 111 <[https://www.researchgate.net/publication/322706172\\_Judicial\\_Activism.pdf](https://www.researchgate.net/publication/322706172_Judicial_Activism.pdf)> accessed on 8<sup>th</sup> April, 2020 @ 3:11pm

<sup>48</sup> Imam, I. 'Judicial Activism In Nigeria: Delineating The Extended Of Legislative-Judicial Engagement In Law Making' [2015][15][1] *International And Comparative Law Review* p.

118 <[https://www.researchgate.net/publication/322706172\\_Judicial\\_Activism.pdf](https://www.researchgate.net/publication/322706172_Judicial_Activism.pdf)> accessed on 8<sup>th</sup> April, 2020 @ 1:34pm

<sup>49</sup> Imam, I. 'Judicial Op.Citp.124

<sup>50</sup> Udofa, I. J. Op.Cit p. 194 and Section 6 Of The Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011]

<sup>51</sup> Section 1 Of The Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011] and Sharma, M.pp. 43-44

<sup>52</sup> Duggal, S. p. 10

powers by the constitution.<sup>53</sup>Towards the actualisation of human rights, judicial review of legislative action is put in place to review the manner in which the legislation are made.<sup>54</sup>

#### 4.4 Grounds of Judicial Review of Legislative Actions

Judicial review of legislative actions is not just like that, in essence, before an application by of originating summons for judicial review of legislative action can be entertained by any court with jurisdiction and to succeed, certain grounds must be made available. The grounds are as follows.

##### 4.4.1 Ultra Vires

*Ultra vires* means beyond the power or not within the power that is allowed or in excess of the power that is allowed for the legislature to exercise its legislative power. It also means unauthorised. A thing is *ultra vires* when it is done beyond the powers granted to a branch of government for doing that thing by law.<sup>55</sup>The *ultra vires* consists of both substantive and procedural. The proper judicial review of legislative action in Nigeria cannot be made without referring to the provision of the *grundnorm* of the country and same will be seen especially in the substantive *ultra vires* as a ground for judicial review of legislative action.<sup>56</sup> *Ultra vires* can either be substantive or procedural.

##### Substantive Ultra Vires

The term substantive *ultra vires* means the substantive defect of the legislation as distinguished from procedural impropriety. In the strict sense of the term, legislative action is said to be *ultra vires* in terms of substance where the legislature goes beyond the power bestowed on it or where the subject matter of the legislative action falls outside the jurisdiction of the legislature, Thus where the legislature passes a law that falls outside the subject matter of its power, it acted in substantive *ultra vires*.<sup>57</sup>The doctrine of supremacy of the constitution means that the constitution as legal document is superior of all the laws and that all laws must conform to it so as to be considered as legitimate. The constitution is supreme and is binding on all persons and authorities in Nigeria and any law that is inconsistent with provision of the constitution shall be void to the extent of its inconsistency.<sup>58</sup> A legislature that passed a law the input and intent of which is in violation of the spirit and letters of the constitution is not acting or conducting itself within the realm of the power granted to it and hence its action is *ultra vires*, it consequently follows that any portion of legislation made by it can be declared unconstitutional which will make it ineffective. In pursuant of the exercise of the power of declaring a law unconstitutional, apex court of the land declared enactment of Lagos State House of Assembly unconstitutional null and void for being outside its power for not engaging National Assembly. <sup>59</sup> The judiciary is vested with power to declare invalid any existing law on the ground of inconsistency with provision of any other law; that is, a law of National Assembly or House of Assembly.<sup>60</sup> Any law that goes outside the power of its maker falls within realm of *ultra vires* as was also affirmed by the Supreme Court of Nigeria in its judgment while striking down the legislation of National Assembly as regards some of the provisions of Electoral Act 2001.<sup>61</sup> In the same development, any law that may be made by any of the State Houses of Assembly will be struck down by way of judicial review of legislative action if enacted on any of subject matters that falls within exclusive legislative list.<sup>62</sup>

<sup>53</sup> Bang, S. S. Op. Cit. p. 5

<sup>54</sup> Bang, S. S. Op. Cit. p.144

<sup>55</sup>Asefa, T. 'Judicial Review Of Administrative: A Comparative Analysis' unpublished [2013] <cholot.files.wordpress.com./2013/judicial-review-of-adminstrative-action-a-comparative-analysis1.pdf> accessed on 16<sup>th</sup> april,2020 @ 4:45pm

<sup>56</sup> Olaniyan, H. A. 'Review Of Judicial And Legislative Approach Of Nigeria To Discretionary Jurisdiction Over Foreign Causes'[2012] [3][12] *International Journal Of Business And Social Sciences* p.204-<<https://www.google.com/search?q=judicial+review+legislative+action+in+nigeria+pdf>> accessed on 8<sup>th</sup> April,2020 @ 5:00pm

<sup>57</sup>Yohannes, A. and Michael, D. *Gop.cit* pp 2-3

<sup>58</sup> Section 1[1] and [3] Of the Constitution of the Federal Republic of Nigeria 1999 [as altered 2011] and Ayodele, G. A. and Olanakanmi, A. J. *op.cit*. p. 15

<sup>59</sup>*Attorney General Lagos State v Attorney General Federation* [2004] 18 NWLR [pt. 904] p.1

<sup>60</sup>Taiwo, S. A. *op.cit* p. 65

<sup>61</sup> *A. G. Abia State and 33 Ors v A. G Federation* [2007] 1 CCLR p. 104

<sup>62</sup> 2<sup>nd</sup> Schedule Part I Of The Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011]

### Procedural Ultra Vires

The compliance to the laid down procedure is necessary for any legal process in order to have the force of law and legislative action is not different. There are certain procedures expected to be respected while conducting legislative process failure of which the action can be struck down for being *ultra vires* procedurally. Where there is constitutional provision setting out the procedure for legislative action, any deviation from the procedure in the exercise of legislative power is actionable and legally responsible to the judicial examination.<sup>63</sup> The apex court of Nigeria in exercising its power of judicial review of legislative actions struck down law enacted by the National Assembly<sup>64</sup>, in this case the plaintiff in this case was one the states of the federation who has an entitlement in the federation account. The President on 28<sup>th</sup> October, 1980 presented a bill on formula for the distribution of money standing to the credit of the account among the 3 [three] tiers of government as provided by section 149 of the 1979 Constitution to the National Assembly. The bill was passed by the Senate on 15<sup>th</sup> January, 1981 with amendments while the House of Representatives passed the bill with different set of amendments on the 22<sup>nd</sup> January, 1981. There was disagreement between Senate and House of Representatives on the passage of the bill, and the Senate President in accordance with section 55 [2] of the 1979 Constitution organised and convened a meeting of joint finance committee of the national assembly to examine the bill with view to resolving the differences between the 2 [two] Houses of the National Assembly<sup>65</sup>. They met and finally adopted the Senate's amendments with some alterations. The committee's approved version was without recourse to the National Assembly, presented to the Clerk of the National Assembly who subsequently presented it to the President of the Federal Republic of Nigeria for assent.<sup>66</sup> The president assented to the bill on the 3<sup>rd</sup> February, 1981 and it became the Allocation of Revenue [federation account] Act 1981. The plaintiff being dissatisfied with way and manner, in which the bill was passed and assented, filed an originating Summons in the Supreme Court challenging the legality of the Act. Fatai Williams JSC in delivering the judgment of the court held thus;

...various provisions of the constitution to which I have earlier referred clearly indicate a different legislative process from that followed by the National Assembly in this case. Since this legislative process has not been followed in the passing of the Allocation of Revenue [Federation Account etc.] Act 1981, the Act to my mind is not a valid....<sup>67</sup>

From the above quotation, it can be understood that the Supreme Court was not concerned about the competence of the National Assembly to enact the law in question but rather it was concerned about the legislative procedure which had not been followed and hence it struck down the law. This indicates the conduct of the National Assembly fell within the procedural *ultra vires*. The Constitution allows the National Assembly and State House of Assembly to regulate their procedures.<sup>68</sup> Pursuant to this, various Legislative Houses Standing Orders and Rules of Business Procedure were adopted.<sup>69</sup> Houses of Representatives of Nigeria made Standing Orders which specified a number of readings a bill should undergo in the course of its passage<sup>70</sup> and failure to follow same will definitely result in procedural *ultra vires* which will make the law to be struck down if enacted.

#### 4.4.2 International Law

Convention, Treaty, Protocol are very strong limitation on the legislative power of the legislature. It is known that Nigeria is an independent nation with its own personal sovereignty and its legislature cannot make a law that will go contrary to international community. There are certain standards to which a nation must abide in order to remain a responsible member of the international community. Any deviation from those standards or norms may definitely be resisted. In international law, once a country is signatory to certain convention, treaty and protocol, such become binding on that country and therefore cannot enact any law that will be in quarrel with those international instruments. It should be noted that ratifying a convention by a nation at international level makes

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<sup>63</sup> Imam, I. op.cit p. 125

<sup>64</sup> *Attorney of Bendal State v Attorney General of the Federation and 22Ors* <<https://nigerialli.org/ng/judgment/supreme-court/1981/4>> accessed on 18<sup>th</sup> April, 2020 @ 5:15pm

<sup>65</sup> Sections 55 and 58 Of The Constitution Of The Federal Republic Of Nigeria 1979, it has the same content with section 62[3] Of The Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011]

<sup>66</sup> Section 54 Of The Constitution of the Federal Republic of Nigeria 1979 it has the same content with section 58[3] Of The Constitution Of The Federal Republic Of Nigeria 1999 [as altered 2011]

<sup>67</sup> Taiwo, S. A. Op.Citp. p. 67

<sup>68</sup> Sections 60 and 101 Of The Constitution Of The Federal Republic of Nigeria 1999 [as altered 2011]

<sup>69</sup> Ayodele, G. A. and Oluksunkanmi, A. J. op.cit. p. 6

<sup>70</sup> Order XII Rule 3 [2] Of The Standing Orders Of The House Of Representatives Of Federal Republic Of Nigeria

such a convention to be superior to the local legislation of that country.<sup>71</sup> Thus, creating a law in contradiction to the international instruments makes ground of judicial review of legislative action available and the said law can be struck down by Nigerian court. Agundare JSC while trying to consider the superiority of African Charter on Human and People's Rights has said "international statutes, once signed by a country, have a greater vigor and strength than other domestic statutes"<sup>72</sup>.

#### 4.5 Limitations of Judicial Review of Legislative of Actions

There are many things in the Nigerian constitutional democracy that hinder court from exercising its power by way of judicial review of legislative actions.

##### 4.5.1 *Locus Standi*

The citizens of the country do not have absolute access to court for the enforcement of their right and maintenance of the constitution as the issue of *locus standi* constitutes serious hindrance to the full utilisation of the court to promote constitutionalism in Nigeria. Therefore, where there are any legislative actions which contravene the provision of the constitution, an individual citizen may be prevented by the doctrine of *locus standi* from instituting an action to remedy the infringement and preserve the constitution.<sup>73</sup> The apex court affirmed that an individual has *locus standi* if he or she can prove enough interest in the action and that his civil rights and obligations have or are in risk of being violated.<sup>74</sup> As it is, it is hard for someone to establish a *locus standi* that will give him/her opportunity to institute an action against legislative action. This is because, going by the principle of *locus standi* established in *Adesanya's* case, even if legislative action contravenes constitutional provision, prospective litigant must show that his interests or rights has been affected and hence he/she will have the legal capacity of a plaintiff to institute an action or proceedings in a court of law.<sup>75</sup>

##### 4.5.2 Constitutional Barrier

Despite it has been provided that legislature; be it at federal or state level is prohibited from enacting a law that will oust the jurisdiction of the court from exercising its power of judicial review of legislative or any other power,<sup>76</sup> the same source also demarcated certain areas in which courts have no power to review what transpired in legislature-the impeachment proceedings, thus, "No proceedings or determination of the Panel or the National Assembly or matter relating thereto shall be entertained or questioned in any court."<sup>77</sup> In the same development, it has also been provided by the *grundnorm*, thus "No proceedings or determination of the Panel or the House Assembly or matter relating to such proceedings or determination shall be entertained or questioned in any court"<sup>78</sup> It is superfluous to say that the above quoted constitutional provisions categorically ousted the jurisdiction of the court to review some of the legislative activities at both federal and state level despite the presence of a section 6 [8] of the Constitution. Certainly, this has created a situation that constitutes limitation to the power of Nigerian court to exercise power of judicial review of legislative action.

##### 4.5.3 Corruption in the Judiciary

The judicature in Nigeria has not only being financially reliant on the executive branch of the constitutional democracy for many decades but has also being politicised immensely.<sup>79</sup> This position in turn makes the judiciary to be susceptible to corruption. While corruption in the judiciary connects with unprofessional or infamous conducts by some of the judicial officers, it is taken to mean effort by separate bodies to mutilate the judiciary; through bribery, cajoling, intimidation or some other means. Indubitably, a financially reliant judiciary cannot enjoy complete independence neither can it dispense justice without fear or favour.<sup>80</sup> Through the politicisation

<sup>71</sup> Taiwo, S. A. Op.Citp. p.56

<sup>72</sup> *General Sani Abacha and 3 Ors v Gani Fawehinmi* <[www.nigeria-law.org/General%20Sanni%20Abacha%20&%20Ors%20V%20Chief%20Gani%20Fawehinmi.htm](http://www.nigeria-law.org/General%20Sanni%20Abacha%20&%20Ors%20V%20Chief%20Gani%20Fawehinmi.htm)> accessed on 18<sup>th</sup> April, 2020 @ 5:00pm

<sup>73</sup> Udofa, I. J. Op.Cit p 201-202

<sup>74</sup> *Adesanya v President Of The Federal Republic Of Nigeria And Another* (1981) 2 N.C.L.R.358 LPELR

<sup>75</sup> *Attorney Gen. Anambra State v Att. Gen Federation* (2007) 12 NWLR (pt.1047) p.4

<sup>76</sup> Section 4 [8] Of The Constitution Of The Federal Republic Of Nigeria 1999 [ as altered 2011]

<sup>77</sup> Section 143 [10] Of The Constitution Of The Federal Republic Of Nigeria 1999 [ as altered 2011]

<sup>78</sup> Section 188 [10] Of The Constitution Of The Federal Republic of Nigeria 1999 [ as altered 2011]

<sup>79</sup> Ojo, E. O. And Adebajo, P. F, 'Can Nigeria's Nascent Democracy Survive?' [2009][11] *Journal Of Sustainable Development In Africa* pp. 17-19 and Udofa, I. J. Op.Cit p. 200

<sup>80</sup> Udofa, I. J. Op.Cit p. 200



of everything in Nigeria, legislature and executive interfere in the judicial activities and hence most of the time making the court unable to dispense justice. Normally, independence of judiciary is theoretical in Nigeria. This is because the process of confirmation of appointment of senior judicial officers and the process of funding the judiciary by the executive become an opportunity that makes the 2 [two] other branches of government to marginalise judiciary.<sup>81</sup>

#### **4.6 Reliefs of Judicial Review of Legislative of Action**

Judicial Review of legislative action is purposive; it is always aimed at achieving a particular judicial goal. If the proceeding of judicial review of legislative action is successful, some reliefs are to be made available which will serve as outcome of the exercise. The reliefs are as follows;

- a. Interpretation of any statute; be it equivocal or otherwise
- b. Declaration as regards validity or otherwise of any law or any legislative action
- a. Eradication of flaws emanating as a result of speedy drafting of statutes
- b. Bringing out the gaps in a legislation and give direction that may help in making amendments.<sup>82</sup>

#### **5. Conclusion**

As exposed in this paper, the exercise of power of judicial review of legislative action will reduce if not eradicate all the recklessness, excessiveness and abuse of legislative power by the legislature in Nigeria. But that can only be possible if judicial branch of government in the Nigerian constitutional democracy is autonomous financially and without any interference by the other 2 [two] institutions of government while dispensing justice, otherwise, the judicial powers will remain subjugated with far-reaching negative effects on our nascent democracy. Hence, the usual saying ‘the court is last hope of the common man’ will not be applicable in the Nigerian judiciary. The paper found that the principle of *locus standi* creates serious barrier for instituting action in our courts more especially as regards judicial review of legislative action. It found also that the Constitution of the Federal Republic of Nigeria 1999 [as altered 2011] contradicted itself through sections 4[8], 143[10] and 188 [8] which vested and ousted the jurisdiction of court respectively in respect of power of judicial review of legislative action in Nigeria. It is discovered that there is no constitutional court in Nigeria that is saddled with responsibility of exposing what constitutional provision is all about. The paper recommended that the doctrine of *locus standi* in the Nigerian legal system be relaxed so as to give countrymen opportunity of challenging any law that deserved to be challenged based on any of the available grounds. It is the recommendation of this paper that sections 4[8], 143[10] and 188 [8] of the Federal Republic of Nigeria 1999 [as altered 2011] be reconciled by way of amendment or possibly judicial pronouncement be delivered on them in order to expose their spirit through their letters. This paper finally recommended that constitutional law court be established that will be manned by professional judges/jurists in constitutional jurisprudence and should have the responsibility of constructing the meaning of Nigerian Constitution’s provisions when the need of their interpretation arises.

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<sup>81</sup> It has been the normal trend in the country

<sup>82</sup>Imam, I. op.cit p. 125