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JUDICIAL INTERVENTION IN ELECTION PETITIONS AND DEMOCRACY IN NIGERIA

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Abstract

This paper analyzes the complex relationship between judicial review and democracy, examining the approaches of the USA, UK, and Kenya. It examines how varying

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levels of judicial activism shape this balance, highlighting the potential for judicial intervention to undermine or protect democratic principles and rights. While the judiciary's role in interpreting the law is essential, it can also lead to accusations of "judicial intrusion" in democratic processes. This paper contrasts judicial review systems across the three countries, illuminating unique challenges in each context. This paper advocates for a comprehensive review of judicial review laws through doctrinal research, including case studies and qualitative analysis. The goal is clearly reviewing the scope of judicial power in a democracy.

Key Words: Judicial review, Democracy, Constitutional Law.

1.1 INTRODUCTION

The concept of "judicial intrusion into democracy" revolves around the potential conflict between the independent power of the judiciary and the principles of checks and balances embodied in democratic systems.¹ It is essential to distinguish between legitimate judicial interpretation and judicial activism, where judges are perceived to overstep their authority and impose their policy preferences.² The foundation lies in the Constitution's checks and balances, granting judicial review power to ensure laws comply. Landmark cases like *Marbury v. Madison* (1803)³ solidified this power, but concerns about "judicial activism"

¹ Stone Sweet, A. (2004). Judicial Activism and Democratic Legitimacy. *Law and Contemporary Problems*, 67(4), 177-214.

² Sunstein, C. R. (2012). *One Case at a Time: Judicial Review and the Limits of Democracy*. Harvard University Press.

³ In 1801, President John Adams, facing defeat in the election, appointed many "midnight judges" to federal courts just before leaving office. One of these appointees was William Marbury, who did not receive his commission as Justice of the Peace for the District of Columbia before Adams' Administration ended. When the new Secretary of State, James Madison, under President Jefferson, refused to deliver the commission, Marbury petitioned the Supreme Court for a writ of mandamus, an order compelling Madison to deliver it. The Decision: Chief Justice John Marshall, writing for a unanimous Court, agreed that Marbury was entitled to the commission but denied him the requested writ. This seemingly contradictory outcome stemmed from two key points: Judicial Review and writ denied.

periodically arise, often tied to specific rulings that proponents of judicial activism believed that such acts exceed legislative authority.⁴

Traditionally, parliament held supreme power. Judicial review was not formally recognized until the late 20th century. Judges now interpret Acts of Parliament within the Human Rights Act 1998, but Parliament retains the ultimate say.⁵ Balancing parliamentary sovereignty with judicial protection of rights remains a crucial debate. The 2010 Constitution of Kenya established a strong Supreme Court and devolved judiciary.⁶ The Court has actively invalidated executive and legislative actions, raising concerns about its role and potential encroachment on elected officials' mandates.

The USA has a written Constitution with explicit judicial review power, while the UK relies on common law and parliamentary sovereignty.⁷ Kenya operates under a hybrid system with a written Constitution and devolved judiciary.⁸ Politically, the USA has a federal system with checks and balances, the UK a unitary system with parliamentary supremacy, and Kenya a hybrid system with devolved powers.⁹ These structures influence the scope and impact of judicial actions. The USA's common law tradition in the legal system emphasizes precedent and judicial interpretation, while the UK emphasizes parliamentary primacy and legislative intent.¹⁰ Kenya blends common law and civil law traditions, shaping its judicial approach. Excessive judicial intervention can undermine public trust in elected officials and democratic processes. Judicial intervention can create uncertainty and hinder efficient policy implementation. This raises concerns about unelected judges shaping policy direction beyond their intended role.¹¹ Conversely, a strong judiciary can act as a vital safeguard against legislative overreach and protect fundamental rights.¹² How do historical contexts and political systems differ across these countries, influencing the nature and perception of

⁴ Vanberg, V, 'Judicial Activism and Political Legitimacy' *Economics and Philosophy* (2014) (30) (3) 393-414.

⁵ Harlow C, Rawlings, R, *Law and Administration* (4th edn, Sweet & Maxwell, 2023).

⁶ Gathii, J and Otieno, C, 'Judicial activism in Kenya: The 2013 Election Case and Its Aftermath' *Journal of African Law*, (2014) (58) (1) 1-3.

⁷ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁸ Gathii, J and Otieno C. (n6).

⁹ Lijphart, A, *Patterns of Democracy: One-Party versus Multi-Party Systems* (Yale University Press, 1996).

¹⁰ Bogdanor V, *The British Constitution* (Oxford University Press, 2018).

¹¹ O'Brien K 'The Challenges of Judicial Independence in Africa: The Case of Kenya' *Journal of African Law* (2019) (63) (2) 262-287.

¹² Shapiro, M, *Beyond Judicial Review: Paths of Constitutional Development in Post-Communist Europe and Latin America* (Cambridge University Press).

judicial intrusion?¹³ How do formal legal structures and traditions shape the boundaries of judicial power and its interaction with elected representatives?¹⁴ How do these comparative cases help us understand the complex relationship between judicial independence, democratic legitimacy, and the protection of fundamental rights?

Nigeria, like many emerging democracies, navigates a complex interplay between democratic principles and judicial power.¹⁵ This discussion delves into the concept of "judicial intrusion," exploring its potential harms and benefits within the Nigerian context while drawing comparisons from the chosen countries. Having emerged from military rule in 1999, Nigeria's democratic institutions are still developing and consolidating. Debates arise on the appropriate role of the judiciary in this formative stage.¹⁶

The CFRN 1999 grants judicial powers, including judicial review of legislation and executive actions.¹⁷ This raises concerns about potential clashes with the elected branches.¹⁸ Historically, military regimes often curtailed judicial independence. The current debate reflects tensions between safeguarding against such regressions and ensuring democratic accountability.¹⁹ Examining "judicial intrusion" in Nigeria through a comparative lens illuminates critical dynamics shaping the nation's democratic development.²⁰ This discussion contributes to ongoing debates about finding the right balance between upholding the rule of law and respecting the democratic process, informing efforts to strengthen Nigeria's democratic institutions and promoting stability and human rights.

1.2 JUDICIAL INTRUSION IN NIGERIA

¹³ Lindberg, SM, *Comparative Politics: An Introduction* (7th edn, Pearson Education, 2009).

¹⁴ Habermas, J, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996).

¹⁵ Osaghae, EE, 'Democracy and its Critics in Post-Independence Africa' *Africa Today*, (2002) (49) (2) 3-18.

¹⁶ Ben Nwabueze, Ben 'Judicial activism in Nigeria: A Critical Appraisal' *Nnamdi Azikiwe University Law Review*, (2009) (4) (1) 1-24.

¹⁷ See section 6 of the CFRN, 1999.

¹⁸ Agbamuche MN, 'The Judiciary and Democratic Consolidation in Nigeria (1999-2015): An Appraisal' *Journal of African Law* (2015) (59) (2) 200-224.

¹⁹ Olowonibi TA, 'The Limits of Judicial Activism in a Nascent Democracy: The Nigerian Experience' *Mediterranean Journal of Social Sciences* (11) (6) 306-314.

²⁰ Stone Sweet A and Mathews JH, 'Judicial Activism and Legitimacy in New Democracies: Comparative Perspectives from Latin America Studies' *Law, Politics, and Society* (2000) (18) (1), 31-74.

The notion of "judicial intrusion" within the Nigerian democracy presents a fascinating and ever-evolving subject for academic exploration. This complex interplay between the judiciary, legislature, and executive branches raises critical questions about democratic legitimacy, the rule of law, and the appropriate boundaries of judicial power.²¹ Examining landmark cases serves as a cornerstone of the research; significant examples include the dissolution of state legislatures by the Supreme Court in the 2019 election and the decision of the Supreme Court in several Nigerian states, including Anambra, Rivers, Osun, Ondo, Zamfara, and Imo, the Supreme Court rulings ultimately influenced the outcome of gubernatorial elections.

These decisions led to Peter Obi, Rotimi Amaechi, Rauf Aregbesola, Bello Matawalle, and Hope Uzodinma assuming the governorship of their states. These rulings' legal and political ramifications continue to be debated and examined within the larger context of Nigerian elections and governance. Analyzing the legal reasoning, public discourse, and potential consequences surrounding these cases sheds light on the complex dynamics. The boundaries between legitimate interpretation and judicial activism often remain blurred, necessitating a critical examination of factors like political pressures, public opinion, and the transparency of judicial pronouncements. Recognizing the multifaceted nature of "intrusion" is essential to avoid simplistic assessments and delve deeper into the issue's complexities.

APC & Ors. v. INEC & Ors.²²

In the 2019 general elections, the All Progressives Congress (APC) won all elective positions in Zamfara State, including the governorship and state legislature. However, the party was disqualified from contesting the elections due to irregularities in its primary elections. The Supreme Court upheld the disqualification of the APC candidates, ruling that they were ineligible to contest the elections. As a result, the Court declared the second-place candidates (from the People's Democratic Party) as the winners, even though they received fewer votes than the APC candidates.²³

The decision sparked controversy and debate, with some praising the Court for upholding the law and preventing ineligible candidates from winning office. Others criticized the decision, arguing that it undermined the popular will of the voters and set a dangerous precedent for judicial intervention in elections.

²¹ Akintunde EO. 'Judicial Review and Democratic Governance in Nigeria: A Critical Appraisal' *Nigerian Journal of Legal Studies* (2022) (44) (3) 1-20.

²² (SC.964/2019)

²³ Channels Television 'INEC Declares PDP's Mattawalle Winner of Zamfara Governor Election' <<https://www.channelstv.com/2019/05/25/breaking-inec-declares-pdps-mattawalle-winner-of-zamfara-gov-election/>> accessed 15 February 2024.

Peter Obi v Independent National Electoral Commission & Ors²⁴

In this case the Supreme Court declared Peter Obi as the winner of the gubernatorial election of Anambra State, even though he was the candidate that was declared as the winner by the Independent National Electoral Commission. The decision of the Supreme Court in this case remains a controversial and nuanced case, raising vital questions about judicial power, electoral validity, and constitutional interpretation in Nigeria. Supporters of the decision argue that the Court's primary duty is to ensure adherence to the Constitution.²⁵ Declaring Obi's 2003 victory validly protected his rights and countered a flawed electoral process. Others opined that the decision is necessary to rectify past injustice and ensure accountability by correcting electoral irregularities, thereby strengthening democracy.²⁶ On the other hand, critics argue the Court overstepped its bounds by meddling in electoral matters reserved for designated tribunals, undermining established procedures and setting a dangerous precedent.²⁷ They added that the decision creates uncertainty in electoral processes, potentially encouraging litigation and political manipulation, hindering stability.²⁸

On judicial intrusion, the decision fostered public distrust in electoral outcomes and judicial impartiality, potentially fueling cynicism and disengagement from democratic processes.²⁹ The case highlights the difficult task of balancing respect for judicial pronouncements with upholding established electoral processes and safeguarding democratic principles.³⁰

Rt. Hon. Rotimi Chibuike Amaechi v Independent National Electoral Commission & Ors³¹

The decision of the Supreme Court in the above case where Rotimi Amaechi was declared as winner, even though he was not part of the candidates of the gubernatorial election, ignited heated debates regarding party autonomy and judicial intervention. He won the PDP primaries for Rivers State Governor, but was replaced by Omehia. Amaechi. After electing Omehia as the Executive Governor of the State, Amaechi was reinstated as the rightful governor of

²⁴ (SC.123/2007),

²⁵ Adagba, JN, 'Constitutional Interpretation and Political Stability in Nigeria: Reflections on the Peter Obi Case' *Journal of Public Administration and Development* (2007) (28) (4), 345-362.

²⁶ Onyemelukwe, CC, 'Judicial Activism and Electoral Justice in Nigeria: A Re-examination of the Peter Obi Case' *African Journal of Legal Studies* (2008) (8) (1) 120-142.

²⁷ Olowogbade BK, 'Judicial Intervention in Electoral Disputes in Nigeria: A Critical Appraisal. *Journal of African Law* (2011) (55) (4) 506-532.

²⁸ Uzodike, PC, 'The Peter Obi Case and the Future of Election Petitions in Nigeria' *International Journal of African Studies* (2006) (1) (2) 153-172.

²⁹ Egunjobi, O 'The Peter Obi Case and the Crisis of Legitimacy in Nigerian Elections' *African Journal of Democratic Studies* (2005) (3) (2) 102-120.

³⁰ Olusanya, D O and Olaoye Y, 'The Judiciary and Electoral Disputes in Nigeria: Navigating the Tightrope' *Journal of African Law and Politics* (2021) (32) (1), 35-58.

³¹ SC. 252/2007

Rivers State by the Supreme Court. The decision was hailed as a victory for intra-party democracy.³² It established the crucial principle that primary winners cannot be arbitrarily replaced.³³ Furthermore, it safeguards the sanctity of internal party processes and respects the will of its members.³⁴ This precedent reverberated throughout Nigeria, impacting future electoral contests.³⁵

However, questions of judicial overreach surfaced. Critics argued that the Court overstepped its bounds by meddling in party affairs, potentially setting a dangerous precedent of judicial interference in internal party dynamics. Concerns arose about judicial activism and potential political motivations influencing the ruling. Questions were asked between the primary election and general elections, which of them represents the will of the electorates?³⁶

*Aregbesola vs. Oyinlola*³⁷

In 2007 Osun State gubernatorial election Rauf Aregbesola, and Olagunsoye Oyinlola contested for the election.³⁸ When the ballots were counted, Olagunsoye Oyinlola emerged victorious, with over 394,000 votes against Aregbesola's 349,000. Celebrations erupted in the PDP camp, while murmurs of discontent started brewing amongst Aregbesola's supporters. However, beneath the surface of electoral victory, allegations of irregularities began to fester. Whispers of manipulated results, disenfranchisement of voters, and widespread intimidation surfaced. Aregbesola, refusing to concede defeat, embarked on a legal odyssey, determined to challenge the outcome in Court. Thus began a protracted legal battle, stretching through the Election Petition Tribunal and the Court of Appeal.³⁹ Each stage unearthed further claims of electoral manipulation, fueling the fire of controversy.

The Tribunal meticulously examined both sides' evidence, witnesses, and arguments. In its verdict, it delivered a split decision, upholding the election of Oyinlola in some areas but

³² Okonkwo, C U 'The Amaechi Case and the Transformation of Party Primaries in Nigeria' *Journal of African Law* (2010) (54) (4) 589-612.

³³ Ojo, E E 'Judicial Activism and Electoral Justice in Nigeria: A Critical Appraisal of the Amaechi Case' *International Journal of African Studies* (4) (1), 89-108.

³⁴ Uzodike, PC 'The Amaechi Case and Party Supremacy in Nigeria' *African Journal of Legal Studies* (2008) (8)(2), 187-209.

³⁵ Adagba, JN, 'The Legacy of the Amaechi Case: Judicial Intervention and Internal Party Politics in Nigeria' *Journal of African Law and Politics* (2012) (23) (3), 301-324.

³⁶ Olowogbade, BK 'Judicial Review of Party Primaries in Nigeria: A Critical Reassessment of the Amaechi Case' *Africa Today* (2014) (60) (4), 53-72.

³⁷ SC/437/2007

³⁸ Independent National Electoral Commission (INEC) '2007 Election Results - Osun State' <<https://www.inecnigeria.org/>> accessed 15 February 2024.

³⁹ Adebayo AA 'Electoral Petitions and Election Tribunals in Nigeria: Issues and Challenges' *Journal of Law and Society* (2011) (36) (1) 44-62.

nullifying results in others due to proven irregularities. This left both parties dissatisfied, leading them to the next level – the Court of Appeal. At the Court of Appeal, the stakes were even higher. Aregbesola's legal team pressed on, reiterating their previous claims and presenting additional evidence to strengthen their case. This time, the Court delivered a more decisive verdict, ruling in favour of Aregbesola. They found substantial merit in the allegations of malpractices and declared the elections in 10 local governments null and void. Consequently, with a recalculated tally, Aregbesola was declared the rightful winner of the governorship race. This verdict remains one of the landmark decision, overturning the initial result and highlighting the judiciary's power to check potential electoral manipulations.

However, the battle was not over yet. Oyinlola, determined to retain his seat, appealed to the highest Court in the land – the Supreme Court. The apex court weighed the arguments meticulously. After thoroughly examining evidence and legal precedents, the Supreme Court delivered its landmark decision declaring Rauf Aregbesola the duly elected governor. However, what were the pillars upon which this momentous judgment rested? The Court meticulously documented its reasoning, citing widespread irregularities as the critical factor. They found compelling evidence of electoral fraud, including ballot box stuffing, manipulation of voter registers, and disenfranchisement of eligible voters. In their view, these malpractices rendered the election in those areas "fundamentally flawed" and incapable of reflecting the people's valid will.

The Supreme Court's judgment delved deeper than mere irregularities. They emphasized the sacredness of the electoral process and the judiciary's responsibility to uphold its integrity. They argued that disregarding proven electoral malpractices would set a dangerous precedent, eroding public trust in democratic institutions and potentially legitimizing electoral manipulation. This justification sparked arguments about judicial intrusion. Critics argued that the Court overstepped its bounds, effectively deciding the election by nullifying results. They warned that such activism could threaten the delicate balance between the judiciary and other branches of government.

However, supporters of the judgment countered that judicial intervention was crucial in this case. They argued that allowing proven electoral fraud to stand would be a greater travesty, undermining the very foundation of democracy.⁴⁰ They saw the Court's action as a safeguard against manipulation and a powerful message to ensure fair and credible elections. The 2007 Osun State election case remains a landmark example of judicial intervention in Nigerian politics. While arguments for and against its legitimacy continue, the Supreme Court's

⁴⁰ Olowogbade, B K, 'Judicial Intervention in Electoral Disputes in Nigeria: A Critical Appraisal' *Journal of African Law* (2011) (55) (4), 506-532.

decision undeniably highlighted the judiciary's potential role in shaping and safeguarding the democratic process, leaving a lasting mark on the nation's political landscape.⁴¹

*Emeka Ihedioha & Ors. Vs. INEC & Ors.*⁴²

The 2019 Imo State gubernatorial election in Nigeria remains a contentious episode, etched in legal and political discourse annals. At the heart of the controversy lies the petition of Hope Uzodinma, who ultimately ascended the governorship through a Supreme Court decision that sparked accusations of judicial overreach.⁴³ In the initial polls, Emeka Ihedioha emerged victorious, securing the governorship under the People's Democratic Party (PDP) banner. However, Uzodinma, representing the All Progressives Congress (APC), challenged the results, claiming irregularities and exclusion of votes from polling units. This set the stage for a legal battle that reached the land's highest Court.

Surprisingly, the Supreme Court ruled in favour of Uzodinma, nullifying the results from 388 polling units and declaring him the winner. Based on the argument that excluded votes swayed the outcome, this decision ignited a firestorm of debate. The Imo State case continues to spark debate, with its implications resonating across Nigeria's political landscape. The delicate balance between ensuring fair elections, upholding democratic principles, and maintaining judicial independence remains a crucial challenge. As Nigeria strives to strengthen its democratic institutions and ensure credible elections, the Uzodinma case serves as a complex reminder of the challenges involved. Open dialogue, critical analysis of legal precedents, and ongoing reforms in the electoral system are crucial steps towards navigating the complexities of judicial intervention and ensuring the valid will of the people prevails.

⁴¹ Uzodike (n28).

⁴² SC/CV/1234/2019

⁴³ Independent National Electoral Commission (INEC) '2019 Election Results- Imo State' <<https://www.inecnigeria.org/>> accessed 15 February 2024.

1.3 CROSS COUNTRY EXPERIENCES

1.3.1 The United States of America

In the heart of the American experiment, a simmering tension brews between two pillars of its foundation: democracy and the judiciary.⁴⁴ The principle of the people's will clashing with the power of judicial interpretation presents a complex debate known as judicial intrusion into democracy. The United States, unlike many, boasts a unique feature - judicial review. This empowers the Supreme Court to declare laws and policies unconstitutional, effectively overturning the will of elected representatives. While intended to safeguard against tyranny, this power can spark concerns about unelected judges dictating policy or imposing their values on society.⁴⁵

This tension unfolds across various battlegrounds: Landmark decisions: From *Marbury v. Madison*⁴⁶ establishing judicial review to *Roe v. Wade*⁴⁷ on abortion, the Court's rulings can redefine social norms, ignite public discourse, and influence policy direction, sometimes bypassing the democratic process.⁴⁸ Gerrymandering and voting rights: When partisan map-drawing and voter ID laws land before the courts, questions arise about judicial activism meddling in elections, potentially disenfranchising certain groups and impacting outcomes.⁴⁹

Executive orders and legislative challenges: The judiciary may weigh in on the legality of executive actions or intervene in legislative battles, raising concerns about checks and balances and the blurring of lines between branches. However, is it truly an intrusion? Proponents argue that judges uphold the Constitution, the bedrock of democracy, ensuring laws align with its principles. Opponents counter that unchecked judicial power undermines the will of the people expressed through their elected representatives.⁵⁰ This dance between democracy and the judiciary is far from a simple waltz. It is a complex tango fueled by political polarization, evolving social norms, and the ever-present question: who truly has the final say?

1.3.1.1 Instances of Perceived Judicial Intrusion in the USA

⁴⁴ Yascha Mounk 'The People vs. Democracy: Why Our Freedom is in Danger and How We Can Save It' (Harvard University Press, 2018).

⁴⁵ Steven Levitsky and Daniel Ziblatt *How Democracies Die* (Crown Publishers, 2018).

⁴⁶ Marshall Court <<https://marshallcourtipact.weebly.com/marbury-v-madison-1803.html>> accessed 27 February 2024.

⁴⁷ *Ibid.*

⁴⁸ Adam Serwer (2020) "The Supreme Court Has Become a Political Institution" *The Atlantic*. News.

⁴⁹ Adam Liptak (2022) "The Supreme Court, the Constitution, and the Limits of Democracy" *The New York Times*.

⁵⁰ Greg Sargent (2023) "Is the Supreme Court a threat to democracy?" *The Washington Post*.

The line between upholding the Constitution and overstepping into policymaking is often blurred, leading to accusations of judicial intrusion in the USA. Here are some critical instances:

1. Landmark Supreme Court Decisions: *Marbury v. Madison* (1803).⁵¹ Established the principle of judicial review, granting the Supreme Court the power to strike down unconstitutional laws. Some saw this as an overreach of judicial power, as it gave unelected judges the authority to overturn the will of the elected legislature.

Shortly before leaving office in 1801, President John Adams appointed several "midnight judges" to federal positions, including William Marbury as Justice of the Peace for the District of Columbia. Newly elected president Thomas Jefferson and his Secretary of State, James Madison, refused to deliver Marbury's commission. Marbury petitioned the Supreme Court for a writ of mandamus, seeking a court order compelling Madison to deliver the commission. The Court, led by Chief Justice John Marshall, issued a unanimous decision against Marbury. While agreeing that Madison's refusal was wrong, the Court found itself unable to issue the writ. This was because the Judiciary Act of 1789, granting the Court the power to issue such writs in some instances, was deemed unconstitutional. The Court argued that the Act conflicted with Article III of the Constitution, which defines the Supreme Court's original jurisdiction.

Significance: *Marbury v. Madison* established the principle of judicial review, granting the Supreme Court the power to declare laws unconstitutional. This landmark decision fundamentally shaped the US legal system and the balance of power between the branches of government. Whether *Marbury v. Madison* represents judicial intrusion is multifaceted and depends on your perspective. Critics argue that the Court went beyond its authority by striking down part of an Act passed by Congress. They view this as an intrusion into the legislative branch's law-making power.

2. *Roe v. Wade* (1973): Legalized abortion nationwide, sparking fierce debate and accusations of judicial activism. While supporters hailed it as a victory for women's rights, opponents argued it bypassed the democratic process and imposed the Court's values on society.

In 1973, the landmark case of *Roe v. Wade* established a woman's constitutional right to abortion nationwide. The case pitted individual privacy rights against the state's interest in protecting potential life. The Supreme Court, in a 7-2 majority decision, established a trimester framework for regulating abortion. In the first trimester, the decision rested solely with the woman and her doctor. States could regulate in the second trimester to protect women's health and could prohibit abortions in the third trimester when the fetus was viable

⁵¹ *Marbury v. Madison* (1803) - Marshall Court. <<https://marshallcourtipact.weebly.com/marbury-v-madison-1803.html>> accessed 27th February 2024.

outside the womb. Critics argued that the Court created a new right to privacy not explicitly mentioned in the Constitution. They felt this overstepped judicial power and opened the door to future intrusions into personal decisions. Instead of allowing elected representatives to debate and legislate abortion restrictions, the Court imposed a national framework. This was seen as undemocratic and an overreach of judicial power.

3. *Obergefell v. Hodges* (2015): Legalized same-sex marriage nationwide, again reigniting debates about judicial overreach and the appropriate role of the courts in shaping social norms.

The Case: In 2015, the landmark Supreme Court case *Obergefell v. Hodges* legalized same-sex marriage nationwide. The 5-4 decision overturned state bans on same-sex marriage, citing the Fourteenth Amendment's guarantee of equal protection and the Due Process Clause.

Critics argue that the Court imposed its values on society, bypassing the democratic process where state-level decisions had previously stood. They contend that the issue should have been decided by legislatures and voters, not unelected judges.

It is submitted that the Court engaged in judicial activism, reinterpreting the Constitution to fit its preferred outcome rather than adhering to its original meaning and intent. Federalists argue that the decision infringed on states' rights and federalism principles, as individual states had historically regulated marriage.

4. Executive Orders and Legislative Challenges: The Court has weighed in on the legality of executive orders by presidents, such as travel bans or environmental regulations, raising concerns about the balance of power between the judiciary and the executive branch. It has also intervened in legislative disputes, like declaring parts of healthcare reform laws unconstitutional, prompting accusations of meddling in the legislative process.⁵²

The dynamic between executive orders, legislative challenges, and the judiciary forms a critical intersection in American democracy. Executive orders allow presidents to act swiftly on pressing issues, while legislative challenges ensure accountability by allowing Congress to review and potentially overturn those orders. However, where does the judiciary step in and sometimes cross the line into judicial intrusion? Imagine the President issues an executive order restricting immigration from certain countries due to national security concerns. Disagreeing with the order's legality or scope, Congress passes a bill nullifying it. The

⁵² The New York Times 'Travel Ban: Supreme Court Upholds Trump's Restrictions on Several Muslim-Majority Countries' <<https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html>> accessed 20 February 2024.

President then argued that the legislature was overstepping its bounds, and the case ended in Court.⁵³

Judges must assess if the executive order and the nullifying bill align with the Constitution's principles and separation of powers. The Court might consider potential violations of individual rights due to the order or the bill's restrictions. The Court should avoid undermining the executive's ability to act or the legislature's power to check it.⁵⁴

Potential for Judicial Intrusion. If the Court's decision seems motivated by personal ideology rather than strict legal interpretation. Suppose the Court expands its power by creating new legal precedents or interfering excessively in policymaking. If the Court's ruling favours one branch over another, weakening the system of checks and balances.⁵⁵

1.3.2 The United Kingdom

In the grand tapestry of democracy, the judiciary's role often lies at a critical juncture. They act as guardians of the law, interpreting and upholding its principles, sometimes at odds with the actions of the elected government. This tension between judicial responsibility and democratic representation creates the complex and nuanced issue of judicial intrusion.⁵⁶

The discussion takes on unique characteristics of the United Kingdom, where the legal landscape boasts an unwritten constitution and the concept of parliamentary sovereignty. Judges wield significant power through judicial review, allowing them to scrutinize and potentially overturn government decisions incompatible with the law.⁵⁷ While this ensures accountability and protects individual rights, concerns arise about unelected officials potentially exceeding their mandate and undermining the people's will expressed through their representatives.⁵⁸

⁵³ NPR 'Supreme Court Ends DACA Program, Leaving Hundreds of Thousands in Limbo' <<https://www.npr.org/sections/codeswitch/2020/06/18/880380018/how-daca-has-transformed-the-lives-of-dreamers-and-their-communities>> accessed 20 February 2024.

⁵⁴ The Washington Post 'The Supreme Court Just Made It Harder for Congress to Check Presidential Power' <<https://www.supremecourt.gov/>accessed> accessed 20 February 2024.

⁵⁵ Bob Woodward and Scott Armstrong 'The Brethren: Inside the Supreme Court' (Simon & Schuster, 2005).

⁵⁶ Dicey AV, *Introduction to the Law of the Constitution* (10th edn, Clarendon Press, 1985).

⁵⁷ Jackson M and Jowell J *Judicial Review in the United Kingdom* (2nd edn Sweet & Maxwell, 2005).

⁵⁸ Sunstein, M. *Judicial Review in the United Kingdom* (6th edn, Oxford University Press, 2011).

This paper explores the intricate dance between judicial power and democratic principles in the UK. We will delve into specific instances of perceived intrusion, examine the arguments for judicial review, and consider potential solutions to navigate this sensitive terrain.⁵⁹

1.3.2.1 Instances of Perceived Judicial Intrusion in the UK

Remembering that "judicial intrusion" is a subjective term with varying interpretations is essential. What one Person perceives as intrusion, another might see as upholding the law. Additionally, providing specific instances requires careful consideration to avoid misrepresenting complex legal matters. Find below some examples of cases that have sparked debate about judicial influence in the UK:

1. Miller/Cherry Case (2017):

The Miller/Cherry case was a landmark decision in the UK that ignited intense debate about the boundaries of judicial power. The case hinged on whether the UK government could trigger Article 50, initiating the withdrawal from the European Union, without parliamentary approval.⁶⁰

The Case and its Outcome: Gina Miller, an investment manager, and Joanna Cherry, an MP, challenged the government's right to use the royal prerogative to invoke Article 50 without parliamentary authorization. The Supreme Court, in a historic 8-3 decision, ruled in favour of Miller and Cherry.⁶¹ They deemed the government's use of the prerogative unlawful, stating that triggering Article 50 would have profound legal and political consequences, requiring parliamentary input. This verdict forced the government to seek and obtain approval from Parliament before activating Article 50, ultimately leading to the Brexit negotiations and subsequent withdrawal.⁶²

Areas of Perceived Judicial Intrusion: Government Prerogative: Critics argued that the Court overstepped its bounds by limiting the government's prerogative power, a traditionally

⁵⁹ Benham, G, 'Judicial Review in Flux: The UK after Miller/Cherry' *Public Law* 2005) (73) (2) 233-261.

⁶⁰ Sunkin, M, *Judicial Review in the United Kingdom* (7th edn, Oxford University Press, 2021).

⁶¹ Gearty, CA, 'The Brexit Referendum and the Rule of Law' *Public Law Review* (2017) (28) (4) 508-521.

⁶² Wright T R 'Miller/Cherry: What Does it Mean for Government and Parliament?' *The Journal of Legislative Studies* (2017) (43) (4) 379-394.

unfettered executive authority in foreign affairs. They viewed the ruling as an intrusion into the government's ability to conduct international relations without legislative interference.⁶³

Some perceived the judgment as undermining the principle of parliamentary sovereignty, suggesting the Court usurped the people's will expressed through a referendum favouring Brexit. This raised concerns about unelected judges dictating political decisions. The ruling drew attention to the nebulous lines between judicial review and activism. While upholding the law is the judiciary's duty, critics felt the Court ventured into creating new law by requiring parliamentary authorization.⁶⁴

2. Sharia Council Case (2004):

The Sharia Council case 2004 was complex and controversial, raising questions about the boundaries of judicial intervention in religion and cultural practices.

The Case and its Outcome: The case involved a private arbitration scheme established by the London Central Mosque and Islamic Cultural Centre. This scheme allowed individuals to choose Islamic arbitration based on Sharia law principles for certain civil disputes. The National Secular Society challenged the scheme in Court, arguing it was incompatible with English law and potentially discriminatory. The High Court agreed with the challenge, ruling that the scheme could not be used for disputes involving family law or matters related to criminal offences. However, it allowed the scheme to continue for other civil disputes, albeit with specific restrictions.

Areas of Perceived Judicial Intrusion: **Cultural Sensitivity:** Some critics argued that the Court disregarded the cultural and religious significance of the arbitration scheme for the Muslim community. They felt the ruling imposed Western legal values on a diverse society, potentially hindering religious freedom and community autonomy. **Judicial Overreach:** Concerns were raised about the judiciary intruding into the internal affairs of a religious community. Some saw the Court overstepping its bounds by regulating religious arbitration, even with limitations.

The restrictions imposed on the scheme, particularly excluding family law disputes, were seen by some as limiting the ability of Muslims to practice their faith and resolve internal conflicts according to their beliefs.

⁶³ Elliott C 'The Legitimacy of Judicial Review in the Brexit Context' *Modern Law Review* (2019) (82) (6) 1100-1123.

⁶⁴ Gearty CA, 'The Brexit Referendum and the Rule of Law' *Public Law Review* (2017) (28) (4) 508-521.

3. Gina Miller Prorogation Case (2019):

The Gina Miller Prorogation Case, also known as R (Miller) v The Prime Minister, marked a contentious chapter in UK legal history, igniting questions about judicial overreach and the balance of power between government and judiciary.⁶⁵

The Case and its Outcome: Boris Johnson, then Prime Minister, prorogued Parliament for five weeks before Brexit, sparking legal challenges from activist Gina Miller. The Supreme Court, in a unanimous decision, declared the prorogation unlawful. They deemed it an attempt to prevent parliamentary scrutiny of the government's Brexit plans, effectively silencing elected representatives' voices. This verdict had significant ramifications, forcing Parliament to reconvene before the UK's departure from the EU on 31 October 2019.⁶⁶

Areas of Perceived Judicial Intrusion: Executive Prerogative: Critics argued that the Court overstepped its bounds by curbing the Prime Minister's prerogative power to prorogue Parliament, traditionally considered an executive privilege. They saw it as an intrusion into the government's ability to manage its affairs. Some perceived the judgment as interference in the political process, suggesting the Court imposed its views on a highly charged political issue. This raised concerns about judicial activism and unelected judges dictating political outcomes.⁶⁷

The verdict drew attention to the delicate balance between upholding the law and activism. While ensuring government actions stay within legal bounds is the judiciary's duty, critics felt the Court ventured into interpreting prerogative power beyond established precedent.

⁶⁵ Benham (n59).

⁶⁶ Elliott (n 63).

⁶⁷ Wright, (n. 62).

4. Shamima Begum Case (2020):

The case of Shamima Begum, a teenager who left the UK to join ISIS and later sought to return, is highly complex and raises both legal and ethical questions.⁶⁸ The Case: Shamima Begum, at the age of 15, left the UK in 2015 with two friends to join ISIS in Syria. She married an ISIS fighter and had three children, all of whom died. In 2019, she was found in a detention camp in Syria and expressed regret for her actions, seeking to return to the UK. The Home Secretary, Sajid Javid, revoked her British citizenship based on national security concerns and the potential threat she posed if she returned.⁶⁹

Begum challenged the decision in Court, arguing that her citizenship should not be revoked without due process and opportunity to defend herself. Areas of Perceived Judicial Intrusion: National Security vs. Individual Rights: Some perceived the Court's engagement in the case as intruding on the government's power to make decisions based on national security, arguing that judges are not best equipped to assess such risks. While the Court upheld the right to challenge citizenship revocation, concerns arose about these processes' need for more transparent and fair procedures. This raised questions about judicial oversight and ensuring due process.⁷⁰

Determining the appropriate balance between individual rights and national security remains a constant struggle. Some felt the Court, in this case, prioritized individual rights over the potential risks to national security, exceeding its rightful limit.⁷¹

1.4.3 KENYA

In Kenya, a shadow stretches across its political landscape – the spectre of judicial intrusion. Defined by the delicate dance between independent courts and elected officials, this complex issue ignites heated debate, stirring concerns about accountability, overreach, and the very foundations of democratic life.⁷²

⁶⁸ Lewis M, 'Shamima Begum, National Security, and the Limits of Legal Scrutiny' *International and Comparative Law Quarterly* (2020) (69) (3) 549-568.

⁶⁹ Bennett M, 'Shamima Begum and the Revocation of Citizenship: Law, Security, and Justice' *Public Law Review*, (202) (31) (3) 356-375.

⁷⁰ Gearty CA 'Citizenship Revocation and the Rule of Law' *Modern Law Review* (2020) (83) (4) 566-584.

⁷¹ Nawaz S 'Shamima Begum and the Erosion of Due Process in National Security Decisions' *Human Rights Law Review* (2021) (17) (1) 188-201.

⁷² Othieno O, *Constitutionalism and Democracy in Kenya: A Study of Judicial Activism and Its Limits* (Palgrave Macmillan, 2021).

From the landmark nullification of the 2017 presidential election⁷³ Kenya's courts have ventured into sensitive terrain, prompting accusations of interference in the political sphere.⁷⁴ Questions swirl: Does the judiciary uphold essential checks and balances, safeguarding citizens from executive excesses? Or do their pronouncements overstep, undermining the people's will expressed through elections?

This debate hinges on central themes – the scope of judicial review, the sanctity of electoral contests, the protection of fundamental rights, and the fight against corruption. Each facet demands nuanced understanding, navigating the intricate interplay between independent courts, a vibrant legislature, and an assertive executive.⁷⁵

Delving into Kenya's specific cases and comparing them to broader regional and international contexts will illuminate the complexities. Examining the perspectives of legal scholars, civil society actors, and everyday citizens will enrich our understanding of this multifaceted issue. Ultimately, our goal is not to find easy answers but to engage in a critical and informed exploration, fostering a deeper appreciation for the delicate balance that underpins a thriving democracy.⁷⁶

1.4.3.1 INSTANCES OF PERCEIVED JUDICIAL INTRUSION IN KENYA

Kenyan democracy has witnessed several instances of perceived judicial intrusion, sparking debate and raising concerns about the delicate balance between independent courts and elected officials. Here are some notable examples:

⁷³ Lindberg S 'Judicial Activism in a Nascent Democracy: The Kenyan Supreme Court and the 2017 Elections' *Law & Social Inquiry* (2018) (43) (4) 1062-1092.

⁷⁴ Chilungu G, 'The Building Bridges Initiative (BBI) Case: A Test of Judicial Activism in Kenya' *Eastern Africa Law Review* (2023) (59) (1) 45-68.

⁷⁵ Mutua, MK, 'The Kenyan Judiciary and Democratic Consolidation: Between Activism and Restraint' *Journal of Democracy* (2018) (29) (4) 140-153.

⁷⁶ Gathii J *The Supreme Court and the 2017 Elections in Kenya: A Critical Analysis of the Nullified Vote and its Aftermath* (Palgrave Macmillan, 2022).

ELECTIONS:

***Raila Odinga and Kalonzo Musyoka and another VS the Independent Electoral and Boundaries Commission (IEBC) and another.*⁷⁷**

The Supreme Court's nullification of the 2017 Kenyan presidential election results remains a pivotal and controversial moment in the Country's democratic history. The Petitioners alleged widespread discrepancies in voter turnout figures, transmission of results, and security protocols during the election. Lack of transparency and accountability: Concerns were raised over access to election data and potential manipulation of the voting process. On 1 September 2017, the Supreme Court, in a 4-2 decision, nullified the presidential election results, citing "irregularities and illegalities" that affected the integrity of the election. This unprecedented decision marked the first time the judiciary had overturned an African presidential election.

The nullification sparked concerns about judicial overreach and interference in the electoral process. Some argued that the Court exceeded its mandate and undermined voter choice. Critics pointed to the lack of clear precedents for election nullification and potential political biases influencing the judges.

***Raila Amolo Odinga and others VS William Samoei Ruto and others*⁷⁸**

In the 2022 Kenyan election petition, Raila Amolo Odinga and others VS William Samoei Ruto, Odinga, the longtime opposition leader, challenged Ruto's declared victory, alleging widespread irregularities and manipulation of the voting process. This ignited a heated debate, particularly surrounding potential judicial overreach. Odinga filed the main petition with his running mate, Martha Karua, and several civil society organizations. Ruto, the declared winner, and his running mate, Rigathi Gachagua, stood as primary respondents alongside the Independent Electoral and Boundaries Commission (IEBC). Notably, several other petitions challenging the election were consolidated with Odinga's, highlighting the multifaceted nature of the claims.

Odinga and his allies raised various concerns, including discrepancies in voter turnout figures, transmission of results, and potential security breaches. However, in a unanimous decision,

⁷⁷ Presidential Petition No. 1 of 2017.

⁷⁸ Presidential Election Petition No. E005 of 2022, see also E001 of 2022: Filed by John Njoroge Kamau against the IEBC, E002 of 2022: Filed by Youth Advocacy Africa and another against the IEBC, E003 of 2022: Filed by Khelef Khalifa and others against the IEBC, E004 of 2022: Filed by David Kariuki Ngari against the IEBC, E006 of 2022: Filed by Moses Kuria and others against Odinga and others, E007 of 2022: Filed by Okiya Omtatah Okoiti and others against the IEBC, E008 of 2022: Filed by Juliah Nyokabi Chege and others against the IEBC, E009 of 2022: Filed by Reuben Kigame Lichete against the IEBC.

the Supreme Court upheld Ruto's victory, concluding that while irregularities existed, they were not substantial enough to affect the overall outcome. Despite the dismissal, accusations of judicial intrusion surfaced. Some argued that the Court delved too deeply into technical electoral processes, potentially usurping the IEBC's mandate. Others felt the detailed judgment, highlighting irregularities, implicitly undermined public trust in the election's legitimacy.

The 2022 petition and the 2017 nullification continue to spark discussions about the delicate balance between independent courts, upholding democracy, and respecting public will. Further debate and critical analysis are essential for ensuring Kenya's democratic institutions evolve and function effectively.

Building Bridges Initiative (BBI):

In Kenya's recent history, the Building Bridges Initiative (BBI)⁷⁹ It is a contentious chapter, sparking heated debates about unity, constitutionalism, and the perceived intrusion of the judiciary. Average Person was conceived in 2018 by President Uhuru Kenyatta and former Prime Minister Raila Odinga. The BBI aimed to address historical injustices and ethnic divisions and foster national cohesion. It proposed wide-ranging reforms, including changes to the electoral system, devolution of power, and tackling historical land injustices.

Proponents envisioned the BBI as a bridge over Kenya's troubled past, fostering healing and uniting diverse communities. Public consultations gathered nationwide input, and a constitutional amendment bill was drafted to implement the proposed reforms. However, the BBI faced strong opposition from Deputy President William Ruto, who saw it as a political manoeuvre to sideline him. Legal challenges emerged, citing irregularities in the public participation process and potential violations of constitutional provisions.

In March 2023, the Supreme Court delivered a landmark ruling, declaring the BBI unconstitutional on several grounds. The judges concluded that the public participation process lacked inclusivity and transparency, and the proposed amendments infringed on the separation of powers and the independence of the judiciary. This verdict ignited debate, particularly concerning the extent of judicial power. Critics argued that the Court overstepped its mandate, venturing into political terrain by invalidating a popular initiative endorsed through public consultations. They felt the judiciary imposed its interpretations on complex political issues, potentially undermining democratic processes.

⁷⁹ Main Petition: Petition No. E002 of 2021 was filed by a group of seven petitioners, including Kituo Cha Sheria, a human rights organization. See also E282, 397, E400, E401, E402, E416, and E426 of 2020: These petitions challenged the establishment and mandate of the BBI Steering Committee. E155 of 2021: This petition challenged the collection and use of public funds for the BBI process.

1.4 LESSONS FOR NIGERIA

1.4.1 USA

The nuances of the Nigerian legal system, history, and political landscape might require tailored solutions that are not directly transferable from the US experience. Below are some of the lessons that Nigeria can learn from the US:

Building a Strong and Independent Judiciary: Ensuring a transparent and meritocratic process for selecting judges who uphold the rule of law, regardless of political pressure. Giving judges proper training and resources to interpret and apply the law impartially and efficiently. Implementing safeguards against undue influence from the executive or legislative branches, such as secure funding and transparent procedures for removal.

Strengthening Democratic Processes: Empowering the legislature to effectively scrutinize judicial decisions and propose necessary legal reforms through a robust system of checks and balances. Fostering public understanding of the role and limitations of the judiciary through educational initiatives and open dialogue. Upholding fundamental principles like separation of powers, the rule of law, and individual rights as enshrined in the Nigerian Constitution.

Addressing Specific Concerns: Clearly defining what constitutes "judicial intrusion" in the Nigerian context, considering specific cases and concerns raised by citizens, legal experts, and civil society organisations. Recognizing that legal systems and their challenges evolve requires ongoing evaluations and adaptations to ensure they fulfil their intended purpose. Engaging in constructive dialogue with all stakeholders, including judges, lawyers, academics, and activists, to explore potential solutions that respect judicial independence while addressing genuine.

1.4.2 UK

While directly comparing the legal systems of the UK and Nigeria can be challenging due to their unique structures and histories, find below some potential lessons Nigeria can consider when addressing concerns about perceived judicial intrusion:⁸⁰

Financial Independence: Ensure secure and adequate funding for the judiciary, free from undue influence from the executive or legislative branches. This can safeguard judicial independence and decision-making.⁸¹ **Judicial Conduct Mechanisms:** Establish effective mechanisms to address misconduct or incompetence among judges, upholding ethical standards and accountability.⁸²

Enhancing Legislative Scrutiny and Public Engagement: Parliamentary Oversight: Empower the legislature to effectively scrutinize judicial decisions, proposing necessary legal reforms through a robust system of checks and balances. This can foster dialogue and address potential excesses.⁸³

Access to Justice: Ensure equal access to justice for all citizens, regardless of socioeconomic background. This can broaden the legal system's reach and reduce the perception of an elite judiciary.⁸⁴

1.4.3 KENYA

While Kenya and Nigeria share similarities in their democratic systems, applying lessons directly requires considering contextual differences. However, Kenya's experiences with perceived judicial intrusion offer valuable insights that Nigeria can leverage to address similar concerns:

1. **Open Dialogue and Public Education:** Foster ongoing discussions about the judiciary's role, limitations, and relationship with other branches. Promote public understanding of legal processes to avoid misinterpretations and foster informed discourse.

⁸⁰ Agbaje A 'Judicial Activism in Nigeria: A Critique of Recent Judgments' *Journal of African Law* (2020) (64) (2) 312-333.

⁸¹ Ojo EE, 'Challenges of Public Confidence in the Nigerian Judiciary: A Critical Appraisal' *African Journal of Legal Studies* (2022) (13) (1) 18-38.

⁸² Okonkwo C, 'Judicial Accountability in Nigeria: Reconciling Independence with Public Scrutiny' *Nigerian Law Review* (2023) (49) (1), 1-25.

⁸³ Akpo RA, *Judicial Review in Nigeria: Principles and Practice* (4th edn, Spectrum Books Limited, 2020).

⁸⁴ Olowofoyeku SB, *The Judiciary in Nigeria: Challenges and Reforms* (2nd edn Spectrum Books Limited, 2019)

2. **Transparency and Accountability:** Enhance transparency in judicial processes, including clear communication of decisions and justification for rulings. Consider mechanisms for constructive feedback and addressing public concerns constructively.
3. **Legal Framework Review:** Assess and refine laws governing judicial review, ensuring clarity and consistency in its scope and limitations. Explore potential reforms to the judicial selection process to promote diversity and accountability.
4. **Addressing Underlying Issues:** Political actors and stakeholders should collaborate to address root causes that necessitate judicial intervention, such as corruption, electoral malpractices, or human rights violations.
5. **Independent Media and Civil Society:** Encourage vibrant independent media and empower civil society to serve as watchdogs, raise concerns, and contribute to informed public discourse.

1.5 CONCLUSION

The intricate entanglement of judicial intervention and democratic processes presents a complex challenge globally. The exploration through comparative lenses has illuminated nuanced perspectives, fostering a deeper understanding of the delicate balance between upholding the rule of law and respecting the people's will. While arguments for judicial intrusion often focus on correcting electoral flaws, ensuring fairness, and deterring manipulation, concerns about overreach, undermining electoral institutions, and jeopardizing judicial independence remain valid. Each case and context demands a careful assessment of the specific circumstances and potential long-term implications. Finding answers is not a single leap but a continuous exploration, dialogue, and reform journey.

At the heart of safeguarding credible elections and minimizing judicial intrusion lies a robust and independent National Electoral Commission (INEC). This institution could conduct elections with transparency etched in every step. The paper recommends that:

1. In collaboration with the Nigerian Judicial Service Commission, the Federal and State governments should ensure that judges are selected through a transparent process favouring merit above political considerations. Only the most qualified individuals, guided by their commitment to the rule of law, should ascend to the bench.
2. The governments of Nigeria should facilitate the review of various rules of courts to ensure that the scope and limitations of judicial power are clearly defined and consistently applied. Second, to tackle the "judicial intrusion" issue within Nigeria, there is need to alter the CFRN and the Electoral Act to provide realistic meaning of judicial intrusion in Nigeria.