The True Foundation of Judicial Review: A View from Nigeria

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This article is a contribution to the debate on the true origins of judicial review. It argues that since most of the common law grounds of review have their origin in the principles of natural law, common law cannot be its true origin. It contends that the intention of the Legislature – “directly” or otherwise – cannot be the foundation. Where the court cannot find justification in the constitution, particularly in countries with written constitutions, it should look for its source in the formal constitution. A constitution, though written, is a codification or the positivization of unwritten norms. Britain has an unwritten constitution. Yet this does not mean that there are constitutional norms not known to people. In the author’s view, the power of the court to review executive or legislative actions must be traceable to the written or the formal constitution. This paper looks into how the judiciary came about its power of review of parliamentary and executive actions.

INTRODUCTION

There are typically three arms or departments of Government: the Judiciary, the Executive and the Legislature. Yet the functions of each complement the others in such a way that in the end, the distinctions between functions become blurred. Certainly, separation of powers as a doctrine does not envisage a situation where the functions of government for the good of the people would completely be in “isolation” or in the aloofness. This means that there cannot be “pure” or absolute separation of powers. The implication is that it provides for cohesion and harmonization of functions so that the goal of separation—liberty of the citizenry—-is achieved. The Judiciary has also recently given credence to “efficiency” as a goal. Whether the classical or the contemporary view of the goal of separation can hold water or not, will for long, remains controversial. It has been argued that the efficiency of separation is gauged by the efficiency of the institutions of governance; i.e., once an arm of government accomplishes its set objectives, separation leads to efficiency. Though the argument thus far is not the concern here, it is still necessary to point out that separation without other institutional control mechanism would lead to “efficiency” in administration. Measuring the performance of each of the institutions of government requires

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some specialized strategies and techniques, which are not necessarily political or constitutional.

The efficiency of an institution is a function of many important factors. Such factors work –individually or collectively – to ensure a smooth running of institutions. Separation alone may, in certain circumstances, serve the end of ensuring specialization. The legislature deals in law-making, the executive in the performance and administration according to given law, and the judiciary interprets it when needed. Undeniably, separation is one of the internal constraints that ensures against institutional dictatorship, totalitarianism or arbitrariness. One of such institutional constraints is the power of the judiciary to engage in post-audit exercise over executive and legislative actions. The natural corollary of such a position would be whether the judiciary should engage in pre-audit exercise of executive and legislative actions? This would mean that rather than an aggrieved person submitting a legislative or executive action for judicial screening, all intended executive and legislative actions must undergo a due process or validity test before being put into action. However, this proposition has been rejected as being one that would, rather than ensure efficiency and smooth running of government, cause delays in administration, and be one that is incapable of being operationalized.

I. ORIGINS OF POWER OF REVIEW

There have been arguments about the true origin of the power of review. Some have argued in favor of common law and some in favor of direct or “indirect” Parliamentary intention. Yet, some have argued in support of the Constitution while some others argued from the point of the rule of law. This paper argues that since all the common law grounds of review have their root in the sacred principles of natural law, common law cannot be the true foundation of judicial review. It argues further that if the foundation of judicial review must be either the direct or indirect intention of the Parliament, this intention must be express, and cannot be implied.

This is primarily because the sovereignty of parliament, which seems to be the basis of the traditional model, has failed to hold good. Sovereignty, which is intimately associated with supreme political power or unquestionable state authority, does not belong to the parliament. It may be supreme as far as law making is concerned. Secondly, it is an elementary principle of interpretation of law that the parliament expresses what it wishes and is silent on what it does not intend; and it is not for the judiciary to import into provisions of law what is not plainly in it. Both institutions of government have obligations under the formal Constitution to keep within the limits prescribed by the law of the constitution. This is an expression of the rule of law being the paramount element of the formal Constitution.
II. JUDICIAL REVIEW AND THE CONTROVERSY

This doctrine has continued to grow in strength in the hand of judges perhaps as a consequence of judicial activism or what is called judicial “overreach” in India. Most written Constitutions now vest in the judiciary the power to check the excesses of the other departments of governance. It may appear strange to the non-lawyers that the role of the judiciary in that sphere would be a fundamental affront to the sovereignty of the Parliament. Especially when the court would not limit itself to only interpreting the provisions of the Constitution or the Statute, but go ahead to look into legal validity of the Act. There may be an anxiety in the area of administrative actions where it is the age long practice that the Courts exercise power of control over administrative actions of government officials and inferior Tribunals. Yet, it has been regarded as a special branch of interpretative function of the judiciary. This may be so because the role the judiciary plays in reviewing a statutory or constitutional provision is not only interpretative in nature. It involves a test of the validity of the entire statute or certain provisions. What the courts do in the end sometimes amounts to testing the jurisdictional competence of the executive or the legislature. This is the doctrine of ultra vires. Constitutions, especially the written one, provide for the powers of each organ of the government. Judicial overseeing gained ground in the seventeenth century when it was established that the government would not be above the law. The powers of each organ, including the court, are provided for, and it is expected by the donors of such powers that the organs act within the powers so granted. To ensure that there is compliance with the jurisdictional competence, the courts are granted additional powers to examine, when called upon to do so, whether the action of the particular institution is intra vires or ultra vires.

This doctrine of ultra vires has however attracted much controversy and debate.

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1. For a scholarly discussion on this theory, See B.O. Okere, Judicial Activism or Possibility in Interpreting the Nigeria Constitution, 36 UConn L. Q. 788, 790-807 (1987). See also Ruma Pall, Judicial Oversight or Overreach: The Role of The Judiciary In Modern India (March 8, 2008), available at http://www2.ssc.upenn.edu/research/papers/RP-WF.pdf (tracing the origin of judicial review in India to the Constitution, the only supreme organ in India. This presupposes that, as the author has rightly pointed out; all the organs are equal in status except that the Constitution vests in the Judiciary that constitutional power of oversight over all the other organs.)

2. Judicial Review is an aspect of control mechanism that is built into the system of governance to avoid evils such as arbitrariness. It is also referred to as constitutional review. It is important to note that a superior court engages on review when it sits on appeal over the decision of an inferior court, but is an appeal unlike when the court sits to consider the constitutionality or legality, or otherwise of an executive or legislative action. However, there may be a similarity in the two situation for what the court does in both is a test of constitutionality or legality, though in an appeal the court may have to look at the evidence of parties on the record to see whether there is miscarriage of justice or a proper appraisal of evidence of parties, yet the appellate court may also have to look at the constitutionality or otherwise of the court itself. This is particularly where the grounds of appeal include question of jurisdiction or power of the court.


4. See De Smith, supra note 3, at 550. This was at least the case in England, where there is no written constitution that would have normally specified the powers of each organ.

as to whether its foundations lie in the "common-law" or in the murky waters of unwritten "legislative intention". The crux of the argument is mainly finding justification for judicial review. On the one hand is the school of thought that believes foundation lies in the common law principle of legality. The opposing view, on the other, advocates the origin of judicial review on the basis of legislative intent stemming from the notion of parliamentary sovereignty. Interestingly, none of the contrasting views denies the existence and essence of judicial review, which in the correct view of Justice Nnaemeka-Agu, is to ensure constitutionalism. A location of the debate in the backdrop of unwritten constitutions is where the schism in the proponents of the common-law origin and parliamentary sovereignty schools of thought is bridged.

A. The Traditional Argument

The primary proponent of the traditional school that believes legislative intent is the source of the doctrine of judicial review, Sir Williams Wade, has argued that ultra vires is the "central principle of administrative law," and that since there is no written constitution on which the judge could rely for judicial power of review, he "must be able to demonstrate that he is carrying out the will of the parliament." The first weakness of this traditional approach is that it is more concerned with administrative law. It fails to recognize constitutional law as embodying administrative law. The jurisdiction of the court is more constitutional than administrative and hence should be governed by constitutional prescriptions. The reliance on administrative law in discussing ultra vires stemmed out of the fact that principles of administrative law emerged from political theories. These

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7. Elliot, Id., at 131.


10. Id.

11. Id.
theories, in countries without written constitutions, formed the basis of struggle by the courts to ensure that those who exercise the powers of state conform to certain standards, the failure to adhere to which the courts would restrain as an exercise of the power ultra vires. 12

The fact that the jurisdiction of the court is not expressly provided in a written constitution may not mean much if it is simply accepted that the written constitution is usually the end product of pre-conceived ideas and norms that are finally positivized and put down in a formal document for ease of reference, clarity and ascertainability. A constitution envisages the formalization of a certain set of societal ideas and norms that is unique to the society in which it is born. The pre-conceived ideas and norms that are transmitted and formalized are not necessarily original in the sense that they have never been so practiced anywhere. They may largely be emerging from a deliberate and conscious search for a model that would suit the purpose of corporate togetherness and existence of the people. They might also be borrowed ideas and norms that are for the need of others and they are adopted in a significant model. There must be a distinction of far reaching importance in discussing constitutional issues. A constitution is formal when it is not externally imposed, and is captured in a document that is referable, and is capable of preservation.

B. A Formal Constitution

A formal constitution is one that is ingrained in the practices of the people whom it seeks to regulate, and is imprinted in public consciousness. The formality of a constitution could also be in the hearts of the people whose affairs the constitution regulates once they know it by heart the constitutional arrangement of system of governance. One of the most important legal issues is the recognition and acceptance of the fact that the constitution exists not in a document, but in the consciousness of the people unto whom it is given and could be sought out to provide direction anytime the need arises. Such is the position with several pre-colonial African Societies with their system of governance, which in some places have similarities with the modern system of governance. They have their constitutional arrangement in their formal, yet unwritten constitutions.

In the Yoruba Kingship system all adults in the kingdom had the knowledge of how the King was appointed and deposed. 13 The constitutional rules were not written, but they had been practiced for long and they became a sort of governance system, the elaborations of which was handed down from one generation to another. This was in fact the position in most pre-colonial African Societies. 14

12. See De Smith, supra note 3, at 550-559.
14. In this situation the rules may not have a constitutional flavor and thus lack the force of law; in other words, the rules may be disregarded at will by the people or breached without any attendant sanction. This
However, such a situation is not the same as a scattered and informal constitution that is of mere practice, though recognized and accepted as the constitutional arrangement. There is therefore the need for a deeper understanding of the legitimacy of a formal, unwritten constitution that in several countries has formed the fundamental basis of its constitutional law. Significantly, where the jurisdiction of the court is not found in a written constitution, then the searchlight should be directed toward the formal constitution for a determination of the jurisdiction of the court in matters such as a determination of its powers of judicial review.

To expect a judge to demonstrate that he possesses the requisite jurisdiction to review, though not written, but implied from the sovereignty of the Parliament is confusing the debate further. If the court cannot lay claim to legitimacy from a written constitution, he should be able to demonstrate that on the express provisions of the Act of parliament. In case of failure he should be able to do that by laying claim to jurisdictional legitimacy from the formal constitution. A problem of contradiction may arise sometimes when the act complained of is based on a written constitution. The basis of supervisory jurisdiction of the court in that moment must equally be written or necessarily formal in the sense discussed above.

The second weakness in the conception of the will of the Parliament is of grave implication for public law. The judiciary is to carry out the will or intention of the legislature. This is only as far as the Act that is sought to be reviewed by the judiciary is administrative. Today, the supervisory jurisdiction of the court extends to the legislature. Could it then be said the court is carrying out the will of the Parliament when it reviews a legislative act? It would certainly be illogical to conceive that the judiciary is acting on the will or intent of the legislature when

marks a great distinction between formal and informal Constitutions. In most African societies, the breach of any of the unwritten, formal constitutional rules was usually a punishable offence.


16. This is one of the essential features of the British Constitution. African customary laws also share this feature. The constitutions in both cases are unwritten, but have been recognized as providing guiding principles in governance.

17. This formal constitution has link with the natural law doctrine. It is assumed that every human being has a sense of right and wrong. It is understood that what is good or bad can be relative, but nevertheless any reasonable person has, ingrained in his mind the law of nature, which is superior to all laws. So where the courts cannot get authority in the written constitution, the search should beam on the unwritten law of nature. See generally JOSEPH OMOEGORE, AN INTRODUCTION TO PHILOSOPHICAL JURISPRUDENCE 172-180, (1997); A.T. Shetu, Islamic jurisprudence in Perspective, 1 IBBRIN B. J. 95, 96-99 (2002). McDowell's criticism of Corwin is probably a mismeasure when he argues that Corwin "refused or failed to draw distinctions that must be drawn. He was unwilling or unable to grasp the philosophical differences in the various ideas of natural law and "higher" law... that had obtained throughout history." See McDowell, supra note 6, at 404-405. However the confusion that Corwin's approach is shrouded in, the fact remains, as McDowell himself would seem to agree, that there is intrinsic connection between the "higher" law (which may or may not be in consonance with Corwin's formulation) and Natural Law.
a court examines the validity of an act of the legislature to see whether it is within constitutional bounds. The court must be seen to be performing an act bestowed on it by a higher authority.\textsuperscript{17}

In a Common law system, the Parliament is supreme to the extent that it can make and unmake any law.\textsuperscript{18} Any law the Parliament finds not in conformity with its will must give way.\textsuperscript{19} This is about the supreme power of the Parliament that all laws must emanate from its chambers. According to Wade, therefore, where the judiciary cannot justify the legitimacy of its review power on an express provision, it should imply that it is acting on the will of the Parliament.\textsuperscript{20}

Professor Craig’s attack on this traditional approach has been very vociferous and insightful. To him, the doctrine is indeterminate because of a lack of precision about exactly what the limits of jurisdictional control of the court and the procedure should be.\textsuperscript{21} His assertion that relying on legislative intent for justification makes it unreliable is one that is correct.\textsuperscript{22} Craig argues astutely, stating that most often the particular legislation being reviewed by the court does not provide the “detailed guide to the courts as to the application of these controls on discretion.”\textsuperscript{23} The truism is clear; the rules of courts provide for the adjectival laws applicable in the courts. Unlike substantive laws, it directs the minds of the court on procedural matters as necessary for the initiation of a case, its hearing and conclusion.\textsuperscript{24} It is the substantive laws that in most cases become the subject of review. These laws most often, as argued by Craig, do not provide the rules that are necessary to assist the exercise of discretion by the courts. The courts are thus left alone to design and apply whatever that suits their temperament, ego or other considerations. So, when judges exercise their discretionary power, they do it on the test of extant laws and judiciality.\textsuperscript{25} In such cases or instances of exercise of discretion, as in consideration of whether or not to grant an interlocutory application, the law does not provide any guide. This is because the relief sought by the applicant is not really a legislative matter. It is rather an equitable relief\textsuperscript{26} that had been designed by the Courts over the years to ensure equitable justice.

\textsuperscript{18} This is certainly because of the belief that the Parliament would not make a wrong or an illegal law, and also that of the assent of the Queen-in-parliament. Fundamentally, supremacy of the parliament indeed lies in the rule that the courts are only to apply the law and not pull it down.

\textsuperscript{19} A Parliament is not bound by the laws made by its predecessor; any such laws may be amended, or repealed. This is so far the sovereignty of Parliament allows. The only check on this power is the opinion of stakeholders the press, and most importantly the unseen provisions of the formal constitution.

\textsuperscript{20} See Elliot, supra note 6, at 130.


\textsuperscript{22} Id. at 67-68.

\textsuperscript{23} This most often appears in criminal legislations where, for example, in an application for bail the court is granted discretion as to what the relevant considerations are that it must consider in granting the bail. The statutes create offences that are bailable and those nonbailable, but fails to provide for guidelines for the courts in considering applications. The courts have over the years developed “what should be considered to be relevant as opposed to irrelevant consideration.”

\textsuperscript{24} See The Fed. High Court Civil Procedure Rules, 2000, made pursuant to NIGERIA CONST. §254.

\textsuperscript{25} C.B.N. v Ahmed 5(2) S.C. 146 (2001); Ademuga v Odemeri 1(1) S.C.72 (2001).

\textsuperscript{26} Id.
Normally, the legislature makes the laws giving the courts the power to adjudicate in the matters brought before it.

On most occasions, courts themselves proceed from what could be termed self-jurisdictional review. That is, the courts suo motu27 or upon the application of a party in the particular suit challenging the power of the court to entertain the suit.28 In such situations, the courts would consider whether the matter or the cause of action29 in the suit is within the jurisdiction conferred on it by the constitution or the legislature. In this instance, the courts can be said to be acting upon the will of the legislature. This is apparently because the power of the court in that respect must have been prescribed by the legislature or the Constitution.30 The courts would also consider whether or not the suit had been initiated properly following the procedure for initiating it. The relevant considerations in this instance would involve whether the procedural31 aspects have been strictly followed. The rules of the courts provide for the procedure. These rules are made by the courts in the form of delegated legislation.32 Can we thus convincingly argue that the rules of courts represent the intent of the legislature and that when the courts apply the test of due process to the particular suit, they are carrying out the intent of the legislature? The answer is in the negative because the rules, though in the form of delegated legislation, represent exclusive judicial traditions, practice and norms that have been, since time immemorial, designed by the courts to facilitate the proper accomplishment of the intention of the legislature. This is unlike a situation where the courts would see whether or not the plaintiff has complied with any statutory condition precedent to the initiation of the particular suit.33

27. See Galadima v. Tambari 6(2) S.C. 196, 213 (2000) where Kalgo, JSC, in his concurring judgment, pointed out that "any issue which challenges the jurisdiction of a court can be raised by the court suo motu."
29. It is the totality of acts or omissions or circumstances that have prompted the litigant to institute an action. The Plaintiff must show in his statement of claim acts, omissions or circumstances leading to grievances that culminated into the dispute between him and the defendant. The courts are not for frivolities. Hence, the courts must ascertain that the plaintiff has a reasonable cause of action. That is the genuine cause for resorting to the court. See Dantata v. Mohammed 5(1) S.C. 16,17 (2000); A.G. Federation v. A.G. Abia State 7(1) S.C. 32, 35 (2001).
30. Id.
31. See, e.g., Fed. High Court Civil Procedure Rules, 2000, made pursuant to § 254 of the Nigeria Const., 1999 Constitution of the Federal Republic of Nigeria. The rules have the force of law in so far as they must be complied with. However, non-compliance may at times be a mere irregularity that may be waived. It all depends on the relevant provision of the rules. See, e.g., Order 4 Rule 1 of the Kwaro State High Court (Civil Procedure Rules) 2005 (Kwara is one of the 36 States of Nigeria) provides that "...the failure may be treated as an irregularity and if so treated, will not nullify the proceedings .”
32. The rules of courts in Nigeria, particularly the superior courts, relating to civil matters are made by the head of the court. § 256, 248, 254, 259, 264, and 284 of the Constitution empowered the various courts; Supreme Court, Court of Appeal, Federal High Court, State High Courts, Sharia's, and Customary Courts of Appeal, to make rules for practice and procedure of the respective courts subject to the provisions of any law made by National Assembly in the case Federal Courts, and the State Houses of Assembly, in the case of states. As pointed-out above, See supra note 31, the rules must be obeyed and since they are not made by the legislature, they must come under delegated legislation. However, in criminal matters, the legislature makes provisions for practice and procedure.
A blanket generalization in the area of public law may go unnoticed to create confusion, such that it becomes difficult to identify matters that are specific in nature from those that are general. If at all the courts could be said to be carrying out the intention of the legislature in judicial review that should be in the area of interpretative jurisdiction where the courts give effect to the intention of the legislature. The legislature makes the law for which it is ordained by the people.

The judiciary is also ordained in the same way to interpret the laws. It is this interpretative function of the courts that engender review, but the consequence (ultra vires) of the review is the problematic subject of the debate on judicial review. There is no review without interpretation and this leads to the question of vires. If, therefore, interpretative function is about the power vested in the courts by the constitution or a higher authority, then it logically follows that the consequences arising from that function is at the same time one of the essence of the power. Simply put, any consequence from the interpretative function is logically the intention of those who vest the judiciary with its powers and not the legislature whose function is not a matter of choice, but that of the mandatory role vested in it by the constitution or a higher authority.

C. The Ultra Vires Argument

Contributing to the debate on the basis of ultra vires, Mark Elliot makes a critical analytical condensation of the views of proponents of common-law and intention – based ultra vires. Through his process of analysis, he makes several propositions, and in conclusion he rejects all but one of them. The first proposition is that when the parliament grants a discretionary power it does not envisage any implied limits on the power. This goes to argue that a discretionary power expressly granted is limited to what is plainly expressed on the enabling Act. Nothing outside the express provision is allowed. To look outside the bounds of the provisions would amount to a voyage of discovery to imply what is not contained in the Act. This, Elliot posits, would infringe upon the sovereignty of the Parliament. In other words, all that the courts do is to limit themselves to that which the Parliament puts in black and white and should not find outside the Act any supposed missing intention of the legislature. This argument accords with judicial passivism.

The courts in Nigeria, a Common law country, are wary of the limits on their interpretative competence. It may be that they are passive when they limit themselves to the intention plainly and unambiguously expressed in the statute they sought to interpret. They sometimes engage in activism or creativity
particularly when the intention of the legislature is not easily and clearly discernible in the statute. The position of the Supreme Court of Nigeria on the matter was expressed in Adewumi v. Ekiti State\textsuperscript{39}, wherein the Court stated,

In case of statutory construction the courts authority is limited. Where the statutory language and legislative intent are clear and plain, the judicial inquiry terminates there. Under our jurisprudence, the presumption is that ill-considered or unwise legislation will be corrected through the democratic process. A court is not permitted to distort a statute’s meaning in order to make it conform to the judge’s own views of sound social policy.\textsuperscript{40}

This is the settled law in Nigeria. The court’s power of construction of a statute is limited to what is clearly and unambiguously expressed therein to be the intention of the Parliament. It is not the duty of the court to imply from an express provision what it does not plainly contain. To do that would amount to judicial legislation and it would be an infringement of the supremacy of the Parliament in its exclusive legislative competence. It is important to note that the power of the Parliament to make laws, in a constitutional democracy, is circumscribed by the limits provided by the Constitution.\textsuperscript{41} Therefore, to import any common-law doctrine into an Act would be absurd the same way as it would be improper to infer the intention of the legislature outside the clear, plain and unambiguous provisions of a statute. However, the courts may resort to interpretation by implication\textsuperscript{42} particularly when the provision construed is unclear or ambiguous. This interpretation by implication enables the courts to ascertain the intention of the legislature rather than imply the intention.

On the second proposition, which Elliot rejects, the same fate should in reality befall it as the first proposition suffered. He proposes that when the Parliament grants discretion it should be read into it all principles of good administration which the courts apply. Foremost, there is no way that the intention of the legislature, that is not explicit in the particular statute, can be discovered by merely reading into the statute an implied intention. Secondly, the principles of good administration that the courts apply are products of judicial creativity evolved over several centuries of jurisprudence. They are not the creation of the Parliament and could not therefore be implied as intention of the Parliament. Another difficulty that is associated with this proposition is that even if we agree to imply all the principles of good administration, how are we sure they are squarely within the intention of the Parliament. This clearly is an unrealistic approach that is patently based on unproven assumptions.

\textsuperscript{40} Id. at 71 (Opinion of Wali, J.S.C).
The third proposition concerns the exercise of discretion. Can the condition be imposed that the power be exercised in accordance with the rules of good administration? There is no doubt that the legislature could make and unmake any law it so wishes provided doing so is within its competence. Therefore, it would be unattractive to suggest that the legislature would grant discretionary power and subject it to the condition that the exercise must conform to the unwritten common law doctrine of good administration. It would be absurd in a situation such as this to assume that judicial review is based on intention of the legislature. If in reality the legislature intends the application of rules of non-arbitrary administration, nothing limits its power to provide for it in the enabling Act. This position was well articulated by the Nigerian Supreme Court in *Thompson Organization v. National Institute for Policy and Strategic Studies (NIPSS)*.\(^{43}\) The court pointed out that even where it is plain that applying the provisions of a statute would work hardship on a person, the court would still go ahead and apply the law because it is not the function of the court to ameliorate the hardship. "That is rather the function of the legislature."\(^{44}\) The court cannot substitute its view, no matter how good it is, for that of the legislature. Statutes are not like commercial contractual relationships where conditions could be implied.\(^{45}\) If it is indeed the intention of the parliament that the discretionary power must be exercised subject to the rules of good administration, this must expressly be stated in the enabling statute. It is doubtful that the parliament would leave such important an aspect of the exercise of power to mere judicial speculation or creativity. If on the other hand, the legislature leaves or creates that vacuum and allows it to be filled by the common law rules of good administration, then the standard upon which activities of the executive would be reviewed is certain to be that which is applicable to common law, and not legislative intention. The supremacy of the legislature dictates that "it retains the choice whether to create discretionary power subject to or free from the requirements of good administration."\(^{46}\) The supremacy is usually circumscribed in a constitutional democracy, where sovereignty lies elsewhere.\(^{47}\) Certainly, this model must be rejected in so far as conditions not expressly made part of a provision cannot be implied. The Parliament expresses what it intends and is silent over what it does not intend, a position best enunciated by the maxim *expressio unis est exclusio alterius*.\(^{48}\) The concurring judgment of Ayoola, JSC of the Supreme Court of Nigeria is apposite here. He stated thus:

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\(^{44}\) Id.

\(^{45}\) In statutory interpretation all the courts do is to interpret the clear text of the law showing the intention of the Legislature as far as the judge could determine from the clear and unambiguous wordings of the statute.

\(^{46}\) Elliot, *supra* note 7, at 141-142.

\(^{47}\) In Nigeria as in most constitutional democracies sovereignty belongs to the people and their wishes and aspiration as to how they intended to be governed are what they put down in the written constitution. See Nigeria CONST§14, cl.(1). All organs of government are established and allocated responsibilities by the constitution.

Where an enactment empowers a person to exercise certain powers when he is satisfied that such exercise of power is necessary it is not right to impose limitations on the exercise of the power where such was not provided for in the empowering enactment... The reasoning of that passage\textsuperscript{49} applies to this case. Had the makers of the law intended to limit the power of the Governor in such a way as the conclusion of the Court of Appeal suggested, they would not have enacted section 9 as part of the law.\textsuperscript{50}

The fourth proposition is that when the legislature grants discretionary power it intends that the power be exercised fairly and reasonably or that it does not intend that.\textsuperscript{51} According to Elliot, this is the main kernel of Christopher Forsyth's model. Elliot's argues that since Parliament legislates in conformity with the requirement of the rule of law, it follows logically that the Parliament intends, while granting discretionary power to an administrative agency, that such power would be exercised in strict observance of the rule of law; that it is taken that the Parliament withholds from such agency the power to act unfairly and unreasonably, while recognizing that the detailed requirements would, from time to time, be furnished by the courts. This grants courts the freedom to fill gaps. He concludes that with this model, there is an "indirect" relationship between legislative intention and ground of judicial review, while putting a caveat that the judicially created rules of good administration should nevertheless be viewed as having been made pursuant to a constitutional warrant granted by Parliament.\textsuperscript{52}

This model, like the earlier ones, raises many more questions than could possibly be answered in this paper. Suffice to say that the model pretentiously ascribed to the Parliament what the Parliament itself could not lay claim to. The concept of "indirect" intention may not be a defensible theory of justification for judicial review. It would beg the obvious question as to why indirect intention, instead of the usual direct intention? When the legislature makes an enactment and assumes that the courts would read into the enactment the principles of the rules of law, the court has certainly been unconstitutionally vested with the power of judicial legislation. The function vested in the judiciary is to interpret the laws made by the Parliament and not to make laws.

In the course of its interpretative jurisdiction, courts most often engage in a review of those laws enacted by the legislature. Any legislative attempt to vest courts with judicial-legislation would certainly be unconstitutional. It infringes on the principle of separation of powers. The rule of law that the courts are sought to imply presupposes that each organ of government must be limited to its area of allocated competence and that the law that governs must be certain and enacted

\textsuperscript{49} See Adeghero v Akinola & Anor 1 All N.L. Rev. 299 (1963) (Opinion of Viscount Radcliffe). \textsuperscript{50} Akunwazi v Okonwu 12(2) S.C. 75, 101-102 (2000). \textsuperscript{51} Elliot, supra note 6, at 142-143. \textsuperscript{52} Id. at 143-144.
by the democratically elected representatives of the people. The judges, not being elected representatives of the people charged with the function of law-making, should concentrate their effort on interpretative function and anything done in that framework would be within the limits of constitutionalism.

It would be improper to ever imagine that when the courts engage in judicial legislation while exercising power of review they are indirectly carrying out the intention of the legislature and therefore, there is, logically, an indirect relationship between intention of Parliament and judicial review. To seek to imply that the legislature intends the exercise of discretionary power would be in conformity with the rule of law is a mere presumption that can be rebutted without any difficulty. The same argument this paper canvases above in relation to the second model is still very much relevant here again. If at all the constitution intends the Parliament to indirectly delegate aspect of its lawmaking power to the judiciary it would have been clearly stated in the Constitution. It would not matter that such constitutional arrangement brazenly violates the principle of separation of power.

An analogous situation occurs in the 1999 Constitution of Nigeria. The saving clause empowers the President of the Republic to modify an existing federal law to bring it into conformity with the provisions of the Constitution.

Where the Chief Executive exercises his power under the provisions, the modified statute is deemed as an Act of the National Assembly (Legislature). In exercise of his power under the provision, the President of the Federal Republic of Nigeria, by Statutory Instrument No. 9 of 2002 amended, in a substantial form, the Allocation of Revenue (Federation Account) Act 1992 as amended by Allocation of Revenue (Federation Account, Etc) Decree No. 106 of 1996.

Consequent upon the exercise of his power of “modification”, Governors of the thirty-six states of the Federation were dissatisfied and they filled an action in the Supreme Court. The President had amended sections 1, 2, 3, & 4 of the principal Act as amended by Decree 106 of 1992. It was the discretionary power of the President that was challenged in the Court. One of the complaints against the exercise of that discretionary power was that it was unconstitutional; that “the President in Nigeria has trespassed into the realm of powers essentially belonging to the legislature i.e. the National Assembly.”

The Supreme Court held:

The principle behind the concept of Separation of Power is that none of the three arms of government under the Constitution should encroach into the powers of the other…. The doctrine is to promote efficiency in government by precluding the exercise of arbitrary power

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53. NIGERIA CONST., § 315(1), cl.(2) (preserving the pre-1999 existing laws).
54. NIGERIA CONST., § 315, cl.33(a) (providing that in the case of a state law, the Governor is vested with the legislative power).
55. NIGERIA CONST., §315, cl.(3)(c) (defining “modification” so as to include “addition, alteration, omission or repeal”).
57. Id at 398 (Opinion of Belgore, J.S.C).
by all the arms and thus prevent friction. If viewed in the above perspective one may easily frown at what section 315 has provided. But our Constitution is a product of our own circumstance, and the like of section 315 (supra) has lived with us all along. . . . The Republican Constitution of 1963 limited it to three years. It is obviously now deliberate that section 315 has no limited time. 58

The Supreme Court, speaking through Belgore, J.S.C, conceded that the constitutional provision was in brazen violation of the principles of separation of powers. It took solace in the fact that the provisions are peculiar to Nigeria and that no two democracies are the same. His Lordship said further that without the modification, the country would have been operating on an unconstitutional revenue allocation statute. 59 The judgment is embroiled in contradictions; it agreed that Section 315 is an affront to the principles of separation of powers, the court did not declare that section of the Constitution and the exercise of the discretionary power of the President in that respect illegal on the basis of non-compliance with the rule of law. Instead, the court went ahead to justify the provision on the ground of necessity. Though Belgore, J.S.C did not mention necessity in the judgment, all his Lordship said amounted to necessity of the situation prevailing and the peculiarities of Nigerian democracy. 60 This has nothing to do with the rule of law, and what the court looked into are the express provisions of the Constitution in determining whether or not the President's exercise of that discretionary power was ultra vires. 61

To infer an "indirect" intention of the Parliament is the same with inferring direct intention. There is nothing to be implied about the purpose of legislation. Most of the time, the heading or title of a statute shows the purpose of the Act. The body would also, where the words are clear and unambiguous, show clearly the purpose of the legislation. It is gratifying to note that Elliot himself, though not retracting from this model, is not insistent on it, and interestingly, also recognizes the fact that the model is a sell-hard as he points out:

However, the ultra vires principle is also used in a second manner in order to explain why the exercise of statutory discretion must conform to the dictates of what have been termed "principles" of good administration. 62 This aspect of the ultra vires model holds that these broader limits on statutory power derive from unwritten parliamentary intention. Such an explanation is clearly susceptible to criticism on the ground of implausibility of inferring from legislative silence the complex requirements of legality which the courts enforce.

58. Id.
59. Id. at 398.
60. Id.
61. Id. at 400.
Elliot's attempt at breaking new ground for the basis of judicial review has nevertheless attracted the support of some commentators. Chief among them is Allan, who comments:

Mark Elliot's "modified" ultra vires doctrine deserves our respect as an attempt to state a generally acceptable position, reflecting the principal strengths and weaknesses on both sides of the argument; and he is surely right to argue that "any attempt to choose between legislative intention and judicial endeavour as the real basis of the supervisory jurisdiction is ultimately futile." Even if ultra vires doctrine, as traditionally explained, has seemed to place more weight on a fiction of parliamentary approval than it could comfortably bear, it is now readily conceded that the relevant intention is only abstract and "indirect".

Allan's "respect" for the modified model proposed by Elliot is rather confusing, and comes rather as a surprise, since apparently, there has been a failure in distinguishing between power and its source; between power and methodology, and between power and its consequence. Some other commentators have also failed to identify the need for such clarification. It is most deserving in a debate of this nature that seeks to reshape a certain aspect of public law, to ensure clarification of concepts so as to enable a proper understanding of the issues in question.

Judicial review leads to ultra vires. While 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, ultra vires or intra vires is the consequence of the intervention by the courts. It does mean that judicial review is a concept, the consequence of which is either ultra vires or intra vires. Selway is correct when he points out that an act, or decision would be invalid because it was in breach of, or unauthorized by law, or was beyond the scope of the power given to the decision maker by the law. This is all about ultra vires theory and the process of arriving at that point in constitutional context is judicial intervention. He sees this as a problem of the use of inappropriate "labels" in discussing the source of power of judicial intervention. When courts intervene, they either declare the action being reviewed as ultra vires or intra vires. Either way, it would depend upon the mode of the exercise of the powers under review. Whether we choose to call the

63. Allan, supra note 5.
64. Id. at 98,100, where there is a re-emphasis of his support for Elliot that neither the ultra vires nor the common law school is yet entitled to claim a convincing victory; yet Elliot certainly deserves scholarly gratitude for his attempt to formulate a mid-way position.
65. Selway, supra note 6. Ultra vires simply means beyond, outside or not within power, while intra vires means within power. Happily, these concepts are not peculiar with public law. They are found in company and other private law. The fact that they are used in public law should not admit of any strain in their conceptual resources.
III. THE TRUE FOUNDATION

In a country with an unwritten constitution, the argument in a debate surrounding the origins of judicial may be in favor of common-law or even the intention of the parliament. This is provided there is no formal constitution the details of which could be found in the hearts of the people. As argued earlier, the fact that a constitution is not written does not affect its formality. The formality revolves around the fact that it constitutes a superior law that is already imprinted in public consciousness. Ideas of fairness, reasonableness, and equity are not new to men, and if most natural law thinkers are to be believed, even predates them. They are therefore are not seized with a need for written formality. Wherever they are formalized, it is yet a positivization of key principles of natural justice that had been enshrined in the hearts and minds of people. The Common law approach does not help or obliterates the fact that the common law doctrines are products of Medieval English Judges who themselves only engaged in activism (critical reasoning) that eventually led them to discover the hidden treasures of the principles of natural justice that eventually metamorphosed in the Common law doctrines.

These concepts, methodologies or tests the courts apply in judicial review should, firstly, not be confused as the sources of the power of the courts to intervene. Second, whether in a written or unwritten constitutional jurisdiction, the concepts of fairness, reasonableness, good administration, and like principles belong to the realm of formal constitution and therefore found to always prevail, irrespective of whether there exists a written or unwritten constitution, and whether we say the source of judicial review is found in the common law or legislative intent.

Common law judges themselves, particularly the passivists, have resisted the temptation of being drawn into a controversy of far reaching consequences with the parliament. The judicial policy was clearly declared in *Action Congress v. Independent National Electoral Commission*, where in his concurring judgment, Onnoghen, J.S.C pointed out:

\[\text{...T}h\text{e judiciary does not make laws; that function or duty is by constitutional arrangement and provision assigned to the legislature}\]

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66. Allan, supra note 5, at 96. It does not matter by what name the role of the judiciary is described. The most important issue should be, for now, the source of that power; whether common law or Parliament.
which, in the instant case, has enacted the Electoral Act, 2006 to
guide all stakeholders in the conduct of the 2007 General Elections
in Nigeria and post election proceedings. The duty of the judiciary
is to interpret the provisions of the relevant laws and constitution,
not to amend, add to, or subtract from the provisions enacted by the
legislature.68

Constitutionally, there is nothing the courts could add to, or subtract from
a statute or amend the same. The proper role of the judiciary is to extract what
had been in the legislature's mind from the express provisions of the statute, and
not to look for any "indirect" source of power. The power of the court must be
established from the clear and unambiguous provisions of the enabling Statute
or Constitution. However, this does not foreclose the inherent powers of the
court that belongs to the formal constitution. In the absence of the clear and
unambiguous authority, the courts then must resort to the provisions of the
formal constitution. Allan's confusion is more discernible when he states:

Constitutional review, if that is how the court's jurisdiction should
now be described, must rest on firmer grounds than our administrative
law has yet provided; but the common law has powerful resources on
which to draw, including a largely implicit conception of the rule of
law...69

Although he argues in an equally correct manner that while both the common
law and parliamentary intent approaches are identical in nature, proponents
on both sides of the debate are only engaged in crises of semantics. He quite
surprisingly comes to the conclusion that the "common law has powerful resource
on which to draw..."70 There may be no argument as to the fact that many, if
not all, of the concepts of the common law found their roots in doctrine of the
rule of law. The rule of law had been there for long, before the emergence of
the common law principles. Judicial creativity manifests in the rule of law in its
foremost and all embracing conceptions. Also, the parliament, along with the
mandate to make laws for society, has also the constitutional responsibility to
legislate in accordance with the dictates of the rule of law.71 Any attempt to discuss
the foundation of judicial review must therefore distinguish between the source
of that power, methodologies and the tests of review. This would be a scrutiny of
the standard the action being reviewed is subjected to, in order to satisfy the test
of constitutional or statutory validity.

68. Id. at 1298
69. Allan, supra note 5, at 96.
70. Id.
71. See, e.g., Rep. South Africa Const., §8(1) (providing that "the Bill of Rights applies to all law, and
binds the legislature, the executive, the judiciary and all organs of state"). See also Zimbabwe Const., §50 and
Nigeria Const., §4 (providing that the legislature shall have powers to make laws for the peace, order and good
government of the society).
A court would only have jurisdiction over review of legislative or executive actions if that court has been constitutionally mandated to do so.\textsuperscript{72} This is an issue of jurisdiction.\textsuperscript{73} The courts themselves have limitations imposed by the Constitution or the Legislature\textsuperscript{74} and this presupposes that judicial review is an aspect of checks and balances that are most often identified with written constitutions.

The methodologies or tests applied by courts, as distinct from the sources of power of intervention are not usually provided in the statutory or constitutional authorities that confer powers on the courts. These are matters of conditions, which persons in authority must observe and satisfy in the exercise of their powers. These principles are found in the age long formal constitutions that is the foundation of the rule of law. The formal constitution has its fundamentals ideals in the hearts and minds of the people it governs. They are inborn, but transmitted, in the chain of political ideals, to the rule of law. These methodologies or tests are inclusive of reasonableness, fairness, equitable, good administration, illegality, irrationality, procedural impropriety, and other such similar concepts.

Consequently, there is nothing to distinguish between the common-law grounds of judicial review and the grounds of intent of Parliament. However, what is certain is that the judiciary cannot “indirectly” epitomize the mind of the Parliament. The judiciary, executive and the legislature derive their powers from a common source- a written or a formal constitution. The source allocates to each institution certain competencies and goes further to circumscribe the power to ensure constitutionalism. One of these circumscriptions is the institution of judicial review. When the court therefore exercises the powers, it is neither carrying out the dictates of the common law nor acting out the script, whether direct or indirect, of the Parliament. All institutions perform their respective functions under the same condition of adherence to the rule of law and constitutionalism. This is the only way that they all can efficiently and effectively affect their mandate.

IV. CONCLUSION

It is certain that the controversy over the true foundation of the power of review

\textsuperscript{72} Indeed there are countries operating full or partial judicial review and there are some without. For example, under the Swiss Constitution, the judiciary cannot declare an act of the federal legislature as unconstitutional. Only the people can exercise that power. However, where a cantonal law conflicts with the federal or cantonal constitution, the Tribunal would declare such cantonal law unconstitutional. \textit{See Vishnoo Bhagwan \\& Vidiya Bhusan, World Constitutions, 333 (2006).} The position in Zimbabwe is such that judiciary cannot look into or intervene in the way the President exercises his discretion. \textit{See Act 23 of 1987, \S 2. The Courts in South Africa have unlimited power of review of legislative and executive actions. See generally Nigeria Const., \S 167, 172.}

\textsuperscript{73} Jurisdiction is fundamental to the exercise of judicial power. Issue of jurisdiction logically involves establishment of the courts, qualification and appointment (including removal) of the judges. It also includes adjudicatory power and the limit or extent of such power. \textit{See generally Shehu, supra note 16, at 68.}

\textsuperscript{74} For example, of all grounds of review, the Nigerian Constitution provides for inconsistency alone. Any provision of an Act of the legislature or executive acts that is inconsistent with the Constitution shall be declared void to the extent of its inconsistency. \textit{See Nigeria Const., \S 1(3).}
is not limited to countries without written constitutions, and is now assuming a
global dimension, as countries with written constitutions have begun to engage
with such issues. An exemplar of this is the United States of America, where the
tussle has shifted from the true origin of the power of review, into who, between
"the people themselves" and the judiciary, should have the power itself.\textsuperscript{75} The
concern in Nigeria, at least for now, is not about the source of that power, but
always legitimately about how effective or honestly the power has been exercised\textsuperscript{76}
and a concern over the degree of brazen disregard for review by the executive arm
without actually challenging the power.\textsuperscript{77} There have been instances of executive
lawlessness when it comes to respect for decisions of courts nullifying actions
that have been found illegal or unconstitutional.\textsuperscript{78} All these have however been
discussed in another work.

A careful analysis of the debate so far as highlighted above would show that
the debate stemmed out of, first, a misunderstanding of the doctrine of \textit{ultra
vires} as used in constitutional or public law. This misunderstanding is manifest
in the arguments of the advocates of the common-law foundation and of the
parliamentary intention school. They have both taken the doctrine to mean the
source of the power to review, overlooking that the doctrine is only the outcome
of the exercise of that power. It is the judicial determination of either executive
or parliamentary action that leads to the doctrine. Where the exercise of a power
is found to be outside, or not in conformity with such a constitutional grant, the
court would declare it as \textit{ultra vires}, but where it is within the grant, it is \textit{intra
vires}. There is an apparent distinction between judicial review and \textit{ultra vires},
they are two different doctrines, but one leading to the other. This is the logical
relationship that the panoply of differing opinions has failed to realize. The debate
is more relevant when shifted to the origin of the power of review and its efficacy as
an indispensable institution in ensuring constitutionalism and liberal democracy.
This would be more enriching, and legitimate in a constitutional discourse of the
nature intended by the different sides of the debate.

It is also untenable to argue that, if it is first agreed that the real issue in the
controversy by way of a reconstruct is the basis of judicial review, the foundation of
the power should be located within the ambit of the intention of the Parliament,
which is itself based on moribund parliamentary sovereignty; that when the judiciary exercises the power, it is acting out the script of the legislature, in the absence of a written constitutional or a statutory provision. This argument fails to take into cognizance the fact that judicial review is neither executive nor legislature-friendly. It is a way of ensuring limited power such that the state officials that are charged with the state powers do not arrogate to themselves absolute powers that would lead to dictatorship, arbitrariness, authoritarianism or totalitarianism. Apparently therefore, judicial review cannot be based on parliamentary intention; no legislature would readily donate to the courts the power to screen legislations for test of constitutional validity. Rather, in the absence of constitutional or statutory provision legitimizing review, the higher law province would come in to fill the gap. This is the case of a formal constitution, which is superior to the written constitution; it is indeed the fountain head of the written constitution for the constitution itself depends on it for its norms and ideas. These ideas and norms such as fairness, equality, fundamental rights, freedom, justice, good conscience and administration etc are all normative concepts of higher law or the formal constitution. All the courts do is to ensure conformity with the normative concepts as are found desirable, as in the result of judicial activism of the early English Judges or as are found on the texts. Again, it is incontrovertible that the courts while exercising the power of review carry out the intention of the legislature only when the action being reviewed is within the legislative competence or the action being reviewed is an executive action or a delegated legislation. This presupposes that there is a need for restraint on generalization in constitutional discourse and it also suggests that the search for justification of judicial review is legitimately an endless, but all important contribution towards a new world constitutionalism. It however may yet be premature to know whether or not there can be universal constitutionalism.