

**JUDICIAL REVIEW OF OUSTER CLAUSE PROVISIONS IN THE 1999 CONSTITUTION:
LESSONS FOR NIGERIA ***

Abstract

Ouster clause provisions rob the courts of jurisdiction, and ouster in Nigeria is observed under the classification of human right into the Fundamental Objective and Directive Principles of State Policy and the Fundamental Human Rights. The provisions of section 6(6) (c) of the Constitution of the Federal Republic of Nigeria, 1999 as such ousts the jurisdiction of the law courts in the enforcement of Directive Principles. The paper considers whether the unification approach adopted in the Preamble to the African Charter, the Constitution of the Republic of South Africa and that of India, is not a better option for Nigeria in the enforcement of matters under the Directive Principles. It investigates whether the ouster of jurisdiction of the courts on pre-election matters and impeachment of the executive do constitute an absolute bar on the courts' jurisdiction. The paper recommends that the courts should adopt judicial activism as they review ouster of their jurisdiction, with a view of protecting human right and forestalling arbitrariness in governance. A court should then hesitate to unduly deny itself of jurisdiction on the provision that restriction should be strictly for the promotion of the interest of the state.

Keywords: *Judicial review, ouster clause, rule of law, unification, judicial activism*

1. Introduction

Ouster clause provisions generally preclude an organ of government from exercising its powers over a subject matter, except on the fulfilment of certain conditions.¹ The assumption is that each organ operates having certain control over the others. The paper however examines the ways by which law courts are restricted from reviewing ouster clause provisions.² To Cora Hoexter, ouster clauses operate in stopping the court from questioning the other organs on their actions that are unlawful, unreasonable and procedurally unfair.³ It is however unlawful for the legislature to make laws that oust the jurisdiction of the Court or judicial Tribunal established by law.⁴ A number of ouster clause provisions in the 1999 Constitution Federal Republic of Nigeria, (CFRN) take away the jurisdiction of the courts in certain aspects relating to inter-governmental powers and functions.⁵ One of such is the classification of human right into the Fundamental Objective and Directive Principles of State Policy and the Fundamental Human Rights.⁶ The provision of section 6(6)(c) as such ousts the jurisdiction of the law courts to entertain cases bordering on socio-political and economic policies of Government, which takes such

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¹ See *Madukolu v Nkemdilim* (1962) 3 NWLR (part 281) 324.

² *Ibid.*

³ Cora Hoexter, *Administrative Law in South Africa*, (2nd Ed, Claremont: JUTA & Co., 2012), p 588.

⁴ Section 4(8) of the Constitution of the Federal Republic of Nigeria, 1999 (CFRN). Abdulfatai O Sambo & Abdulkadir B Abdulkadir, 'Ouster Clauses, Judicial Review and Good Governance: An Expository Study of the Experience in Nigeria and Malaysia' (2012) (05) (09) *OIDA International Journal of Sustainable Development* 102.

⁵ See DPSP in Section 6(6) (c) of the Constitution, and impeachment issues examined in *Hon Muiyiwa Inakoju & Others v Hon Abraham Adeolu Adeleke* [2007] 2 FWLR (pt 366) 2403; (2007) 1 SCM 188. Pre-election matters as examined in *Amaechi v INEC & Others* (2008) 18 NWLR (Pt 1066) 42; (2008) 1 SCM,

⁶ See Chapters II and IV CFRN, 1999 respectively.

subjects outside the scope of litigation.⁷ On the assumption that there is a positive link between the political and economic rights, the paper considers whether the unification approach adopted in the Preamble to the African Charter, is not a more pragmatic option to the Nigerian rights classification.⁸

The Constitution also provides ouster of court's jurisdiction on impeachment proceedings. Section 188 (10) CFRN provides on impeachment proceedings thus: 'No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.'⁹ The Constitution thus makes the determination of what amounts to misconduct, upon which a chief executive may be removed, an exclusive preserve of the Assembly, and which is to the exclusion of the jurisdiction of courts.¹⁰ The law courts' jurisdiction to entertain cases arising from pre-election matters is outlawed, as the same constitute domestic affair of a political party.¹¹ The paper then considers whether the ouster of jurisdiction of the courts on pre-election matters in the circumstances is absolute or negotiable.

Judicial review is the exercise of the court's inherent power to determine whether an action is lawful and the award of suitable relief. The court on review mission acts in line with the provisions of section 6 of the CFRN. The term 'judicial review' implies a review of the manner in which a decision was made and does not cover the merit of a case.¹² The courts are there to keep the state and its officials within the bounds of their powers and do protect citizens from excesses of power.¹³ Judicial review thus aims at attaining reliefs from outside the legislative and executive chambers, otherwise known as the political channels.¹⁴ The Court in its exercise of judicial review queries the authenticity of provisions ousting their jurisdiction, for it to be able to champion the course towards the attainment of the rule of law.¹⁵ The rule of law to AV Dicey¹⁶ denotes an absence of arbitrary power, equality before the law and the protection of human rights. The law courts are then able to enforce the rule of law and access to justice as they ensure that the nation is governed in line with the provisions of the Constitution.¹⁷ Section (1) (2) CFRN provides that the Country may only be governed by person(s) in accordance with the

⁷ *Archbishop Anthony Okogie and Others v The Attorney-General of Lagos State*, is one of non-enforceability. See (1981) 2 NCLR 350. See also S Ibe, 'Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities' (2010) 10 *African Human Rights Law Journal* 201.

⁸ 'Justiciability of ESC Rights: The Indian experience' Circle of Rights - Economic, Social and Cultural Rights Activism available at:

<<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm>> (accessed 28 July 2010).) Adem Kassie Abebe, 'Human Rights Under The Ethiopian Constitution: A Descriptive Overview' (2011)(5)(1) *Mizan Law Review*, p 55.

⁹ *Chief Enyi Abaribe v The Speaker Abia State House of Assembly and Others*. (2002) 14 NWLR (Ot 788) page 455 at page 492.

¹⁰ See Section 188 (10) and (11) *Inakoju v Adeleke* (n 5).

¹¹ *Frank Daniel v Independent National Electoral Commission & 2 Others* (2015) 4 SCM 148 at p 182 See also *PDP v Silva* (2012) 13 NWLR (Part 1316) 85(2012) 8 SCM, 200.

¹² Cora Hoexter, (n 3) 145.

¹³ *Id.* 139.

¹⁴ L Stewart, 'Adjudicating Socio-Economic Rights Under a Transformative Constitution' (2009) 20 *Penn State International Law Review* 506. Carol C Ngang, 'Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take 'Other Measures'' (2014) 14 *African Human Rights Law Journal*, 660.

¹⁵ Oladele Osinuga, 'The Impeachment Process, Ouster Clauses, Non-Justiciable Provisions and the Interpretation of Nigeria's Constitution.' <<http://www.gamji.com/article5000/NEWS5525.htm>> accessed 12 November 2016.

¹⁶ Andrew Venn Dicey, *Introduction to the Study of Law of the Constitution* (1885) Reprinted 1996 as 8th Edition. See also Funmilola Tolulope Abioye, 'Rule of Law in English Speaking African Countries: The Case of Nigeria and South Africa' Unpublished LLD Thesis, University of Pretoria 2011, 4.

¹⁷ O Osinuga (n. 15).

provisions of the Constitution.¹⁸ The law court on its rule of law mission then ensures that in respect of pre-election matters,¹⁹ an organ of government or its agency does not act in violation of the provisions of the law. The Nigerian Supreme Court in *Amaechi v INEC & Others*,²⁰ demonstrated this when it asserted its jurisdiction and set aside un-authorised substitution of candidate for not meeting the requirement of the law on 'time' and 'reason.' The paper then investigates the usefulness or otherwise of the principles of the rule of law in the review exercise of the courts.

The courts in exercise of their judicial powers under Section 6 of the Constitution have the jurisdiction to nullify legislation, that are not enacted in accordance with the Constitution.²¹ The judiciary in its role as the compliant organ of government ensures that the principles of constitutionalism are held sacrosanct.²² The paper considers the ouster of court's jurisdiction and the way in which the judiciary reviews ouster of its jurisdiction, with a view of protecting human right and forestalling arbitrariness in governance. In that light, an independent judiciary²³ is advised to adopt judicial activism so as to better able to protect human rights.²⁴ The paper consequently examines jurisdictions such as Republic of South Africa and India in respect of the protection of human right.²⁵

2. Ouster Clause Provisions

Ouster clauses are general provisions, which preclude an organ of government from exercising its powers over a subject matter, except certain conditions are met.²⁶ The judiciary is not able to review certain subjects matter because of ouster clause provisions.²⁷ Cora Hoexter thus argues that ouster clauses operate in stopping the court from questioning the other organs on their actions that are unlawful, unreasonable and procedurally unfair.²⁸ This development then hinders the judiciary in ensuring that arbitrariness in government activities, which the rule of law frowns at, is not curtailed. The ouster is a contrast to the provisions of section 4(8) of the Constitution of the Federal Republic of Nigeria, 1999 that prohibit the National Assembly or the State House of Assembly from enacting any law, which ousts or purports to oust the jurisdiction of the Court or judicial Tribunal established by law.²⁹ Legislative powers should not be exercised inconsistently with the provisions of the Constitution.³⁰ Provisions of law and even the Constitution, which violate the supreme law of the land, which vest judicial powers on the courts,³¹ are thus inconsistent and should be declared null and void. The effectiveness of any curtailment in the discharge of statutory responsibilities however ultimately depends on the attitude of the courts.³²

¹⁸ CFRN 1999.

¹⁹ O Osinuga (n 15).

²⁰ *Amaechi* (n. 5) p 1.

²¹ *Attorney General Abia State and 2 Others v Attorney General Federation and 1 other* (2005) 10-11 SCM 1.

²² See section 6(1) (2) CFRN, 1999.

²³ Lovemore Madhuku, 'Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa' (2002) 46 *Journal of African Law* 232.

²⁴ The Supreme Court established that it is unconstitutional for an organ to control how another organ conducts its activities. See *Paul Unongo v Aper Aku* (1983) 9 SC 186; *Attorney General Ondo State v Attorney General Federation and 35 Others* (2002) 9 SCM 62.

²⁵ Madhuku (n 23) 232.

²⁶ See *Madukolu v Ndemdilm* (n 1).

²⁷ See *Madukolu v Ndemdilm* (n 1).

²⁸ Hoexter (n. 3) p 588.

²⁹ See *Sambo & Abdulkadir* (n. 4) p 102.

³⁰ *INEC and 1 Other v Balarabe Musa and 4 Others*, (2003) 1 SCM 62, 85.

³¹ See section 6 CFRN, 1999.

³² *Sambo & Abdulkadir* (n. 4) p 97.

The term ouster clause and non-justiciability are often used interchangeably with respect to clauses in legislation, and the Constitution,³³ which oust the jurisdiction of the courts.³⁴ It is a concept whereby legal drafters limit the authority of the courts with respect to review or interpretation, which primarily is the role of the judiciary. Ouster or ‘privative’ clauses are legislative provisions that prevent the court from exercising its review obligation over specified administrative decisions.³⁵ The Constitution embodies several civil and political rights most of which are adopted from the provisions of the UDHR.³⁶

Ouster clause is not a subject of speculation or conjecture, but one, which is a very hard matter of strict law, which must be clearly donated by the provision.³⁷ The Constitution recognises two sets of ‘rights’ namely; the Fundamental Objective and Directive Principles of State Policy and the Fundamental Human Rights.³⁸ Human rights are a set of rights, which confer rights and obligations on citizens.³⁹ The Directive Principles merely provide a guide to a government in power in Nigeria on how to meet the essential needs of Nigerians on the political, economic, social, educational and other matters.⁴⁰ This is on account of Section 6(6)(c) of the Constitution which provides that the judicial powers shall not cover a determination of any act or omission to comply with the Fundamental Objectives and Directive Principles of State Policy as set out in Chapter II of the Constitution.⁴¹ The provision of section 6(6)(c) as such ousts the jurisdiction of the law courts to entertain cases bordering on socio-political and economic policies of Government, which takes such subjects outside the realm of litigation.

Ogungbe then submits that ouster clause provision denies the court the ability to make any meaningful contribution with respect to a particular matter brought before the court.⁴² The Court in *Archbishop Anthony Okogie and Others v The Attorney-General of Lagos State*,⁴³ held on the status of directive principles that no court has the ‘jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles.’⁴⁴ On a more liberal pronouncement on ouster clause, the Court held in *Attorney-General of Ondo State v Attorney-General of the Federation*,⁴⁵ that the effect of ouster clause is that of qualified enforceability. The protection of human right under the ouster of the courts’ jurisdiction of review is

³³ The Constitution itself provides a number of ouster clauses taking away the jurisdiction of the courts in certain aspects. See DPSP in Section 6(6) (c) of the Constitution, Impeachment, Pre-election matters.

³⁴ Section 6 CFRN, 1999.

³⁵ Hoexter (n. 3) p 588.

³⁶ Adem Kassie Abebe, ‘Human Rights Under The Ethiopian Constitution: A Descriptive Overview’ (2011)(5)(1) *Mizan Law Review* 49-50.

³⁷ See Tobi JSC in *Hon Muyiwa Inakaju & Others v Hon Abraham Adeolu Adeleke* [2007] 2 FWLR (pt 366) 2403. Elijah Adewale Taiwo, ‘Judicial Review of the Impeachment Procedure in Nigeria’ 2009 (3)(2) *Malawi Law Journal* 256.

³⁸ See Chapters II and IV CFRN, 1999 respectively.

³⁹ See Chapter IV, CFRN.

⁴⁰ GN Okeke, ‘Fundamental Objectives and Directives Principles of State Policy: A Viable Anti-Corruption Tool in Nigeria’ 175 <www.ajol.info/index.php/naujilj/article/download/82400/72555> accessed 12 August 2016. 175.

⁴¹ *Okogie and Others v The Attorney-General of Lagos State* (n 7).

⁴² See MOA Alabi, *The Supreme Court in the Nigerian Political System 1963-1997*, (Demyax Press Ltd, Nigeria) 244. See also Sambo & Abdulkadir (n 4) p 97.

⁴³ *Okogie* (n 7) 350. See also Ibe (n 130) 201.

⁴⁴ Olaniyi F Olayinka, ‘Institutional Autonomy and the Realization of Objects of Universities in Nigeria’, Unpublished LLD Thesis, University of Pretoria 2015, 198-199. To that extent, Okeke contends that if the Fundamental Objectives and Directive Principles are not serious enough as to bind government to provide them for the governed, then, they are better removed from the Constitution. Okeke (n. 40) p 180.

⁴⁵ *Attorney-General, Ondo State v Attorney-General, Federation of Nigeria* (n 135) 1-231, See also Ibe (n 7) 203.

uppermost in any consideration of the topic of ouster provisions and has to be given the desired attention always. The issue of the justiceability of directive principles thus remains open.

3. Judicial Review of Ouster Provisions

Judicial review is the exercise of the court's inherent power to determine whether an action is lawful and the award suitable relief. The court on review is as such concerned with the question of whether the act or order in question should be allowed to stand.⁴⁶ The term 'judicial review' implies a review of the manner in which a decision was made and does not cover a review of the merit of a case.⁴⁷ The Court in its exercise of judicial review queries the authenticity of provisions ousting their jurisdiction, as they have to champion the course towards the attainment of the rule of law.⁴⁸ 'The courts are there to keep the state and its officials within the bounds of their powers and do protect citizens from excesses of power.'⁴⁹ The subject of judicial review towards compliance with constitutional provisions gained considerable attention after the decision of the American Supreme Court in *Marbury v Madison*.⁵⁰ In Nigeria, the Constitution confers authority on the High Court, Court of Appeal and the Supreme Court to interpret and enforce the provisions of the Constitution.⁵¹ The power of the courts to review provisions of the Constitution, other legislation and the exercise of power by any other organ of government or any of their agencies is derived in the main, from the unlimited original jurisdiction of the Courts.⁵² It is trite that the jurisdiction of a court is conferred by statute and a court lawfully exercises jurisdiction in relation to an action before it, if certain conditions deducible from the enabling statute are conjunctively met.⁵³

Judicial review is the court's endorsement or overturn of the action of the legislature or the executive.⁵⁴ To Cora Hoexter, judicial review is the power of the courts to scrutinize and declare as unconstitutional any type of legislation, original or delegated, or state's conduct that infringes on rights or that otherwise offends against provisions of the Constitution.⁵⁵ A court under judicial review is not bound to set aside legislation and conduct under review; it may equally authenticate the same. Judicial review aims at ensuring that an individual received a fair treatment under judicial, quasi-judicial or administrative proceedings to which the individual has been subjected.⁵⁶ In essence, however, judicial review is designed to protect the enjoyment of human rights, particularly, when the political channels become unavailable, ineffective, inaccessible or insufficient.⁵⁷ With judicial review, notwithstanding the failure

⁴⁶ See HWR Wade, *Administrative law* (6th Ed, Oxford: Oxford University Press, 1988) p. 37; see also Taiwo (n. 37) p 245.

⁴⁷ Hoexter (n. 3) p 145.

⁴⁸ O Osinuga (n. 15).

⁴⁹ Hoexter (n. 3) p 139.

⁵⁰ Supreme Court of U.S 1803 5 US. (1) (Granch) 137, 2, L.Ed.60; Tesfaye Fessha, 'Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review' (2006)14 *African Journal of International and Comparative Law* 55.

⁵¹ The power to make final decision rest on the Supreme Court. See CFRN, see also Fessha (Id) p 57.

⁵² See Section 6(1) (2) CFRN, 1999.

⁵³ See Muhammed JSC in *Zakari v Nigerian Army & Another* (2015)5 SCM 252, at pp 277-278; The prescribed conditions to confer jurisdiction include a proper constitution of a Court; the subject matter coming within jurisdiction and there is no feature of the case which prevents the court from exercising its jurisdiction; the case is initiated by due process of law and upon fulfilment of any condition precedent to the exercise of the jurisdiction. Bairamian FJ in *Madukolu & Others v Nkemdilim* (n. 1) p 2; SCNL 341 at 348. See also *Tukur v The Government of Taraba State & Others* (1997) LPELR 3273 (Sc).

⁵⁴ See Louis Fisher, *American Constitutional Law* (4th Ed, Carolina: Academic Press, 2001) p 35. Sambo & Abdulkadir (n. 4) p 98.

⁵⁵ Hoexter (n 3)113.

⁵⁶ EA Taiwo (n 37) p 245. Hoexter (n. 3) 140.

⁵⁷ L Stewart (n 14) p 506; C Ngang (n. 14) p 660.

of the political organs to perform, the position of the courts as the last hope of every Nigerian become manifest.

On what should be the attitude of the courts to ouster of its jurisdiction, the Supreme Court in *Engineering Works Ltd v Danap Ltd and 1 Other*⁵⁸ urged the courts to jealously guide their jurisdiction, ouster should be compulsorily examined and should not be held to extend beyond its ordinary meaning. The efficacy of ouster provisions thus depends on the extent to which the court is prepared to allow the constriction of its powers. The courts exercise their powers of interpretation of the Constitution to protect their jurisdiction from being unnecessarily restricted.⁵⁹ The discourse of ouster provision can only be properly undertaken where the protection of human right is given adequate attention. The courts however play prominent role in interpreting such provisions as they ensure that the enjoyment of human right is not unduly curtailed.

3.1 Ouster Clause and Protection of Human Right

Ouster clause provision prevents a court from exercising its jurisdiction to review specified administrative decisions, and is thus an obstacle towards the protection of human right.⁶⁰ The Courts in the exercise of their judicial review queries the authenticity of provisions ousting their jurisdiction by virtue of the judicial oversight on the decisions of the political organs.⁶¹ Any contrary disposition of the judiciary establishes that ouster clause provision is an absolute barrier to the enjoyment of human right. The courts are therefore expected to observe ouster clause provision to the level of compliance with the constitutional provisions.⁶² The power of the courts to review cases is however restricted through the promulgation of laws that oust the courts' jurisdiction.⁶³ The judiciary is thus unable to adopt strict interpretation of ouster clause provisions where it does not enjoy independence in its composition and in discharging its activities.

The role of the judiciary in protecting human rights is so immense and cannot be exaggerated, as it is the primary body to which victims of human rights violations approach for a formal redress.⁶⁴ The courts by judicial review thus protect citizens from abuse of power as they keep the government and its officials within the bounds of their powers.⁶⁵ The courts review governmental decisions by ensuring that governmental agencies remain within the powers delegated to them by the legislation.⁶⁶ Towards the protection of human right, the courts in exercise of their judicial powers have the jurisdiction to nullify legislation, which was not enacted in accordance with the provisions of the Constitution.⁶⁷ In that light, an independent judiciary⁶⁸ is vested with the power to nullify any law, which prescribes how

⁵⁸ *Engineering Works Ltd v Danap Ltd & 1 Other* (2002) 2 SCM 68 at pages 85 to 86.

⁵⁹ *Sambo & Abdulkadir* (n. 4) p 97.

⁶⁰ *Hoexter* (n. 3) p 588.

⁶¹ *O Osinuga* (n 15).

⁶² *Taiwo* (n. 37) p 271.

⁶³ Statutes oust the jurisdiction of the courts and likewise, provisions of the Constitution. See *Sambo & Abdulkadir* (n. 4) p 97.

⁶⁴ *Tsegaye Regassa*, 'Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia' (2009) (3) (2) *Mizan Law Review* 322-323.

⁶⁵ In discharging this duty, the judiciary enforces the rule of law, which prescribes that the Country should not be run arbitrarily. See also *Hoexter* (n. 3) p 139.

⁶⁶ *Hoexter* (n. 3) p. 140.

⁶⁷ *Attorney General Abia State & 2 Others v Attorney General Federation & 1 other* (2005) 10-11 SCM 1.

⁶⁸ *Madhuku* (n.23) p 232.

it should conduct its affairs.⁶⁹ The vesting of judicial functions in a truly independent judiciary is thus a desired step towards the protection of human right.⁷⁰ Ouster clause provisions ordinarily limit the power of the courts to discharge its judicial functions. Nonetheless, the independence of the judiciary enables the courts to apply a strict interpretation of ouster clause provisions, through which human rights can be protected.

3.2 Judicial Review of Ouster Clauses and the Rule of Law

The rule of law entails that activities have to be conducted within the framework of recognised rules and principles, which restrict discretionary power.⁷¹ The position of the rule of law in Nigeria is captured in the provisions of section 1(1) of the 1999 Constitution as it establishes the supremacy of the provisions of the Constitution and reinstates its binding effect on the authorities and persons throughout the Federal Republic of Nigeria. Section (1) (2) of the Constitution exemplifies the rule of law properly when it provides that the Country may only be governed by persons in accordance with the provisions of the Constitution.⁷² AV Dicey⁷³ then classifies the rule of law into absence of arbitrary power, equality before the law and the protection of human rights. Towards the realisation of human rights, judicial review is adopted to review the manner in which decisions by the political organs are reached.⁷⁴ Judicial review thus becomes essential exercise in view of the requirement that Nigeria should not be governed arbitrarily, but in accordance with the provisions of the Constitution.⁷⁵

Judicial review is the exercise of the court's inherent power as it determines whether an action is lawful or not and as it awards suitable relief. The court conducting a review is as such concerned with the question of whether the act or order in question aligns with the provisions of the Constitution and should be allowed to stand.⁷⁶ The courts are the guardians of the values of the Constitution, as they enforce the rule of law.⁷⁷ In a constitutionalist system that recognizes judicial review, the judiciary thus acts as the compliant organ of government, as it ensures that the principles of constitutionalism are held sacrosanct.⁷⁸ This follows the fact that the Constitution is the *grundnorm* and the fundamental law of the land and that all other legislation in the Country take their root from the provisions of the Constitution.⁷⁹ The constitution is an organic instrument, which confers powers and creates rights and limitations. The courts become more eligible to protect the rule of law as an institutional setting, structured to discuss issues objectively,⁸⁰ and thus curbing the abuse of power by the government.⁸¹ The

⁶⁹ See also *Paul Unongo v Aper Aku* (1983) 9 SC 186; *Attorney General Ondo State v Attorney General Federation and 35 Others* established such is unconstitutional (2002) 9 SCM 62 just as the judiciary cannot fix a time limit for the proceedings in the National Assembly.

⁷⁰Madhuku (n 23) p 232.

⁷¹ W Wade & CF Forsyth, *Administrative Law* Oxford: Oxford University Press (2009). Olayinka (n. 44) p 318.

⁷²Ibid.

⁷³ AV Dicey; see also FT Abioye (n.16) p 4.

⁷⁴Hoexter, (n 3) p 140.

⁷⁵ Section 1(2) of the 1999 Constitution.

⁷⁶ See HWR Wade (n 46) 37, see also Taiwo (Impeachment) (n. 37) p 245.

⁷⁷ See section 1(1) of the 1999 Constitution. See also Regassa (n. 64) p 325.

⁷⁸ See section 6(1) (2) CFRN, 1999.

⁷⁹ *Buba Marwa & Another v Murtala Nyako* (2012) 2 SCM 67 per Adekeye JSC at p 135. See also *AG Ondo State v AG Federation* (2002) 9 NWLR (pt 772) 222.

⁸⁰ H Spector, 'Judicial Review Rights and Democracy' (2003) 22 *Law & Philosophy* 285, 303. See also Patrick Lenta, 'Democracy, Rights Disagreements and Judicial Review' (2004) 20 *South African Journal on Human Rights*, 20.

⁸¹ Johann van der Westhuizen, 'A Few Reflections on the Role of Courts, Government, the Legal Profession, Universities, the Media and Civil Society in a Constitutional Democracy' (2008)8 *African Human Rights Law Journal* 257. S Gloppen, 'Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health' (2008)10 *Health and Human Rights Journal* 22. See also Carol Ngang (n 14) pp 661, 662.

courts are there to keep the state and its officials within the bounds of their powers, and they protect citizens from arbitrary use of power manifesting by way of excesses or abuse.⁸² The courts in the discharge of the obligation thus question the outright default of the government to discharge its obligation or the discharge of such below set standards.

Towards the realisation of the rule of law, the courts do not have to interpret sections of the Constitution as ousting their jurisdiction when it did not.⁸³ Notwithstanding the provisions of ouster clause in a statute, the court is bound to confirm that the conditions precedent to the enforcement of the ouster provision is fulfilled.⁸⁴ This position aligns with provisions of section (1) (2) CFRN that the Country may only be governed by person(s) in accordance with the provisions of the Constitution.⁸⁵ The law courts are then able to maintain their vital role in ensuring that persons in line with provisions of the Constitution govern the nation, and thus enforcing the rule of law and access to justice by litigants.⁸⁶ Prior to the decision in *Inakoju v Adeleke*,⁸⁷ Nigerian Courts had consistently held that ouster of courts power of review on impeachment matters constitute an absolute bar to the jurisdiction of the courts.⁸⁸ The Supreme Court however departed from that norm and tradition when it applied constructive interpretation of ouster provision to hold that the pre-conditions for effecting the ouster were never met, as it set aside the impeachment order. The Nigerian Supreme Court in *Amaechi v INEC & Others*,⁸⁹ on impeachment matters⁹⁰ equally asserted its jurisdiction as the requirement of law on 'time' and 'reason' for substitution of a candidate were not met. The law court was thus able to maintain its vital role in enforcing the rule of law and in facilitating unhindered access to justice by litigants.⁹¹ The judicial disposition in the case amounts to judicial activism, by which the judicial organ apply pragmatic canon of interpretation.⁹² A court should be wary of the canon of interpretation to apply so as not to unduly deny itself of jurisdiction.

The Supreme Court in *Attorney General of Lagos State v Attorney General of the Federation and 35 Others*⁹³ applied a liberal interpretation to give effect to the intention of the makers of the Constitution. Oko then submits that the position supports the fact that the Nigerian Constitution and other laws contain substantive and procedural safeguards designed to dispense a fair trial.⁹⁴ In the case of *Inakoju*

⁸²See section 1(2) of 1999 CFRN. See also Hoexter (n. 3) p 139.

⁸³ *Inakoju v Adeleke* (n 5) pp 65-66. In *Osadebay v Attorney General of Bendel State*, the Supreme Court held that courts should not decline jurisdiction nor strike out a suit once an ouster of jurisdiction clause has been observed. The conditions precedent must have been verified to be present. See (1991) 1 NWLR Pt 169) 525.

⁸⁴ *Ekpe v Calabar Local Government* (1993) 2 NWLR (Pt 28) 324.

⁸⁵ CFRN (n 4).

⁸⁶ O Osinuga (n 15).

⁸⁷ *Inakoju v Adeleke* (n 5).

⁸⁸ Ouster clause provisions thus bars access to justice as contained in sections 143(10) and 188(10) of the Constitution. See *Chief Enyi Abaribe v The Speaker Abia State House of Assembly and Others*. (2002) 14 NWLR (Ot 788) pp 455, 492.

⁸⁹*Amaechi v INEC* (n. 5) p 1.

⁹⁰ See *Balarabe Musa v Speaker, Kaduna State House of Assembly* (1981) 3 NCLR 450; *Musa v Hamzat & Others* (1982) NCLR 229. See also *Okogie v AG Lagos State* in terms of justiciability of the DPSP. See Okogie (n 7).

⁹¹ O Osinuga (n 15).

⁹² Michael Kirby, 'Judicial Activism: Power Without Responsibility? No Appropriate Activism Conforming To Duty' (2006) 30 *Melbourne University Law Review* 576, 592.

⁹³*Attorney General of Lagos State v Attorney General of the Federation and 35 Others* (2003) 9 SCM 1 at page 102.

⁹⁴ Okechukwu Oko, 'Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of Judiciary in Nigeria (2005) (31)1 *Brooklyn Journal of International Law* 13.

v Adeleke,⁹⁵ the trial court however applied the literal rule of interpretation and upheld the ouster of its jurisdiction without even considering the preconditions for the application of the ouster. As a way out, the Supreme Court in *University of Ibadan v Adamolekun*⁹⁶ thus held that no section of a statute should be read in isolation of other relevant sections as to make the latter ineffective or unnecessary. The Court held further that the reading of a provision or section of a statute or Constitution in isolation would be counterproductive. Pre-election matters constitute domestic affair of a political party, and the law courts have no jurisdiction to entertain cases arising there from.⁹⁷ Where a political party conducts primary election, and a dissatisfied contestant at the said primaries files an action in court on the conduct of the primaries, this development then vests jurisdiction on the courts. Section 87(9) of the 2010 Electoral Act,⁹⁸ as such vests jurisdiction on the court to examine if the primaries were conducted in accordance with the provisions of the Electoral Act, the Constitution and the guidelines of the party.⁹⁹

The judicial review by the law courts protects the rule of law and human rights, as Abioye submits that the rule of law exists where law is faithfully observed, and the societies that live under the rule of law enjoy great benefits in comparison to others that do not.¹⁰⁰ The benefits accrue to societies and individuals as judges are neutral, and as they reach decisions on the strength of impersonal reasons and values.¹⁰¹ Judges maintain 'impersonal' detachment as they examine the features of the case from outside the particular perspectives of the litigants. They as such resist every predisposition to decide in favour of any party independently of the strength of his or her claim.¹⁰² The law court is thus found to be more qualified to protect the rule of law when compared with the legislature, which Lenta regards as 'unprincipled.'¹⁰³ The paper then observes that the appointment of judges, which has no direct link with the electoral processes assist the courts in deciding cases objectively. This position aids the courts in enforcing the rule of law and in protecting human rights.

3.3 Impeachment Proceedings and Ouster Clauses

Impeachment is an exercise by which the executive, of the cadre of a governor or a deputy governor, a president or a vice-president is removed from office for gross misconduct.¹⁰⁴ Impeachment proceedings hold on the assumption that power, which is vested in the executive, has been abused and that the combined obligation of the political and judicial systems should be invoked to attain a redress. The impeachment process is a trial process and as such subject to the rules applicable in the courts.¹⁰⁵ The effect of impeachment proceedings is to put the executive on its toes, particularly in discharging its electoral promises within the ambits of the law. Section 188(10) CFRN provides on impeachment proceedings thus: 'No proceedings or determination of the Panel or of the House of Assembly or any

⁹⁵ Ibid.

⁹⁶*University of Ibadan v Adamolekun* (1967) 1 All NLR 213 at 94. See also *PDP v INEC* (1999) 7 SCNJ 297 particularly Uwais JSC at 324.

⁹⁷ *Frank Daniel v Independent National Electoral Commission & 2 Others* (2015) 4 SCM 148 at p 182 See also *PDP v. Silva* (2012) 13 NWLR (Part 1316) 85(2012) 8 SCM, 200.

⁹⁸ The 2010 Electoral Act (as amended).

⁹⁹ The courts will never allow a political party to act arbitrarily or as it likes, doing otherwise will be in violation of the rule of law. A political party must as such obey its own Constitution. *Buba Marwa & Another v Murtala Nyako* (2012) 2 SCM 67 per Adekeye JSC p 135.

¹⁰⁰ Abioye (n. 16) p 5.

¹⁰¹ P Lenta (n. 80) p 19.

¹⁰² Id. 20.

¹⁰³ H Spector (n. 80) p 285, 303. See also P Lenta (n. 80) p 20.

¹⁰⁴ A gross misconduct is an impeachable act. See the Supreme Court in *Inakoju v Adeleke* per Dahiru Musdapher (JSC), (n. 5) p 711.

¹⁰⁵ Osinuga (n 15).

matter relating to such proceedings or determination shall be entertained or questioned in any court.¹⁰⁶ The Constitution thus makes the determination of what amounts to misconduct, upon which a chief executive may be removed, an exclusive preserve of the Assembly, and which is to the exclusion of the jurisdiction of courts.¹⁰⁷ The power of the Assembly to remove the chief executive is however subject to meeting the preconditions for such exercise without which the court is under the obligation to review a case.¹⁰⁸ The Supreme Court in *Inakoju v Adeleke*,¹⁰⁹ held that the entire section 188 sub-sections 1-11 must have been read together to establish that the ouster clause on impeachment of the executive, as contained in subsection (10) can only be invoked after due compliance with sub-sections (1)-(9) that preceded it.¹¹⁰ Ordinarily, review of impeachment proceedings is outside the jurisdiction of the courts, the courts have to establish that such proceedings meet the set preconditions. In that regard the right to fair hearing on civil rights and obligations of Nigerians is protected.

3.4 Pre-Election Matters and Ouster Clause Provision

A pre-election matter is raised before the real election is held. The issues relating to the sponsorship and nomination of candidates by a party are pre-election matters that should be heard before an election petition.¹¹¹ The issue of nomination or sponsorship of a candidate, and the substitution of such a candidate, are pre-election matters, which come within the domestic affairs of a political party.¹¹² The courts as such have no jurisdiction to nominate a candidate for any political party. The processes towards the emergence of candidates to represent political parties in election are consequently political and domestic affair of such political parties. It is thus a registered political party that can sponsor and canvass for votes for a candidate in an election.¹¹³ In *Shinkafi & Another v Yari & others*,¹¹⁴ Onnoghen JSC established that: ‘(t)he issue of nomination of a candidate by a political party for any election is within the exclusive preserve of the political parties and that the courts have no jurisdiction to interfere.¹¹⁵ The discretion of political parties on pre-election matters is far reaching as a political party may exclude a candidate otherwise screened and cleared for primary election from participating in the exercise.¹¹⁶ The candidate so excluded has no legal remedy against the action taken by the party.¹¹⁷

¹⁰⁶ *Chief Enyi Abaribe v The Speaker Abia State House of Assembly and Others*. (2002) 14 NWLR (Ot 788) page 455 at page 492.

¹⁰⁷ See Section 188 (10) and (11) CFRN.

¹⁰⁸ *Inakoju & others v Adeleke & others* (n. 5) p 188. See also *Ekpe v Calabar Local Government* (1993) 3 NWLR (Pt 281) 324.

¹⁰⁹ *Inakoju & others v Adeleke & others* (n 5).

¹¹⁰ See also *Sambo & Abdukadir* (n. 4) p 105.

¹¹¹ *Alhassan & Others v Ishaku & Others* (2016) 2 SCM 1 at 29, Per Rhode- Vivour JSC 29: See also *Suleiman Galadima JSC in Alhassan & Others v Ishaku & Others* (2016) 2 SCM 1 at 32.

¹¹² The Supreme Court per Onnoghen JSC in *Jenkins Gwede v Independent National Electoral Commission & Others* (2014) 11 SCM 135 at p 181. *Akpamgbo-Okadigbo & Others v Chidi & Others* (2015) 3 SCM 158.

¹¹³ Section 221 of the 1999 Constitution. The National Assembly has made a bill recognizing independent candidates to run for elective offices in future elections. To that effect, Section 177 of the Constitution has been amended with the insertion of a new paragraph (d), which reads, ‘he is a member of a political party and is sponsored by that party or he is an independent candidate.’ See the fourth amendment to the 1999 Constitution in ‘National Assembly Approves Independent Candidacy’ <<https://guardian.ng/news/nigeria/national/national-assembly-approves-independent-candidacy/>>accessed 31 August 2017.

¹¹⁴ *Shinkafi & Another v Yari & others* (2016) 3 SCM 135 at 172. Tobi JSC in *Dalhatu v Turaki* (2003) 15 NWLR (Part 843) 300 affirms the right of political party to sponsor a candidate for an election as a domestic right of the party, which cannot be questioned by a court of law.

¹¹⁵ See also *Alhassan & Others v Ishaku & Others* (2016) 2 SCM 1 at 29.

¹¹⁶ The Supreme Court per Aka’ahs (JSC) in *Frank Daniel v Independent National Electoral Commission & Others* (2015) 4 SCM 148 at p 182

¹¹⁷ *Ibid*.

The courts then hold that the discretion of political parties on pre-election matters must have met the conditions-precedent. The applicable provisions of the law must be complied with before a political party can handle such as its domestic affair.¹¹⁸ A candidate's claim against a political party's conduct of its primaries vests jurisdiction on the court by virtue of section 87(9) of the 2010 Electoral Act.¹¹⁹ The court then examines if the primaries were conducted in accordance with the provisions of the Electoral Act, the Constitution and Guidelines of the Political Party.¹²⁰ Hayek then observes that the compliance with the conditions-precedent aligns with the principle of the rule of law, by which party primaries can only be held on the basis and within the constraints of the law.¹²¹

Consequently, a delay in instituting a pre-election matter, until after the conduct of the general election, constitutes undue delay, which then confers jurisdiction on the courts. In the circumstances, the nomination, sponsorship and substitution of candidates cease to be domestic affair of political parties.¹²² In respect of ouster of courts power of review on pre-election matter, the Supreme Court in *Amaechi v INEC & Others*¹²³ identified the pre-condition of time for substitution of a candidate. Consequent on the default in meeting the pre-conditions, the court assumed jurisdiction in the case. A pre-election matter, falling outside the ambit of the law ceases to be recognised and treated as an exclusive preserve of a political party. The right of access to justice enables a court of law to examine whether the conditions precedent to giving effect to ouster clause in a statute have been met, failing which the court is under obligation to review a case.

4. Ouster Clauses and the Separation of Powers

Separation of powers operates to forestall the conferment of too much power in the hands of a single organ of government.¹²⁴ The separation of the legislature from the executive, and the existence of an independent and impartial judiciary constitute the desired conditions to attain freedom and liberty of Nigerians.¹²⁵ Separation of powers implies that the three functions of the government should be performed by different bodies of persons; wherein each department is limited to its own sphere of action, and thus remaining within that sphere.¹²⁶ The Court then considered Section 25(10) of the Electoral Act 2002, which seeks to limit the period within which any judicial proceedings must be concluded. The Supreme Court, per Uwais (CJN) in *Attorney General Abia State and 35 Others v Attorney General of the Federation*,¹²⁷ held that the Electoral Act infringes on the principle of separation of powers as entrenched in the Constitution. The Court held further that the National Assembly has no power to dictate to the judiciary how to conduct its affairs, just as the judiciary cannot fix a time limit for the proceedings in the National Assembly.¹²⁸ Also in *Attorney General Ondo State v Attorney General*

¹¹⁸ *Akpangbo-Okadigbo & Others v Chidi & Others* (2015) 3 SCM 158.

¹¹⁹ See *Akpangbo-Okadigbo & Others v Chidi & Others* (Ibid); see also *Amaechi v INEC & Others* (n. 5).

¹²⁰ Ibid.

¹²¹ See FA Hayek, *The Road to Serfdom* (1944) 92. Curoth also reiterates this position. N Curoth, 'Foreign Aid, the Rule of Law, and Economic Development in Africa' (2010) (11) *University of Botswana Law Journal* 12.

¹²² Galadima JSC in *Jenkins Gwede v Independent National Electoral Commission & Others* (2014) 11 SCM 135 at p 181.

¹²³ *Amaechi* (n. 5) p 1.

¹²⁴ D Davis, 'The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *South African Journal on Human Rights* 489; See also C Ngang (n. 14) p 664.

¹²⁵ A K Chaturvedi, *Dictionary of Political Science*, (New Delhi: Academic Publishers, 2006) p 282. See also Fineface Ogoloma, 'The Theory of Separation of Powers in Nigeria: An Assessment' (2012) (6) (3) *International Multidisciplinary Journal, Ethiopia*, 129.

¹²⁶ AK Chaturvedi (Ibid). Ogoloma (Ibid) p 129.

¹²⁷ *Attorney General Abia State and 35 Others v Attorney General of the Federation* (n 21) p 213.

¹²⁸ See also *Paul Unongo v Aper Aku* (1983) 9 SC 186.

Federation and 35 Others,¹²⁹ the Court held that the legislation on when judicial proceedings start and when it is concluded is unconstitutional. Also, in *Paul Unongo v Aku*,¹³⁰ the Supreme court held that such a legislation constitutes an unjustifiable interferences with the judicial functions and is in breach of the entrenched doctrine of separation of powers in the Constitution.

The 1999 Constitution recognizes the principle of separation of power and accordingly vests all the powers of the Federal Republic of Nigeria in three distinct organs, namely, the executive, the legislature and the judiciary. As such section 4 (2) of the Constitution provides as follows: ‘The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List.’¹³¹ The Assembly has the power to make laws for the peace, order and good government of the federation.

Section 5(1) (a) vests executive powers of the Federation in the President and the powers may be exercised by him directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the State. Similar provision vests executive powers in a State of the Federation in the Governor of the State.¹³² The power extends to the execution of all laws made by the National Assembly, enforcement of the decisions of the judiciary and maintenance of the Constitution. Section 6(1) of the Constitution provides for judicial powers of the Federation as follows: ‘The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.’¹³³

The Supreme Court has held that the exercise of all powers, whether legislative, executive or judicial must be traceable to the Constitution.¹³⁴ Thus, while the court should refrain from determining the validity of the internal proceedings of the legislature, the National Assembly should not dictate to the judiciary how it has to conduct its affairs.¹³⁵ This development to Lovemore Madhuku operates in the realization that the independence of the judiciary is a logical corollary of the principle of separation of powers.¹³⁶ On the need to uphold the principle of separation of powers under the Nigerian Constitution, no organ is expected to step out of its assigned field. This position holds in fulfilment of the requirement of the rule of law that Nigeria should not be ruled arbitrarily, but by the requirement of constitutional provisions. Any act of power abuse or excesses is unconstitutional and shall be declared null and void by the court. This provision aligns with the principles of separation of powers to the effect that an organ should concede to the other organ, powers that the Constitution vests in it.

4.1. Checks and Balances

The doctrine of checks and balances entails that governmental powers should be controlled by overlapping authority within the government and by giving citizens the right to criticize state actions and remove erring officials from office.¹³⁷ Overlap in functions, and checks and balances create the

¹²⁹ *Attorney General Ondo State v Attorney General Federation and 35 Others*, (n. 24) 62.

¹³⁰ *Paul Unongo v Aku* (n. 28).

¹³¹ Legislative powers in the States are provided for in section 6(6), which vests the legislative powers in the House of Assembly of the State.

¹³² See Section 5 (2)(a) of the Constitution

¹³³ Similar provisions relating to a State is contained in Section 6(2) of the Constitution.

¹³⁴ See *INEC v Alhaji Abdulkair Balarabe Musa* (2003) 1 SCM 63.

¹³⁵ See also *Paul Unongo v Aper Aku* (n. 128) 186; *Attorney General Ondo State v Attorney General Federation and 35 Others* established such is unconstitutional (2002) 9 SCM 62 just as the judiciary cannot fix a time limit for the proceedings in the National Assembly.

¹³⁶ L Madhuku (n. 23) p 232.

¹³⁷ Ogoloma (n. 125) p 130.

room for the courts to review legislative and executive activities. The principles of checks and balances address the question of the extent to which the Constitution recognises separation of powers. It addresses the intention of the drafters of the Constitution on a symbiotic relationship between the various organs of government.¹³⁸ The strength in checks and balances was recognised in the case of *National Assembly v President*,¹³⁹ the requirement of the two – thirds majority of National Assembly was needed to override the President’s veto. The requirement of the minimum of 73 members in the Senate and 240 members in the House of Representatives were not met with the votes of 55 Senators and 204 members of House of Representatives. The Court of Appeal as such declared the veto vote as un-constitutional.¹⁴⁰ The decision flowed from the judicial powers to nullify legislation, which was not enacted in accordance with the Constitution.¹⁴¹

In practise, however, the Courts apply the doctrine of checks and balances to ascertain that the preconditions for the exercise of jurisdiction by an organ of government or its agency are met.¹⁴² The doctrine of checks and balances is thus a useful tool, particularly, in the hands of the judiciary to ensure that other organs of government and their agencies strictly adhere to the provisions of the Constitution and other legislation. The application of checks and balances as such assist in the protection of the human right as arbitrariness in governmental actions is not tolerated by the courts.

5. Ouster Clause Provisions and the Lessons for Nigeria

Human Right Provisions and the DPSP

Human rights and the Directive Principles of State Policy (DPSP) are distinct, just as the former are generally enforceable the later are beyond judicial interpretation and thus un-enforceable.¹⁴³ This development denies the citizens the opportunity to hold the Government accountable on the budgetary allocation on the subjects contained in the Chapter II of the Constitution.¹⁴⁴ The Preamble to the African Charter¹⁴⁵ however provides a way out for Nigeria, as the Charter’s rights jurisprudence unifies political and economic rights. The unification approach is based on the positive link of the political and economic rights.¹⁴⁶ The unification of the economic, social and cultural rights as well as the civil and political rights is adopted under the Bill of Rights of South Africa.¹⁴⁷ The classification and justiciability of economic rights in South Africa has however been established in the Constitutional provisions and

¹³⁸ No single organ is an island that does not need to collaborate with others for a fruitful discharge of its obligations.

¹³⁹ *National Assembly v President* (2003) 9 NWLR (Pt 824) 104 at page 132

¹⁴⁰ Also in *Adetoun Akinmade & 16 Others v Donaldson Abiodun Ajayi* (2008) 12 NWLR (Pt 1101) 498, the impeachment of the respondent without giving him the statutory notice of impeachment was set aside by the Court.

¹⁴¹ See Section 6 of the CFRN. See also *Madukolu v Nkemdilim* (n. 1) p 324.

¹⁴² *Ibid.* The Supreme Court held that the pre-condition of ‘time’ and the giving of ‘cogent reason’ for substitution of a candidate (as contained in Section 188(1) to (9) of the 1999 Constitution) were very essential. The Court held that the preconditions were not met and it set aside the substitution of candidate by the political party. See *Amaechi v INEC & Others* (n. 5) p 1.

¹⁴³ Section 6(6) (c) of the Constitution restricts the courts from entertaining cases on DPSP. See generally Chapter II CFRN, 1999.

¹⁴⁴ Okeke (n. 40) p 177.

¹⁴⁵ The Bill of Rights encompasses the civil, political as well as the social economic rights, and the system has been adopted by South Africa. Nigeria as a signatory to the Charter stands to gain if it adopts a unification of its political and economic rights. Adem Abebe, (n. 8).

¹⁴⁶ See the Preamble to the African Charter. Nicholas Haysom ‘Constitutionalism, Majoritarian Democracy And Socio-Economic Rights’ (1992) 8 *South African Journal On Human Rights* 452.

¹⁴⁷ South Africa’s 1996 Constitution. The position aligns with the provisions under the Preamble to the African Charter that political rights cannot be dissociated from SERs.

decided cases.¹⁴⁸ This development makes the socio-economic rights in the Country enforceable rights.¹⁴⁹ India is also in the class of South Africa in the area of having DPSP enforceable. The Supreme Court in India has read the DPSP into the justiciable guarantees of the Constitution despite an explicit declaration of non-justiciability.¹⁵⁰ In Nigeria, the political rights are classified in the Chapter IV of the Constitution, and are enforceable. The Socio-economic and cultural rights (SERs) which is the equivalence of Nigeria's Directive Principles are not enforceable. The Country's human right profile is bound to increase where the economic and political rights are unified and enforced accordingly.

With the unification of political and economic rights, the DPSP then turns into human rights. The Objective policies as human rights creates an absolute duty on the government to go for their realization both immediately and in the future and this in turn gives rise to an era of responsive government.¹⁵¹ Consequently, the socio-economic problems like unemployment, lack of basic amenities, social strife, which manifest in the religious, political and tribal disturbances or clashes becomes eliminated.¹⁵² Nigeria as such stands to gain tremendously if it adopts a unification of its human right provisions with its DPSP. Nigerians equally stand a better chance to enjoy economic rights under a unification of rights in this respect.

Ouster clause provisions and limitations are lawful infringements of rights and it constitutes acceptable or 'justifiable' violations to the effect that such rights may not be enjoyed in absolute manner.¹⁵³ Such restrictions must then be strictly necessary for the promotion of the interest of the state.¹⁵⁴ Nigerian Courts and Nigeria as a Country have to appreciate the policy and directive that '[t]he reasons for possible limitations must be founded in a legitimate state interest as the limitation must be necessary to protect legitimate state interest.'¹⁵⁵

The legitimate state interest, which is observed in the limitations across countries, is the fact that rights have to be enjoyed in the context of scarce public resources, space, and time.¹⁵⁶ As a result, social economic and cultural rights require the state to undertake positive action, which is contingent on its budgetary provisions.¹⁵⁷ The financial capability of the State to enforce certain categories of the SERs, with a view of saving the State from crashing out on financial commitments is a sufficient state interest,

¹⁴⁸ See for instance chapter 2 of the South African Constitution. In *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC); *Soobramoney v the Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) *et cetera*.

¹⁴⁹ Other Countries having similar classification of SERs as South Africa include the Philippines, by its 1987 Constitution and Kenya, by its 2010 Constitution. See EA Udu, 'The Imperatives of Economic, Social and Cultural Rights in the Development of Nascent Democracies: An Inter- Jurisdictional View' (2014) *Nnamdi Azikiwe University Journal of International Law Journal* 31.

¹⁵⁰ See generally, 'Justiciability of ESC Rights: The Indian experience' Circle of Rights - Economic, Social and Cultural Rights Activism available at: <<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm>> (accessed 28 July 2010).) See Adem Abebe (n. 8) p 55.

¹⁵¹ Okeke (n. 40) p 179.

¹⁵² *Id*, p 175.

¹⁵³ CESCR General Comment No 14 (2002) para 28; NW Orago, 'Limitation of Socio-Economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes' (2013) (16) (5) *PER / PELJ*, p 193.

¹⁵⁴ CESCR General Comment No 14 (2002) para 28; see also Orago, *ibid*.

¹⁵⁵ Abdi Jibril Ali, 'Distinguishing Limitation on Constitutional Rights from their Suspension: A Comment on the *Cud Case*' (2012) (1) (2) *Haramaya Law Review* 7.

¹⁵⁶ Davis (n. 124) p 475; see also Regassa (n. 64) p 313.

¹⁵⁷ See Article 22 UDHR; Article 2(1) of ICESCR also prescribes rights enforcement to the maximum of states' available resources.

which limit the prospect of enforcing ouster clauses. SERs are thus regarded as programmatic,¹⁵⁸ as they may not be realized immediately.¹⁵⁹ In the case of Nigeria, rather than section 6(6) (c) CFRN making DPSP out rightly unjusticeable, enforceability should be made subject to the State's financial resources.

On the prospect of making the DPSP enforceable by legislation, Taiwo,¹⁶⁰ affiliates with the submission of Okeke, as he draws attention to *Attorney-General, Ondo State v Attorney-General, Federation of Nigeria*.¹⁶¹ Legislation have been developed and applied by national governments to aid in the dispensation of justice, which promotes good governance that is essential for sustainable development.¹⁶² The argument of Okeke and Taiwo that ouster clause provision in the DPSP may be made enforceable by legislation, so as to make it obligatory on the government to enforce, may not be sustained.¹⁶³ Rather than applying legislation to give the directive principles the status of automatic enforceability, the state should be allowed to enforce SERs subject to reasonable funding the Country can access. Otherwise, legislating the enforcement of the DPSP in the circumstances will rather open the floodgate of litigation, and thus making the state liable on contempt proceedings for failing to enforce SERs.

In the review of ouster clause provisions, the courts ensure that such provisions aim at protecting state interest. Consequently, Taiwo considers the challenge of delayed justice, the states interest in having a speedy handling of court proceedings, particularly where pre-election, and impeachment matters are brought before the courts.¹⁶⁴ This is regarded as a state interest, which can be attained with ouster clause provision. The submission is based on the weakness of Nigeria's judicial system, which is riddled with delays and technicalities.¹⁶⁵ This argument appears persuasive in view of the undeniable facts of delayed justice in Nigeria.¹⁶⁶ The courts as such are expected to apply ouster clause provision to attain a speedy dispensation of justice.¹⁶⁷ It is further argued that the insertion of ouster clauses in the Constitution insulates the judiciary from political issues, particularly on pre-election matters and the impeachment

¹⁵⁸ States have to take steps, individually and through international collaboration, assistance and co-operation, legislative measures and other appropriate means subject to its maximum available resources. See also Article 2(1) of ICESCR.

¹⁵⁹ Ibid.

¹⁶⁰See also EA Taiwo, 'The Implementation of the Right to Education in South Africa and Nigeria' Unpublished LLD Thesis, Nelson Mandela Metropolitan University, April 2011 79.

¹⁶¹ In *Attorney-General of Ondo State v Attorney-General of the Federation*, the Court considered section 15(5) of the State's objective to abolish all corrupt practices and abuse of power. See (2002) 9 SCM 1, 98; (2002) 27 WRN 1-231. See also Ibe (n 7) p 203.

¹⁶²'Legislation' covers 'other legislative activities' which have to conform with constitutional provisions. See also *Attorney General Abia State & 2 Others v Attorney General Federation & 1 other* (2005) 10-11 SCM 1. Legislation have been developed and applied by national governments to aid in the dispensation of justice, which promotes good governance that is essential for sustainable development. I J Essien *et al*, 'Law, Economy and Sustainable Development: X-Raying the Nexus,' A Paper Delivered at the 49th Annual Nigerian Association of Law Teachers (NALT) Conference, p 11. Okeke sees no complex challenge for the National Assembly to insert the phrase 'right to' in respect of directive principles. Okeke (n. 40) 181.

¹⁶³ Okeke (n 40)180.

¹⁶⁴Taiwo (n. 37) p 258. The lack of jurisdiction on ouster clause provisions such as impeachment proceedings, pre-election matters give room for expeditious striking out by the courts.

¹⁶⁵ Article 7(1) (d) of the African Charter on Human & Peoples' Rights and Section 36(1) (4) of the 1999 Constitution emphasize on hearing of cases within a reasonable time. Oko then argues that the delay in justice dispensation in Nigerian courts blocks access to justice in Nigeria. See Okechuku Oko (n. 94) pp 39, 40.

¹⁶⁶ Taiwo (n. 37) p 258.

¹⁶⁷ The application of ouster clause provision in the manner of abdication of duty by the law courts operates in denial of access to justice which does much damage than the suppose benefit of ouster provisions.

proceedings, which are politically motivated.¹⁶⁸ The judiciary as an organ of government is distinct from the political organs by the way of its appointment, which has nothing to do with the electoral processes.

Notwithstanding the benefits derivable from ouster provisions, such as the speedy handling of court proceedings and the insulation of the judiciary from political issues, such provisions have to meet certain legal requirements. Limitations, whether they are enacted in pursuance of a general or specific limitation clause, should comply with certain requirements. Limitations, as such can only be made through laws, which should be reasonable, clear and accessible since ignorance of the law is not an excuse.¹⁶⁹ Ouster clause provisions and the restriction must be in accordance with the law, including international human rights standards, and has to meet the interest of legitimate aims pursued.¹⁷⁰ This is a useful hint for legal drafters in Nigeria, to make laws that are without ambiguity and to make them accessible to Nigerians. Consequently, as Nigeria imposes restrictive measures on the enjoyment of rights, the Country bears the burden of justifying such restriction.¹⁷¹ Thus, limitation is primarily intended to protect the rights of individuals, rather than to permit the imposition of limitations by the States.¹⁷² Stewart thus mandates courts, particularly in Nigeria, to utilise their ‘quasi lawmaking’ powers to translate entrenched socio-economic rights into enforceable legal claims for the judiciary to be more transformative in the exercise of its broad remedial powers.¹⁷³ The Limburg Principles provide that articles 4 and 5 of the ICESCR are meant to protect rights rather than to permit the imposition of limitations, and insist on their strict interpretation.¹⁷⁴ The strict interpretation by the judiciary, which was adopted by the court in *Inakoju v Adeleke*,¹⁷⁵ is commended to all other courts in the Country. This is essentially one way towards the protection of the human right provision, which is restricted.

Further to the courts strict interpretation and the protection of human rights, the principle of necessity has equally been introduced, wherein the hazard of limitations of rights is avoided or minimized.¹⁷⁶ Limitation provisions should not be interpreted or applied in a manner capable of jeopardizing the essence of a rights provision or which is intended to render the right ineffective or illusory.¹⁷⁷ Consequently, Ali submits that ‘If a compelling governmental objective can be achieved in a number of ways, that which least restricts the right protected must be selected.’¹⁷⁸ This paper thus emphasizes that limitation provisions aim at protecting rights rather than denying it.¹⁷⁹ The interpretation of section 6(6)(c) of CFRN in *Okogie v AG Lagos*¹⁸⁰ should not have attracted a literal interpretation as to deny

¹⁶⁸ The argument is that the un-elected organ should not control ‘the will of the people.’ The paper considers case of ouster provisions on impeachment of the executive in *Inakoju v Adeleke*, (n 5) and pre-election matters, particularly in *Ameachi v INEC* (n 5). It submits that where the pre-conditions for the ouster are not met, the courts should ignore political connotations, and should assume jurisdiction. The decisions of the courts are not based on political considerations, but objectively on the provisions of law. See also Taiwo (n. 37) p 258.

¹⁶⁹ See also Ali (n 155) 9.

¹⁷⁰ Orago (n 153) 193.

¹⁷¹ CESCR; General Comment No 14 (2002) para 28. See the interpretation of article 4 of the ICESCR.

¹⁷² See the CESCR, General Comment Number 14.

¹⁷³ See C Ngang (n 14) p 660.

¹⁷⁴ The Limburg Principles on the Implementation of the ICESCR para 17. A group of 29 experts in international law adopted the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights on 6 June 1986 70 at para 17. See Limburg Principles 46-69.

¹⁷⁵ *Inakoju v Adeleke* (n 5).

¹⁷⁶ Limburg Principles principle 56 (n 174).

¹⁷⁷ Ibid.

¹⁷⁸ Ali (n 155) p 7.

¹⁷⁹ See also the Limburg Principles 56 (n 174).

¹⁸⁰ *Okogie* (n 7)

Nigerians the right to education. The Courts in Nigeria are therefore enjoined to give priority attention to the protection of human rights over and above other considerations.

6. Conclusion

The provision of the DPSP ousts the jurisdiction of the law courts to entertain cases bordering on socio-political and economic policies of Government.¹⁸¹ Ouster clause provisions generally preclude an organ of government from exercising its powers over a subject matter, except on the fulfilment of certain conditions.¹⁸² The courts, by virtue of powers of judicial review are thus able to exercise jurisdiction as they ensure compliance with the conditions precedent, in accordance with the principles of checks and balances. Review of the DPSP, impeachment proceedings,¹⁸³ and pre-election matters¹⁸⁴ are subjects in which the courts construe ouster clause provisions, as useful instrument for the protection of human right.¹⁸⁵ The courts as such enforce the rule of law and access to justice as they ensure that the nation is governed in line with the provisions of the Constitution and not arbitrarily.¹⁸⁶ The paper establishes that with the unification of political and economic rights, the DPSP then turns into human rights, which confer absolute duty on the government.¹⁸⁷ The socio-economic problems like unemployment, lack of basic amenities, social strife, religious, political and tribal disturbances or clashes in Nigeria thus become eliminated.¹⁸⁸ The paper draws on the unification of the political and economic rights in India and South Africa,¹⁸⁹ and concludes that Nigerians stand a better chance to enjoy economic rights under a unification of rights.

¹⁸¹ See section 6(6) (c) CFRN. See also *Okogie & Others v The Attorney-General of Lagos State*, (n. 27). See also *S Ibe* (n. 7) p. 201.

¹⁸² See *Madukolu v Nkemdilim* (n.1) p 324.

¹⁸³ See Section 188 (10) and (11) *Inakoju v Adeleke* (n 5).

¹⁸⁴ *Ibid.*

¹⁸⁵ See also *MO Ogungbe* (n. 8)

¹⁸⁶ Section (1) (2) CFRN.

¹⁸⁷ *Okeke* (n 40) p 179.

¹⁸⁸ *Id.*, p 175.

¹⁸⁹ *Abebe* (n. 8) p 55.