OUSTER CLAUSES, JUDICIAL REVIEW AND GOOD GOVERNANCE: AN EXPOSITORY STUDY OF THE EXPERIENCE IN NIGERIA AND MALAYSIA

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 ISSN: 1923-6654 (print)
ISSN 1923-6662 (online). Available at http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html

Abstract: Ouster clauses are provisions in the statutes that take away or purport to take away the jurisdiction of a competent court of law. It denies the court the ability to make any meaningful contribution with respect to matters relating to sustainable development and good governance brought before the court. In fact, it seeks deny the litigant any judicial assistance in respect of the matter having bearing on sustainable development and good governance brought before it. The legislature seeks, by the enactment of ouster clauses, to deny the court the power of judicial review in respect of the matter in which its jurisdiction has been ousted. Ousting the jurisdiction of the court is a reaction from the legislative arm of government to the increasing powers of the court in respect of judicial review of certain disputes. Thus, democracy with calls for constitutionalism has gained more recognition in many parts of the world. Given the general functions of judiciary as one of check and balance mechanisms in democracy, most people and government have developed interest in the judiciary and judicial process. Despite this, the benchmark of academic discourse seems to argue that courts' hands are tied and should not review matters having to do with ouster clauses. This paper therefore makes an analytical exposition into the attitude of the courts in Nigeria and Malaysia to matters having to do with ouster of courts' jurisdiction. It reveals the reactions of courts to constitutional ouster clauses and the ones contained in statutes and analyses how judicial review of the clauses can help promote good governance and sustainable development. The objective is to improve the quality of courts' decisions and aid law reform in this area of law. It therefore hypothesizes that review of ouster provisions by the courts promotes constitutional justice, democratic principles, good governance, sustainable development and reduces injustices in the polity. For the purpose of the analysis, various constitutional provisions and courts' decisions from the countries under review are examined.

Keywords: constitutionalism, good governance, judicial review, ouster clauses, sustainable development.

INTRODUCTION

The major function of the courts as the third arm of government is to settle disputes through interpretation of the law. The law needs to be interpreted in such a way as to ensure the development of the nation. This is more so that disputes in any human occurrence are inevitable. In order to interprete the law which will assist in good

governance and development, the legal framework must have permitted the court to embark on such actions. In other words, the court needs to have jurisdiction to perform such actions. Where the courts jurisdictions are ousted by the legislature, this becomes a difficult task for the courts to force its way by assuming jurisdiction. This hinders judicial review in such actions in which its jurisdiction has been ousted.

Despites the above problem, many countries like countries under review still have in their statutes books and constitutions, ouster clauses. The choice of these countries is motivated because of both countries have statutes which oust courts' jurisdictions. Again, being of common law origin with the doctrine of judicial precedent,[1] one needs to investigate the role of courts when confronted with issues of ouster of courts' jurisdiction. The reason is that the court has jurisdiction to determine whether or not its jurisdiction has been ousted in a case. Also, both countries operate the concept of constitutional supremacy where the Constitution is seen as the supreme law of the land.[2] Both countries also operate the doctrine of separation of power[3] and are based on the concept of democracy.[4]

Against the above backdrop, the paper makes an expository study of the Nigerian and Malaysian experience on matters which relate to ouster clauses, judicial review and good governance. In doing this, the paper discusses the conceptual issues such as ouster clauses, judicial review and good governance. It also discusses how courts react to ouster of courts' jurisdiction over the years and its impacts on good governance in countries under review.

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[1] See Ashgar Ali Ali Muhammed, "Recent Decisions Offending Stare Decisis in Malaysia" (2008) 3 *MLJA* 97. See also the Nigerian case of *Dalhatu v Turaki* (2003) FWLR (Pt. 174) 247. See also Sambo, A. O. & A.B. Abdulkadir, "Socio- Economic Rights for Sustainable Development in Malaysia: Lessons from Selected African Countries' Constitutions" (2011) 2 (9) *OIDA International Journal of Sustainable Development*, 11-22.

[2] See section 1(1) and (3) of the Constitution of the Federal Republic of Nigeria which provides that the Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria and that if any law is inconsistent with the provision of the Constitution, the Constitution shall prevail and such other law shall to the extent of its inconsistency be void. Similarly, Article 4 (1) of the Malaysia Federal Constitution provides that the Constitution is the Supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with the Constitution shall to the extent of its inconsistency be void.

[3] See sections 4, 5, and 6 of the Constitution of the Federal Republic of Nigeria for the operation of the doctrine of separation of powers in Nigeria. Section 4 provides that the legislative powers of the Federation shall be vested in the National Assembly which consists of the Senate and the House of Representatives. The sections goes ahead to state the legislative powers of the Federation of Nigeria, Section 5 vests the executive powers of the Federation in the President of the Federal Republic of Nigeria who may exercise such powers in person or through the Vice President or the Ministers appointed by him. Section 6 vests the judicial powers of the Federation in the Courts established for the Federation and states some other powers of the courts in Nigeria. In Malaysia, Article 39 reads, 'The executive authority of the Federation shall be vested in the Yang di Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorized by the Cabinet, but Parliament may by law confer executive functions on other persons.' Also, Article 44 reads, 'The legislative authority of the Federation shall be vested in a Parliament, which shall consist of the Yang di-Pertuan Agong and two Majlis (Houses of Parliament) to be known as the Dewan Negara (Senate) and the Dewan Rakyat (House of Representatives).' More still, Article 121(1), whose marginal note reads 'Judicial Power of the Federation' now reads, inter alia, 'There shall be two High Courts of coordinate jurisdiction and status namely...'. Unlike arts 39 and 44, which mentions executive and legislative powers, art 121(1), following the 1988 amendment, no longer contains the term 'judicial power', which was previously mentioned by the original version of the provision. See also Abdul Aziz Bari, "The Doctrine of Separation of Power and the Ghost of Keram Singh" (2001) 1, *MLJA*, 1 where he argued that the foundation of the entire constitutional structure of Malaysia rests on the principle of separation of powers. See Sambo, A. O. & A.B. Abdulkadir, (n. 1).

[4] See section 14(1) and (2) of the Constitution of the Federal Republic of Nigeria which provides that the Federation shall be based on the principles of democracy and social justice and declares that sovereignty belongs to the people from whom the governments through the Constitution derives its powers and authorities and ensured the participation of the people in their government in accordance with the provision of the Constitution. In Malaysia, see Article 113 for the conduct of elections and Articles 114 to 120 of the Federal Constitution for various issues relating to elections.

CONCEPTUAL ANALYSIS

Ouster Clauses

Ouster clauses are provisions in the statutes that take away or purport to take away the jurisdiction of a competent court of law. It denies the court the ability to make any meaningful contribution with respect to a particular matter brought before the court.[5] In fact, it seeks to deny the litigant of any judicial assistance in respect of the matter brought before it. In other words, the legislature seeks by the enactment of ouster clauses, to deny the court the power of judicial review in respect of the matter in which its jurisdiction has been ousted.

Ousting the jurisdiction of the court is a reaction from the legislative arm of government to the increasing powers of the court in respect of judicial review of certain disputes. This is a weapon to curtail the jurisdiction of the court by rendering a matter to be non-justiciable before the court. The clause may sometimes confer the determination of such disputes to the legislature or executive or any other body. However, the ability to curtail the powers of the court therefore depends on the extent to which the court is prepared to allow the constriction of its powers by the legislature. This is because since the ultimate powers of interpretation of the Constitution or the statutes rests in the court, the court may jealously guard its jurisdiction and save it from being unnecessarily curtailed.

This aspect of the paper examines the reaction of the court towards ouster of its jurisdiction by the legislative arm of government through the enactment of clauses that oust the jurisdiction of the court. It also examines whether enactment of ouster clauses is constitutional in a country where the doctrine of constitutional justice is in operation. The researcher will, however, be focused on the examination of judicial decisions where there had been an interpretation of ouster provisions in relation to the powers and functions of the other arms of government. In other words, our focus, here, shall be on ouster clauses that affects intergovernmental powers and functions. The objective here is to analyse how important developments in the political systems shape the court's decisions and reactions of the courts to the attempt by other arms of government to fetter the court' ability to play meaningful role in the society through the promulgation of laws that oust the courts' jurisdiction. This will, therefore, be divided into two: statutes which oust the jurisdiction of the courts and where the Constitution ousts the jurisdiction of the courts.

Judicial Review

Many academic discourses have ignored the definition of judicial review despites its significance in constitutional law.[6] This is because no much controversy surrounds the meaning of the term. Rather, the origin,[7] scope and arguments as to whether judicial review is actually needed or justified in a democratic society or in a particular case seems to dominate the debate.[8] Also, the focus seems to be on the review of administrative actions.[9] This paper focuses on the judicial review as it affects ouster clauses.

Judicial review has been described to mean when the court overturns the action of the government finds

[5] See Alabi M.O. A., *The Supreme Court in the Nigerian Political System 1963-1997*, Demyax Press Ltd, Nigeria, 2002, at 244.

[6] T.R.S Allan, "Deference, Defiance, and the Doctrine of Defining the limits of Judicial Review" (2010) 60, *University of Toronto Law Journal*, 42-59; Xuehua Zhang and Leonard Ortolano, "Judicial Review of Environmental Administrative Decisions: Has It Changed The Behavior Of Government Agencies?" (2010) No. 64, *The China Journal*, 97-199; Kainec, Lisa A., "Judicial review of Senate impeachment proceedings: Is a hands off approach appropriate?" Summer 93, vol. 43, *Case Western Reserve Law Review*; Issue 4, 1499.

[7] T.R.S. Allan, "The Constitutional Foundation of Judicial Review: Conceptual Conundrum or Interpretative Inquiry" (2002) 61 (1) *C.L.J*. 87, for scholarship on its origin.

[8] Erwin Chemerinsky, "Bush V. Gore Was Not Justiciable" (2001) 76, Notre Dame Law Review, 1093 criticizing the decision in the case of *Bush V. Gore* 121 S. Ct. 525 (2000) that the ccourt ought not to exercise power of judicial review in that case.

[9] This is mostly common in Malaysia. See Sudha CKG Pillay, "The Emerging Doctrine of Substantive Fairness - A Permissible Challenge to the Exercise of Administrative Discretion?" [2001] 3 *MLJA* 1-21; V Anantaraman , "The Extended Powers of Judicial Review in Malaysian Industrial Relations: A Review", [2006] 4 *MLJA* 114, Wan Azlan Ahmad and Nik Ahmad Kamal Nik Mahmod, *Administrative Law in Malaysia*, Sweet&Maxwell Asia, Malaysia, Singapore&Hongkong, 2006, 27-52 and 207-259; Krishnan Arjunan, "Judicial Review and Appellate Powers: Recent Trends in Hong Kong and Malaysia" [2000] 2, *MLJA*, Sudha CKG Pillay, "The Ruling In Ramachandran - A Quantum Leap In Administrative Law?" [1998] 3, *MLJA*, 62; Anwarul Yaqin & Nik Ahmad Kamal Nik Mahmod, "Review and Appellate Powers: An Elusive Quest For Maintaining the Dividing Line" [2004] 3 *MLJA* 66.

support for it or refuse to rule.[10] Some also see it as judicial law making.[11] Some see it as judicial supremacy.[12] The wider usage of the term appears to be when the court decides a case on the merit thereby affecting the powers and functions of the political class or where the court strikes down the actions of the political class.[13]Judicial review in this paper is used to mean the legal way in which the court overturns the ouster clauses, or decides on the merit disputes in which courts' jurisdiction has been ousted.

The concept judicial review has a controversial origin. Some writers trace the origin to the case of *Marbury v Madison*[14] while some say it was before *Marbury* cases. They noted the practices of the English courts in the sixteenth and seventeenth century. It was opined that courts' power to review existed before *Marbury's* case but was rarely exercised unless it expressly violated the constitution.[15] However, it was also argued that judicial review was commonly practiced before Marbury's case and was not limited to express constitutional violations.[16] Another view is that Marbury's case was a clear departure from the original understanding of the role of the court as judicial review was never meant to apply to congressional legislation. Some others examined the origin of judicial review from an elaborate understanding where the court examined statute in order to determine whether it violated natural law or written constitution.[17] One more view is that judicial review to certain extent was caused by the dissatisfaction with legislative supremacy and obnoxious legislations.[18] Also, some opine that it was in the word of founders, thoughts of patriots, and actions of the states.[19] Some even submitted that judicial review was unconstitutional as it was not permitted by the constitution.[20] It was also argued that both text and structure actually intended to permit judicial review.[21] Some even advocated for complete abrogation of judicial review. Lastly, a writer says those founders were influenced by early repugnant reviews both by corporate practice and review for consistency with natural law.[22] However, notwithstanding the controversy surrounding its origin, the concept of judicial review has cropped up into the constitutional jurisprudence of many nations

[10] See Louis Fisher, *American Constitutional Law*, 4th edn, Carolina Academic Press, Durham, North Carolina, United States of America, 2001, at 35.

[11] As bishop Hoadley stated in 1717 " whoever hath an absolute authority to interprete any written or spoken laws, it is he who is truly the law giver, to all intents and purposes, and not the person who first wrote or spoke them." James Bradley Thayer, 7 Harv. L. Rev. 129, 152 (1893) as cited in See Louis Fisher, *American Constitutional Law*, Ibid.

[12] Jamal Greene, "Giving the Constitution to the Courts" (2008) 117, *Yale L.J.*, 886, a review of Keith E. Whittington's Political Foundations of Judicial Supremacy: The Presidency, The Supreme Court and Constitutional Leadership in U.S. History, 2007. 'Judicial supremacy is the new judicial review'

[13] See Kate Mallesson, "Judging Judicial Review-Criteria for Judicial Appointment" in Richard Gordon Q.C. *Judicial Review in the New Millennium*, Sweet & Maxwell, London: 2003, at 19-30; Christopher S. Elmendorf, Structuring Judicial Review of Electoral Mechanics: Explanations And Opportunities, (2007) Vol. 156, *University Of Pennsylvania Law Review*, 313; see also A. T. Shehu, "The True Foundation of Judicial Review: A View from Nigeria", (September, 2010) 2 *Jindal Global L. Rev.*, 212 where he stated that "judicial review entails judicial intervention in the exercise of powers by the other institutions of government and those who have been charged with the duties of carrying out the duties and authorities of those institutions…"

[14] 5 U.S. (1 Cranch) 137 (1803).

[15] Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We The Court*, 115 *Harv. L. Rev*. 4, *73-4* (2001); Larry D. Kramer, "The People Themselves: Popular Constitutionalism and Judicial Review" (2004).

[16] William M. Treanor, " Judicial Review before Marbury" 2005) 58 *Stan. L. Rev*. 455, 457-8.

[17] Suzanna Sherry, "The Founders' Unwritten Constitution", (1987) 54, *U. Chi. L. Rev.* 1127; Randy E. Bamett, "Reconceiving the Ninth Amendment" (1988) 74, *Cornell L. Rev*. 1; Arthur E. Wilmarth, Jr., "Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic" (2003) 72, *Geo. Wash. L. Rev*. 113.

[18] Jack N. Rakove, "The Origins of Judicial Review: A Plea for New Contexts, (1997) 49, *Stan. L. Rev*. 1031, 1054-6.

[19] Anthony V. Baker, "So Extraordinary, So Unprecedented an Authority*":* A Conceptual Reconsideration of the Singular Doctrine of Judicial Review" (2001) 39, *Duq. L. Rev*. 729, 734.

[20] Larry D. Kramer, "Putting the Politics Back into the Political Safeguards of Federalism" (2000) 100, *Colum. L. Rev*. 215, 234-35.

[21] Saikrishna Prakash & John Yoo, "The Origins of Judicial Review*"* (2003) 70, *U. Chi. L. Rev*. 887, 982.

[22] Lawrence Joseph Perrone, "The Fundamental And Natural Law 'Repugnant Review' Origins Of Judicial Review: A Synergy Of Early English Corporate Law With Notions Of Fundamental And Natural Law" vol. 23, *BYU Journal Of Public Law*, 61-81.

and can be seen to have come to stay. It is an essential tool for the rule of law and good governance.

Good Governance

The tem governance has been enjoyed several connotations over the years. It has been defined as that which "comprises the traditions, institutions and processes that determine how power is exercised, how citizens are given a voice, and how decisions are made on issues of public concern."[23] Also, it has also been seen as: "manner in which power is exercised in the management of a country's economic and social resources for development."[24] It has also simply been put as: "the activities or process of managing public affairs.[25] Many usages of the term seem to governance at governmental level and corporate governance.

Our focus is on good governance. In the present day, the solution to the problem of developing country seems to lie in the concept of good governance. Ability to achieve sustainable development seems to be a mirage is a country where good governance is lacking. Good governance thus relates to the soundness of the guiding structure, mechanism, and process which direct socio-economic and political relationship of a nation. It comprises of the three interrelated spheres of government: administrative, political and economic. It includes quality service and fair, transparent, accountable, participatory and corrupt free society.[26]

Thus, the important components of good governance require a brief mentioning. First, is the adherence to the rule of law. This means that everything needs to be done in accordance with the law. There must be equality before the law irrespective the class of people. The law should be fair and the implementation should be humane. Acts of the ruler and the ruled should be subject to the dictate of the law before ordinary courts of the land. Human rights and minority right should be taken into consideration. It requires an independent judiciary and good implementation of the law.

Effective participation is another cardinal principle of good governance. This shows that participation irrespective of gender, whether male or female is a major foundation of good governance. It could be direct or through the true representatives of the people. There should be free speech and people should be able to freely associate. The societies concern should be put into account before policies are passed and implemented. People need to be informed in an organized manner.

Similarly, there is the need for Transparency, Responsiveness. Consensus oriented. This means that decisions and its implementation should follow the laid down rules and regulations. State should not be conducted as a secrete society and everybody especially those affected by government decisions should have required information in the affairs of the state. The press also needs to be free. Good governance requires that institutions and processes try to serve all stakeholders within a reasonable timeframe. Also, the government should do enough consultations before taking decisions in certain national interest. To achieve this, the government needs to understand the culture, history, and values of a given society. In the event of conflicts, steps should be taken to mediate between the people according to law and justice of the matter.

In the same vein, equity and inclusiveness, effectiveness and efficiency, and accountability are significant aspect of good governance. The society should be built on fairness and egalitarianism. An inclusive government as opposed to winners take all, needs to be promoted. The welfare package of the people by the state should be general and should be the primary concern of the government. This needs to be done irrespective of the group of the people. The government is required by this to use the natural and human resources at her disposal to harness the best interest of the society. The resources should be sustainably made use of so as to cater for the people and not the personal use of the people at the elms of affairs. Government should be accountable to the people. It should also be run in such a situation where the people can hold the government accountable. Accountability should be visible in all sectors of the society.

THE NIGERIAN AND MALAYSIAN EXPERIENCE

Statutory Ouster Clauses

At the initial stage of the National polity in Nigeria, most of the ouster clauses were based on the areas of chieftaincy matters. The ability of the courts to exercise powers or jurisdictions in this area was further restricted by the legitimacy given to these ouster provisions by the then Constitution.[27] Thus, the

[23] Graham, J., Bruce A. and Plumptre, T "Principles for Good Governance in the 21st Century," (2003) Institute On Governance , *Policy Brief No.15*.

[24] World Bank. 1992. *Governance and Development*, Washington D.C.

[25] Abdun Noor, Ethics, Religion and Good Governance, (2008) *JOAAG*, vol. 3, no. 2, 62-66.

[26] UNDP. 1997. "The Ethics of Good Governance", in PARAGON Generic Training Module on Public Service Ethics and Accountability.

[27] See section 158(4) (a) and 161(3) of the Republican Constitution of 1963.

court at this period had to give effect to the provision of the ouster clauses.[28] In fact, judicial review of ouster clauses suffered a lot of set back at this period of time as courts' jurisdictions were effectively ousted by these provisions.

Thus, in the case of *Salami Olaniyi v Gbadamosi Aroyehun and others*,[29] the plaintiff challenged the validity of the appointment and installation of *Oni Ira of Ira*. The High Court of Kwara State assumed jurisdiction. The Court of Appeal reversed the decision of the Court on the ground that the Court lacked jurisdiction because the matter concerns chieftaincy matters. The Supreme Court affirming the decision of the Court of Appeal was of the view that section 3 of the Chieftaincy Disputes (Preclusion of Courts) Ordinance No. 30 of 1948 was an existing law and therefore ousted the jurisdiction of the Court from matters relating to Chieftaincy affairs. The decision of the Court in the many cases that follow this case continued in this line of reasoning by not reviewing any matter that concerns chieftaincy.[30]

The Supreme Court had an opportunity to react to ouster clauses that border on governmental powers and functions or constitutional matters in the case of *Senator Chief T. Adebayo Doherty v Sir Abubakar Tafawa Balewa and others.*[31] In that case, the Commission and Tribunals of Enquiry Act gave power to the Prime Minister to issue a commission, appointing commissioners to hold a commission of Enquiry relating to matters specified in the Act and that the action of the Commission and that of the Prime Minister should not be subject to question in any court of law in Nigeria. The Prime Minister exercised this power by appointing Commissioners to hold enquiry into the activities of certain persons which included the plaintiff. The Supreme Court, although, holding the action to be a valid legislative exercise of the Parliament, invalidated section 3 (4) of the Act as unconstitutional because it seeks to limit the jurisdiction of the Court to hear and determine civil rights and obligation and constitutional matters contrary to sections 21, 31 and 108 of the then Constitution.

In a similar case of *J.S. Olawoyin v Commissioner of Police*[32], the Court was of the view that the law which provided for the sharing of powers of the High Court with any other person or body of persons will be declared void as being inconsistent with the provision of the Constitution except it is expressly permitted in the Constitution.

During the period of the military regimes, a number of Decrees and Edicts were promulgated to take away the jurisdiction of the courts. The Supreme Court was bold enough to review these clauses despite the fact that it was made by the military government although not without reactions from the military. The opportunity to review these clauses came before the Supreme Court in the case of *Council of University of Ibadan v N.K. Adamalekun.*[33] In that case, the government promulgated an Edict to establish the Western Nigeria Court of Appeal when an appeal against the decision of the Ibadan High Court was pending. This Edict No. 35(2) denied the appellant the right to appeal to the Supreme Court directly without first appealing to the newly established Western Nigeria Court of Appeal. The Court accordingly nullified this Edict on the ground that it infringed upon the constitutional right of the appellant to appeal directly to the Supreme Court.

Similarly, in the case of *Lakanmi and Anor v Attorney General of the West and Another*[34], an Edict (subsequently validated by Decreee No. 45 of 1968) was enacted to forfeit the assets of some named individuals. The Decree contained an ouster clause precluding the court from entertaining any matter relating to the forfeiture of the assets. The Supreme

[28] See the Supreme Court of Nigeria in the case of *Enwezor v Onyejekwe* (1964) NSCC 9 which gave effect to ouster clauses by not exercising jurisdiction in chieftaincy matters under section 158(4)(a) and 161 (3) of the 1963 Constitution. The Supreme Court was also of the view in the case of *Adeyeye v Adeboye* (1987) NSCC 1084 that section 11(a) of the Chiefs (Appointment an Deposition) Law of the Northern Nigeria and section 78(6) of the Constitution of the Northern Nigeria,1963 ousted the Court's jurisdiction with respect to chieftaincy affairs.

[29] (1991) 1 SCNJ 25.

[30] See for instance the case of *Chief Utuedor Uti and Six Others v Jacob Umurhurtu Onoyivwe and five others* ((1991) 1 SCNJ 25 where the Supreme Court in a majority decision of six to one upheld section 36 of the Chiefs Law, Cap 37, Laws of Bendel State of Nigeria, 1976 and section 161(1) and (3) of the then 1963 Constitution and held that questions relating to the validity of the selection, selection, upgrading, deposition or abdication of the Chief cannot be questioned in any Court of Law. See also the Supreme Court in the case of *Governor of Oyo State and Others v Oba Ololade Folayan* (1995) 9SCNJ 50 at 80 where the Court held that the existing law determined the Court jurisdiction at the time cause of action arose and that by sections 158(4) (a) and 161(3) of the then 1963 Constitution, the jurisdiction of the Court was effectively ousted over chieftaincy affairs.

[31] (1961) NSCC 248.

[32] (1961) ALL NLR 203.

[33] (1967) NSCC 210.

[34] (1970) NSCC 143.

Court declared the Edict and the Decree null and void for ousting the court's jurisdiction and 'nothing short of legislative judgement, an exercise of judicial powers.'

The Military government reacted seriously to the review of these clauses as they saw it as an open challenge in the guise of judicial interpretation. It, therefore, promulgated another Decree[35] shortly after the decision of the Supreme Court which expressly nullified the decisions of the Supreme Court in the two cases above and restricted, entirely, the powers of the court to review laws made by the Military government.[36] This Decree, therefore, had effects on judicial review of ouster clauses contained in the laws made by the Military throughout the era and remained uncontested.[37]

Thus, the Court in the case of *Chief Adejumo v Colonel Mobolaji Johnson, Military Governor of Lagos State*[38] refused to review even an executive instrument purported to have been made under an Edict.[39] The Court was of the view that it had the same protection of the Decree and Edict thereby denying judicial review.[40]

However, the Supreme Court later went back to its reviewing of ouster clauses when an opportunity presented itself in the case of *Onyuike v Estern States Interim Assets and Liabilities Agency*.[41] The issue in that case was whether Eastern Nigeria Detention of Persons Edict No 11of 1966 contravened Decree No.1 of 1966 and Section 31 of the 1963 Constitution. The trial Court had declined jurisdiction. The Supreme Court, however, held that the Court had jurisdiction without overruling the previous decision and remitted the case back to the trial Court for a retrial.[42] This decision reflected in the subsequent decisions of the courts till when democratic government was ushered in 1979.[43]

In Malaysia, there are a number of statutes precluding judicial review with respect to certain matters. This is because the constitution does not preclude the power of the parliament to make laws with the provision of ouster clauses. For instance, section 18(c) of the Societies Act precludes the courts from exercising judicial review in matters relating to internal affairs of political parties. It is not material whether an injustice has occurred in the course of party interactions. The reason for this is that the courts believe that if somebody has mortgaged his conscience in joining a particular party, it is not for the courts to review the actions taken by the political party. The court by this does not want to manage the affairs of the parties for them.

Also, section 13(14) of the Penang freedom of information enactment, 2010 contains an ouster clause which provides that an order made by the Board of Appeal on any appeal before it is final, cannot be questioned in any Court. Similar provision though with some forms of modification is contained in the Selangor Freedom of Information Enactment, 2011. It provides that (14) An order made by the State Information Board on an appeal before it shall be final, shall not be called into question in any court, and shall be binding on all parties to the appeal or involved in the matter provided that an applicant who is dissatisfied with the decision of the State Information Board shall, within twenty one days from the issuance of the order of the State Information Board, appeal against such order in court. Also, the recent competition law which was in effect in 2012 also contains a provision which precludes the court from exercising judicial review in certain matters relating to the law. This shows that statutes can also oust the jurisdiction of the court. The reason is that

[35] The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970.

[36] Ibid. See Section 1(2) of the Decree. This Decree was in effect given a retrospective effect so that it could nullify the decisions of the Supreme Court. This Decree also appears not to be the first situation in Nigeria where a law was passed to nullify Court's decision. The Western Parliament enacted the Constitution of the Western Nigeria (Amendment Law) on 27/05/63 and back dated to 02/10/60 thereby nullifying the decision of the Privy Council in the case of *Adegbenro v Akintola* (1963) AC 614 before the 1963 Constitution was passed to abolish appeals to the Privy Council.

[37] Eso, Kayode, *The Mystery Gunman: History, Politics, Power-Play, Justice*, Spectrum, Ibadan, 1996 at 27.

[38] (1972) All NLR 164.

[39] This case was incidentally presided over by the Chief Justice of Nigeria who was the one that presided over the earlier decisions nullified by Decree No.28 of 1970.

[40] See also a later case of *Adenrele v Colonel Mobolaji Johnson*(1974) All NLR 26 which also denied judicial review on the ground that Decree No 28 precluded the Courts from enquiring to declare the validity or otherwise of the Decree or Edict.

[41] (1974) All NLR 685.

[42] This change to the era of judicial review of ouster clauses was led by Elias- the Chief Justice of Nigeria who ironically was the Federal Attorney General when Decree No28 of 1970 annulling the decision of the Supreme Court was promulgated.

[43] See the cases of *Barckeys Bank of Nigeria v Central Bank of Nigeria* (1976) NSCC 291 at 297, *Agip (Nig.) Ltd v Attorney General of Lagos State* (1977) NSCC 442, *Peenok Investments Ltd. v Hotel Presidential Ltd* .(1982) NSCC 477 .

no express provision in the constitution which precludes the legislature from exercising such powers.

Constitutional Ouster Clauses

The return to democratic government and the coming into effect of the Constitution of the Federal Republic of Nigeria, 1979 witnessed remarkable growth in judicial powers and hence more powers of judicial review. The Constitution, in clear and unambiguous terms, prohibited the enactment of ouster clauses by the legislature.[44] Apart from this, the Constitution became the supreme law of the land and declared void any other law that was inconsistent with the provision of the Constitution.[45] Judicial powers were also extended to include all inherent powers and sanctions of courts of law.[46] The actions of the executive and legislature were made reviewable by the ordinary court of the land.[47]

Thus, it appears statutes ousting the Court's jurisdiction were never passed during the operation of the 1979 Constitution as none appears to be challenged before the court during the period. However, since the Constitution does not have retrospective effects on previous transactions, they were considered in compliance with the law in force at the time when the cause of action arose because obligations of the parties must be considered in the light of the law when the cause of action arose.[48]

However, despite the prohibition of ouster clauses by the Constitution and the powers of judicial review provided for in the Constitution, the Constitution itself provided a number of ouster clauses taking away the jurisdiction of the courts in certain aspects relating to inter governmental powers and functions. The notable ones are section 170(10) of the 1979 Constitution. It provides in relation to impeachment proceedings thus;

No proceedings or determination of the Committee or of the Assembly or any matter relating thereto shall be entertained or questioned in any Court.

Other ouster clauses are contained in section 6(6) (c) and (d) of the 1979 Constitution. Subsection (c) provides that:

judicial powers shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person as to whether any law or any judicial decision is conformity with fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution',

and subsection (d) of section 6(6) provides that:

Judicial powers shall not as at the date when this section comes into force, extend to any actions or proceedings relating to any existing law made on or after 5th January, 1966 for the determination of any issue or question as to the competence of any authority or person to make any such law.

Section 195(5) of the 1979 Constitution also provides 'the question whether any, and if so what, directions have been given under this section shall not be inquired in any Court' [49]

It must be noted that judicial review of ouster clauses in the above stated provision of the Constitution was highly restricted. In other words, the court gave effect to the ouster clauses contained in the Constitution by refusing to entertain any matter brought in connection with those provisions. The most notable constitutional ouster clause which the Court denied judicial review was the provision of section 170(10) of the 1979 Constitution. Thus, in the case of *Balarabe Musa v Auta Hamza*,[50] the Court of Appeal refused to review the decision of the Kaduna State House of Assembly in relation to the impeachment of the governor of the State despite huge allegations of procedural irregularity and non compliance with the provision of the Constitution. The Court was of the view that the jurisdiction of the courts was effectively

[44] See section 4(8) of the Constitution of the Federal Republic of Nigeria, 1979 which precludes the National Assembly or the State House of Assembly shall not enact any law which ousts or purports to oust the jurisdiction of the Court or judicial Tribunal established by law.

[45] Ibid. See section 1(1) and (3) which provides that the Constitution is Supreme and its provision shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria and that if the provision of any other law is inconsistent with the provision of the Constitution, the Constitution shall prevail and such other law shall to the extent of its inconsistency be void.

[46] Ibid, see section 6(6) (a).

[47] Ibid. See section 4(8) which provides that the exercise of legislative powers of the National Assembly or by a House of Assembly shall be subject to the jurisdiction of the Court and of judicial Tribunal established by law.

[48] See the cases of *F.S. Uwaifor v Attorney General, Bendel State and others*(1982) NSCC 221, *Audu Adamu v Attorney General, Bendel State*(1982) 3 NCLR 676, *Olaniyi v Aroyehun and others*(1991) 7 SCNJ 40 at 51.

[49] The section has to do with the Control of the Nigeria Police by the Federal and the State governments.

[50] (1982) NSCC 219.

ousted by section 170(10) of the 1979 Constitution. Unfortunately, the Supreme Court did not have the opportunity of interpreting this provision of the Constitution at this point in time.

With regard to section 6(6) (c) of the 1979 Constitution, the courts also deferred to constitutional ouster clauses by denying judicial review in matters falling under chapter II of the Constitution.[51] The basis for denying judicial review in this instance was that the Constitution effectively ousted the court's jurisdiction in this matter. Thus, the court in *Okogie v Attorney General of Lagos State*,[52] denied judicial review in that case on the ground that judicial power does not extend to issue whether fundamental objectives and directive principles of the State policy has been complied with.[53]

While section 195(5) of the 1979 Constitution appears not to come before the Supreme Court for interpretation, section 6(6) (d) of the same 1979 Constitution came before the Supreme Court for interpretation. Thus, in the case of *F.S. Uwaifor v Attorney General Bendel State* [54], the issue before the Court concerns Public Officers Special Provision Decree 1976 which expressly ousted the court's jurisdiction in questioning any act done under the Decree. The High Court, Court of Appeal and the Supreme Court rejected the contention of the appellant that jurisdiction of the Court was not ousted in view of the fact that the action was instituted at a time when the 1979 Constitution came into operation. The Supreme Court was of the view that obligations and rights of the parties must be considered in the light of the applicable law when the cause of action arose and that the jurisdiction of the Court was effectively ousted by the provision of the Constitution. The Courts in subsequent cases brought under the 1979 Constitution followed this line of reasoning of the Supreme Court.[55]

Judicial review of ouster clauses suffered another setback when the Military came into power in 31st December, 1983. There were, however, some differences in the approach to review unlike what happened in the pre 1979 situation. Thus, in the case of *Military Governor of Ondo State and another v Victor Adegoke Adewunmi*[56], the State government made the Chiefs Edict No. 11 of 1984 with retrospective effect to January 1st 1984 while a case was pending. Apart from the Edict ousting the court's jurisdiction in chieftaincy affairs, it provided for imprisonment for the offence of challenging the validity of appointment of a chief or parading oneself as a chief. The issue before the Supreme Court was whether an Edict of a State could oust the court's jurisdiction. The Court technically declared the Edict as void because it was inconsistent with the provision of a Decree and the unsuspended part of the Constitution.[57]

In fact, the Supreme Court pronounced on the hierarchy of laws in Nigeria in order of superiority in the case of *Dokun Ajayi Labiyi and Others v Mustapha Moberuagba Anretiola*[58] as follows:

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[51] Chapter II contains Fundamental Objectives and Directive Principles of State Policies.

[52] (1981) 2 NCLR 337.

[53] See also the cases of *Adewole v Jakande* (1981) 1 NCLR 262, *Ehimare v Governor of Lagos State* (1981) 1 NCLR 166 for similar position.

[54] (1982) NSCC 221. The appellant was being investigated by the Assets Verification Panel under the Decree.

[55] See the case of *Attorney- General of Imo State v Attorney General of Rivers State* (1983) NSCC 370 where it was held that section 6(6) (d) of the 1979 Constitution was a bar to any question into the competence of the Federal Military government to make Decrees from 16th January 1966 – 30th September 1979. These were periods of Military rule in Nigeria. See also *Attorney General of Lagos State v Hon. Justice L.J. Dosumu* (1989) All NLR 504 where the Supreme held that the jurisdiction of the Court was effectively ousted by the provision of the 1979 Constitution since the action was instituted before the coming into effect of the Constitution. See also Mustapha v Governor of Lagos State and others (1987) 5 SCNJ 112 or (1987) 1 NSCC 632 where the Court was of the view that the Courts cannot arrogate to themselves powers, which the Constitution the source of their own power has excluded from them. Similar conclusions were reached in *Joseph Mangtup Din v Attorney General of the Federation* (1988) 9 SCNJ 14, *Osadebay v Attorney General of Bendel State* (1991) 1 SCNJ 162.

[56] (1988)1 NSCC 1136.

[57] The unsuspended part of the 1979 Constitution includes sections 6 and 236 which in effect conferred unlimited jurisdiction on the State High Court. Thus, because it was saved by a Decree, Edict could not be inconsistent with it.

[58] (1992) 10 SCNJ 1. The defendant in an interlocutory appeal in this case contended that the High Court lacked jurisdiction on the ground that the Court's jurisdiction was ousted by section 2 of the Chieftaincy Matters (Exclusion of Jurisdiction of Courts) Edict No. 3 of 1985 Oyo State. The Supreme Court which identified the central issue in this case to be whether the High Court could exercise jurisdiction to rule upon the effect of the provision of an Edict which was inconsistent with the provision of the Constitution held that the combined effect of Section 1(1), 6(6) (b) and 236 of the 1979 Constitution was to restore to the Courts the exercise of jurisdiction in

Constitution (Modification and Suspension) Decree 1984; Decrees of the Federal Military Government; Unsuspended Provision of the 1979 Constitution; Laws made by the National Assembly before 31st December 1983 or having effect as if so made; Edict of the Governor of a State; Laws enacted by 31st December 1983 by the House of Assembly of a State or having effect as is so made.[59]

The coming into effect of the 1999 Constitution of Nigeria witnessed a remarkable improvement in the judicial review of the provisions of ouster clauses. Just like the 1979 Constitution, the 1999 Constitution declares its own supremacy[60] and renders void any provision of the law which is inconsistent with its provisions.[61] Thus, the Constitution is presently the supreme law in Nigeria and no any other law is allowed to be inconsistent with its provisions. [62]The Constitution is not only supreme; it declares its provisions have binding force on all authorities and persons throughout the Federal Republic of Nigeria including the executive and the legislature.

Apart from the supremacy of the Constitution over any other law in the country, the Constitution precludes the enactment of the ouster clauses by the legislature on any matter.[63] In other words, the power of the legislature in Nigeria does not extend to making any law that takes away the jurisdiction of the Court on any matter. It, therefore, goes without saying if the legislature enacts any law that takes away the court's jurisdiction on any matter, such law will be regarded as null and void because it would be inconsistent with the provision of the Constitution. In addition, the Constitution makes all actions of the legislature subject to the review of the ordinary court of the land or of the judicial tribunal established by law.[64] The judicial powers are also extended to include all actions against any person or authority in relation to the extent of legal rights.[65]

Thus, it would appear that because of the expansion of the court's power, statutes ousting the jurisdiction of the courts (passed after the coming into effect of the 1999 Constitution) have not come before the Supreme Court for interpretation. Notwithstanding the expansion of the powers of the courts in relation to judicial review and despite the fact that the Constitution precludes the legislature from passing any law that takes away the jurisdiction of the Court in any matter, the Constitution itself contains some provisions ousting the jurisdiction of the court in certain respects. The question that, therefore, calls for answer is: what are the reactions of the courts towards provisions of the Constitution taking away the jurisdiction of the courts? The researcher therefore examines some of the major cases in this period where the courts have reacted to ouster provisions.

Thus, in *Chief Enyi Abaribe v. The Speaker, Abia State House of Assembly and Ors*,[66] the provision of section 188(10) came before the court for adjudication in relation to impeachment proceedings instituted against the Deputy Governor of Plateau State of Nigeria. The Court of Appeal was of the view that section 188(10) of the 1999 Constitution precludes all courts from allowing any proceedings or determination of a House of Assembly or its Panel with respect to proceedings under section 188 to be challenged before it. It also precludes all courts from allowing any matter relating to such proceedings and determination to be entertained before it. The Court came to this conclusion in this case because the issue of whether the House of Assembly complied with section 188(1-9) was not raised as an issue before the court. Consequently, the court invoked the ouster clause and held that its jurisdiction was effectively ousted by the section.

In another case of *Jimoh v. Olawoye*,[67] section 26 (10) of the Local Government Law of Kwara State, 1999 which provides that: "No proceedings or determination of the panel or the legislative council or any matter any relating thereto shall be determined or questioned in any court" was brought to court for interpretation. The Court was of the firm view that there must be proceedings or determination of a panel

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chieftaincy matters that was formerly taken away from the Court. By section 158 (4) of the 1963 Constitution. The Court also nullified section 2 of the Edict for being inconsistent with section 6(6) (b) and 236 of the 1979 Constitution.

[59] Ibid. at 14- 15.

[60] See section 1(1) Constitution of the Federal Republic of Nigeria, 1999.

[61] See section (1) (2).

[62] See section 1(3).

[63] See section 4(8).

[64] Ibid.

[65] Ibid. See section 6(6) (b). The Supreme Court of Nigeria now has the jurisdiction original jurisdiction to entertain disputes between the Federal government and the States of the Federation, or disputes between the States themselves. The National Assembly in 2001 also passed a law extending the Supreme Courts original jurisdiction to extend to matters between the President and the National Assembly, disputes between the National Assembly and any State House of Assembly and disputes between the National Assembly and any State of the Federation.

[66] (2002) 14 NWLR (Pt. 738) 466 at 492.

[67] (2003) 10 NWLR (Pt. 828) 307.

or the Legislative Council before the ouster clause will become operational. In other words, the proceedings or the determination must be in accordance with the procedure stated in section 28(1) - (9) of the law before section 26(10) can be invoked. In the instant case, the trial Court has the power, and is entitled, to look into the matter and it is only where it comes to the conclusion that there was compliance with the provisions of section 26 (1) - (9) of the law that the jurisdiction of the trial court would be ousted. Where there is non- compliance with the provisions of the law, the trial Court was held to have the jurisdiction to hold that the provision of section 26 (10) which ousts its jurisdiction does not apply.

The court's decision is correct in the researcher's view. However, apart from the ground relied upon in coming to this conclusion, the court could have also held that the legislature does not even *ab initio* have the power to pass any law that will oust the court's jurisdiction as done by this section 26(10). This has been precluded by the Constitution in this regard.[68]

Furthermore, in *Inakoju v Adeleke*[69] section 188(10) of 1999 Constitution also came to court for interpretation. The Court was of the view that the entire section 188 sub-sections 1-11 must be read together. It noted that a proper reading of the whole section will reveal that the ouster clause in subsection (10) can only be properly resorted to and invoked after due compliance with sub-sections (l)-(9) that preceded it. Subsection (11) makes it abundantly clear that it is the House of Assembly that decides whether or not a conduct is gross misconduct exists to warrant the removal of a Governor or Deputy Governor. This must depend on the facts and circumstances of each particular case. Failure to comply with any of the provisions of subsections (1) - (9) will mean that the ouster clause of subsection (10) cannot be invoked in favour of the House of Assembly.[70]

Also, in *Akinmade v Ajayi*,[71] the respondent who was the chairman of Abeokuta South Local government of Ogun state was impeached by some of the appellants on 9th Jan, 2006 but challenged the procedure for non compliance. The court assumed jurisdiction and rejected the argument that it was a purely legislative affairs. The Court of Appeal held that section 37 of the local government law of Ogun State had not effectively ousted the High Court's jurisdiction.[72] Similar conclusion was reached in the case of *Ekpenyong v Umana*.[73] The Court noted that for ouster clause in section 188(10) of the Constitution to apply, the steps in subsection (1)-(9) of section 188 must be observed strictly to ensure that the Constitution is not violated.

It is submitted from the foregoing that the restriction on the powers of the legislature to enact ouster clauses by the Nigeria's Constitution contributes significantly to the courts reactions to political questions in Nigeria. Also, reactions of the courts to ouster provisions are largely determined by the law in place at the period in time and the government in power.

With regard to statutory ouster clauses, the courts even during the Military regime in Nigeria interpreted it very strictly to cushion the effects of such clauses on the role of the courts. Today, any legislation which contains ouster clauses will be struck down by the courts when challenged.[74] This is because the Constitution has limited the powers of the legislature to enact ouster clauses. With regard to constitutional ouster clauses, although the courts under the 1979 Constitution bowed down unconditionally to those clauses since it was contained in the Constitution, opposite is the case today. The court today will exercise jurisdiction for it to determine whether or not its jurisdiction has been truly ousted. Thus, nobody or authority can hide under ouster clauses to avoid determination of his matter.[75] The court would see that the legislature or persons concerned do not violate the constitution before its jurisdiction can be effectively ousted. No

[68] See section 4(8) of the Constitution of the Federal Republic of Nigeria, 1999 which provides that …the National Assembly or a House of Assembly enact any law that ousts or purports to oust the jurisdiction of a court of law or judicial tribunal established by law.

[69] (2007) 4 NWLR (pt.1025) 423.

[70] *A.-G., Bendel State* v. *A.-G., Federation* (1982) 3 NCLR 1; *Okoya v. Santilli* (1990) 2 NWLR (Pt. 131) 172. referred to.] *(Pp. 653, pants. B-E; 661, paras. E-G)* Per Ogbuagiu S.C. at 697-698

[71] (2008) 12 NWLR (Pt 1101 498 at

[72] The *Supreme Court in the case of Cotecna Int'l Ltd v Churchgate (ng.) Ltd*. (2011) 18 WRN 1 at was of the view that any law which seeks to deprive a citizen any of his constitutional right must be strictly construed by the court. Per Galadima JSC at 28.

[73] (2010) All FWLR (Pt. 520) 1387 at 1397 paras. G-H.

[74] This is reflected from the interviews conducted with all the judges.

[75] The interviews with many of the judges reveal that while dealing with ouster clauses, they do as if it never existed based on their legal eyes. This according to them is to ensure that the clauses do not curtail their ability to do justice as far as the cases are concerned. They are also of the view that no democratic constitution should contain ouster clauses. Cases should be decided on their merits.

legislature can hide under ouster clauses where it has breached the provisions of the Constitution.

In Malaysia, however, it would appear that actions based specifically for the purposes of challenging ouster provisions have not been brought before the courts. This is because the constitution does not preclude the legislature from enacting ouster clauses.[76] Thus, the ones that indirectly came before the courts especially with regard to Articles 62 and 72, the courts have bowed down unconditionally to those clauses by refusing judicial review.

Therefore, it is observed that the Malaysian Federal Constitution has a number of ouster clauses. The Constitution, for instance, it provides that where any question arises regarding the disqualification of the Speaker under subsection 4 the decision of the Legislative Assembly shall be taken and shall be final.[77] Also, it provides further that if any question arises whether a member of the Legislative Assembly has become disqualified for membership, the decision of the Assembly shall be taken and shall be final.[78] In the same vein, it is provided that if any question arises whether a member of the Senate has been duly elected in accordance with the provisions of this schedule, the decision of the Senate shall be taken and shall be final.[79]

Also, a majority of the members of the Conference of Rulers shall form a quorum and, subject to the provision of this Constitution, the Conference may determine its own procedure.[80]

Similarly, actions of the executive, to some extent, also enjoy protection form courts' power of judicial review. It is provided that a decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court.[81] Also, with regard to state of emergency, Article 150(8) provides that notwithstanding anything in this Constitution- (a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called to question in any court on any ground; and (b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of –(i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1); (ii) the continued operation of such Proclamation; (iii) any ordinance promulgated under Clause (2B); or (iv) the continuation in force of any such ordinance.

In the same vein, proceedings and actions of the legislature are also ousted from the court's jurisdiction. Article 72(1) provides that the validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any court. Also, Article 68(4) provides that when a Bill is presented to the Yang di-Pertuan Agong in pursuance of this Article it shall bear a certificate of the Speaker of the House of Representatives that the provisions of this Article have been complied with, and that certificate shall be conclusive for all purposes and shall not be questioned in any court. Article 63(1) also provides that the validity of any proceedings in either House of parliament or any committee thereof shall not be questioned in any court. Article 62(1) Also states that subject to the provisions of this Constitution and of Federal Law, each House of Parliament shall regulate its own procedure. Furthermore, Article 57(6) provides that where any question arises regarding the disqualification of the Speaker or a Deputy Speaker under Clause 5the decision of the House of Representatives shall be taken and shall be final. Article 56(6) says where any question arises regarding the disqualification of the President or Deputy President under Clause (5), the decision of the Senate shall be taken and shall be final. Similarly, Article 53(1) provides that if any question arises whether a member of the house of Parliament has become disqualified for membership, the decision of that house shall be taken and shall be final. Article 30(3) also says for the purpose of determining clause (1) whether a person was born a citizen a citizen of the Federation, any question whether he was born a citizen of another country shall be decided by the Federal Government, whose certificates thereon (unless proved to have been obtained by means of fraud, false representation or concealment of material fact) shall be conclusive.

It would appear that actions based specifically for the purposes of challenging ouster provisions have not been brought before the courts. This is because the constitution does not preclude the legislature from enacting ouster clauses.[82] Thus, the ones that

[76] In fact, Article 10(4) of the Malaysian Federal Constitution provides that the Parliament may pass law precluding the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

[77] Eight Schedule (Article 71) Part 1, Section 10 (5).

[78] Eight Schedule (Article 71) Part 1, Section 8 (1).

[79] Seventh Schedule (Article 45), Section 5.

[80] Fifth Schedule [Article 38(1)], Section 5.

[81] Second Schedule Part II1 (Article 31), Section 2.

[82] In fact, Article 10(4) of the Malaysian Federal Constitution provides that the Parliament may pass law precluding the questioning of any matter, right, status, position, privilege, sovereignty or prerogative

indirectly came before the courts especially with regard to Articles 62 and 72, the courts have bowed down unconditionally to those clauses by refusing judicial review.

CONCLUSION

Reviewing of ouster provisions by the courts seems to be a necessary mechanism to ensure constitutional justice, democratic principles, good governance, and sustainable development. It will also reduce injustices in the polity. The reason is that matters brought before courts should be decided on their merits in so far as the court has jurisdiction. This will ensure that ouster clause will not serve as toll-gates in the express way of justice. The 21st century should be seen as an era which has bidden bye-bye to technicalities defeating the interest of justice. However, reviewing an ouster clause is not an easy task. It will mean that the court is forcing its way into deciding matters in which its jurisdiction has been ousted. Thus, since the law does not allow the legislature to violate the law, it does not mean that the courts should violate the plain provision of statutes ousting its jurisdiction.

In view of the above, it can be said ouster clauses are undemocratic. This in a way can be regarded as unconstitutional. This is true about the position in Nigeria. The reason is the Constitution itself precludes the legislature from enacting any ouster clause. The only challenge seems to be constitutional ouster clauses. In Malaysia, however, ouster clause can hardly be regarded as unconstitutional. This is because the Constitution does not preclude the Parliament from enacting laws that oust court' jurisdiction. It also contains a number of provisions which take away the jurisdiction of courts. The effects of these ouster clauses are that it ties the hands of courts from dispensing justice in matters which taking decision on the merit will ensure good governance and sustainable development. It is therefore high time that the countries under review amended its ouster provisions to allow the court play a meaningful role in ensuring good governance and sustainable development in matters brought before it.

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established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.