

CONSTITUTIONAL SILENCE AND JUDICIAL LAW-MAKING IN NIGERIA: FILLING THE GAPS OR REWRITING THE CONSTITUTION?

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ABSTRACT

Constitutional discourse has traditionally focused on the interpretation of constitutional text, the allocation of governmental powers and the protection of constitutional rights. Comparatively little attention has been devoted to the constitutional significance of what constitutions leave unsaid. Yet some of the most consequential constitutional controversies arise not from constitutional provisions themselves but from constitutional silence. This article examines the nature, implications and jurisprudential significance of constitutional silence within the Nigerian constitutional order. It argues that constitutional silence is not merely an interpretative challenge but a fundamental feature of constitutional governance that has played a decisive role in the development of Nigerian constitutional law. Adopting a doctrinal and analytical methodology, the article interrogates constitutional theory, judicial law-making and selected decisions of the Nigerian appellate courts relating to federalism, resource control, impeachment, electoral governance, gubernatorial tenure and judicial independence. Through an examination of these authorities, the article demonstrates that many of the most significant developments in Nigerian constitutional jurisprudence emerged from judicial responses to constitutional gaps rather than from the interpretation of explicit constitutional provisions. The article advances the concept of constitutional silence as the invisible constitution, the body of unresolved constitutional questions that continually shapes constitutional development despite never appearing within the constitutional text itself. The article further contends that constitutional silence should be understood as a constitutional condition rather than a constitutional defect. It develops the concept of the jurisprudence of constitutional necessity to explain why judicial intervention frequently becomes unavoidable when constitutional governance confronts questions beyond the reach of constitutional text. However, recognising the inevitability of judicial engagement with constitutional silence does not eliminate concerns regarding constitutional legitimacy. The article therefore proposes a distinction between constitutional preservation and constitutional reconstruction as a more useful analytical framework than the conventional debate between judicial activism and judicial restraint. While constitutional preservation seeks to derive solutions from constitutional text, structure, history and values, constitutional reconstruction occurs where judicial innovation becomes detached from those foundations and assumes the character of constitutional redesign. The article concludes by proposing a principled framework founded on constitutional fidelity, institutional necessity, democratic compatibility and constitutional humility as guides for judicial engagement with constitutional silence. It is argued that the future legitimacy of constitutional adjudication in Nigeria will depend not merely on the willingness of courts to respond to constitutional gaps, but on their ability to do so in a manner that preserves constitutional authority, democratic legitimacy and the rule of law.

KEYWORDS: *Constitutional Silence; Invisible Constitution; Judicial Law-Making; Constitutional Preservation; Nigerian Constitutional Law*



1. INTRODUCTION

Constitutional scholarship has traditionally focused on what constitutions say. Courts interpret constitutional provisions, scholars analyse constitutional language and political actors invoke constitutional text to justify governmental action. Yet a closer examination of constitutional history reveals a different reality. Some of the most significant constitutional controversies arise not from constitutional provisions but from constitutional silence. Constitutions are often defined as much by their omissions as by their commands. This reality is particularly evident in Nigeria, where disputes relating to resource control, impeachment, gubernatorial tenure, succession to public office, federal-state relations and electoral accountability have repeatedly exposed areas in which the Constitution provides no complete answer.¹ In many such instances, constitutional governance depended less on the text itself than on how courts responded when the text fell silent.

The significance of this phenomenon extends beyond adjudication. It raises a fundamental question concerning the nature of constitutional authority in a democratic society. Constitutions derive their legitimacy from the people and are intended to provide the supreme framework for governance. Yet where constitutional silence exists, courts are often compelled to formulate principles not expressly contained in the constitutional text. This creates an enduring constitutional tension. Constitutional silence cannot be permitted to produce constitutional paralysis, yet judicial responses to constitutional silence must not become instruments of constitutional redesign. The resulting challenge is one of the most neglected questions in Nigerian constitutional law: how should constitutional institutions respond when the Constitution says nothing at all?²

Despite the frequency with which constitutional silence appears in constitutional litigation, Nigerian constitutional scholarship has rarely examined it as an independent constitutional phenomenon. Existing literature has concentrated on constitutional interpretation, judicial activism, constitutional supremacy and the separation of powers.³ While these subjects remain important, they do not adequately explain the constitutional implications of silence itself. This article advances the concept of constitutional silence as the *invisible constitution*, the body of unresolved constitutional questions that continually shapes constitutional development despite never appearing in the constitutional text itself. It argues that some of the most significant developments in Nigerian constitutional jurisprudence emerged from judicial responses to constitutional gaps rather than from the interpretation of explicit constitutional provisions. It further contends that constitutional silence should be understood as a constitutional condition rather than a constitutional defect, and

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¹ *Attorney-General of the Federation v Attorney-General of Abia State & 35 Ors* [2002] 6 NWLR (Pt 764) 542; *Inakoju v Adeleke* [2007] 4 NWLR (Pt 1025) 423; *Amaechi v Independent National Electoral Commission* [2008] 5 NWLR (Pt 1080) 227; *Marwa v Nyako* [2012] 6 NWLR (Pt 1296) 199.

² B Nwabueze, *Constitutional Democracy in Africa* (Spectrum Books Ltd, 2003) 12.

³ Y Osinbajo and A Kalu (eds), *Issues in the Nigerian Constitution* (Nigerian Institute of Advanced Legal Studies, 1999) 44.

that the legitimacy of judicial responses to constitutional silence depends upon whether such responses amount to constitutional preservation or constitutional reconstruction.

The article therefore seeks to make both a descriptive and normative contribution to Nigerian constitutional scholarship. Descriptively, it demonstrates that constitutional silence has played a decisive role in the evolution of Nigerian constitutional law. Normatively, it develops a principled framework founded on constitutional fidelity, institutional necessity, democratic compatibility and constitutional humility as guides for judicial engagement with constitutional silence. The significance of this inquiry extends beyond contemporary constitutional disputes. As constitutional democracies confront emerging challenges arising from technological innovation, digital governance, environmental regulation and evolving rights claims, constitutional silence is likely to become more prominent rather than less. The resilience of Nigerian constitutionalism may therefore depend upon the ability of constitutional institutions, particularly the judiciary, to respond to constitutional silence without undermining constitutional legitimacy. For ease of analysis, the article is divided into six substantive parts, beginning with the conceptual and theoretical foundations of constitutional silence and concluding with a proposed framework for addressing constitutional gaps within the Nigerian constitutional order.

2. CONCEPTUAL AND THEORETICAL FOUNDATIONS

Constitutional silence is a concept that is frequently encountered in constitutional practice but rarely examined in constitutional literature. Courts regularly confront disputes in which the Constitution provides no direct answer, yet legal scholarship has often focused more on constitutional interpretation than on constitutional silence itself. This tendency is understandable. Lawyers are trained to search constitutional texts for answers. Judges are expected to interpret constitutional provisions. Scholars analyse constitutional language. However, constitutional governance is shaped not only by what constitutions say but also by what they leave unsaid. A meaningful understanding of constitutional adjudication therefore requires an appreciation of constitutional silence as a distinct constitutional phenomenon.⁴

At its most basic level, constitutional silence refers to the absence of an express constitutional provision governing a question that subsequently requires constitutional resolution. It arises where a constitutional controversy emerges but the constitutional text provides no direct guidance capable of resolving it. Constitutional silence should not be confused with constitutional ambiguity. Ambiguity exists where constitutional language is capable of more than one meaning. Silence exists where no relevant constitutional language exists at all.⁵ The distinction is important because the judicial task differs in each case. In cases of ambiguity, courts seek to determine what the Constitution means. In cases of silence, courts are often required to determine whether

⁴ Nwabueze (n 2) 28.

⁵ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 7.



constitutional principles can be derived from sources beyond the express text. The existence of constitutional silence should not be viewed as evidence of poor constitutional drafting. No constitution, regardless of its length or sophistication, can anticipate every future political, social, technological or institutional development. Constitutional framers draft for both the present and the future. They establish broad frameworks intended to endure across generations rather than comprehensive codes designed to answer every conceivable question.⁶ The inevitable consequence is that constitutional silences emerge as societies evolve and confront circumstances beyond the contemplation of constitutional framers.

Indeed, constitutional silence may arise in several different forms. First, silence may occur where an entirely new constitutional problem emerges for which no constitutional provision exists. Secondly, silence may arise where the Constitution addresses a subject generally but leaves important aspects unresolved. Thirdly, constitutional silence may arise where competing constitutional principles create tensions that cannot be resolved solely by reference to constitutional text.⁷ In each of these situations, constitutional institutions are required to determine how the constitutional order should respond despite the absence of explicit constitutional direction.

The Nigerian constitutional experience demonstrates the practical significance of this phenomenon. Although the Constitution of the Federal Republic of Nigeria 1999 (as amended) is one of the most detailed constitutional instruments in the Commonwealth, constitutional disputes frequently arise in areas where constitutional guidance is incomplete. Questions relating to fiscal federalism, impeachment proceedings, electoral transitions, judicial discipline and executive succession have repeatedly exposed constitutional gaps requiring judicial intervention.⁸ These controversies demonstrate an important constitutional truth: constitutional detail does not eliminate constitutional silence.

Theoretical explanations for constitutional silence are found within broader theories of constitutionalism. Constitutionalism is founded upon the idea that governmental power must be exercised according to law and within constitutional limits. Yet constitutionalism also assumes that constitutional systems must remain functional even when constitutional texts fail to provide explicit answers. A constitutional order that becomes incapable of resolving disputes whenever constitutional silence appears would be incapable of enduring. Consequently, constitutional silence creates a tension between constitutional fidelity and constitutional functionality.⁹ Courts must remain faithful to the Constitution while ensuring that constitutional governance remains effective.

⁶ David A Strauss, *The Living Constitution* (Oxford University Press 2010) 35.

⁷ H L A Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 124.

⁸ *Attorney-General of the Federation v Attorney-General of Abia State & 35 Ors* [2002] 6 NWLR (Pt 764) 542; *Inakoju v Adeleke* [2007] 4 NWLR (Pt 1025) 423; *Marwa v Nyako* [2012] 6 NWLR (Pt 1296) 199.

⁹ Peter W Hogg, *Constitutional Law of Canada* (5th edn, Thomson Reuters 2007) 17.

This tension explains why constitutional silence has become one of the most significant yet least acknowledged forces in constitutional development. Constitutional systems evolve not only through constitutional amendment but also through institutional responses to constitutional gaps. In many cases, constitutional silence becomes the catalyst for constitutional innovation. The constitutional question is therefore not whether silence exists but how constitutional institutions should respond to it without undermining constitutional legitimacy.

It is against this background that this article advances the concept of constitutional silence as the *invisible constitution*. By this, the article refers to the body of unresolved constitutional questions that continuously shape constitutional development despite never appearing within the constitutional text itself. The invisible constitution is not an alternative constitution. Nor is it a substitute for constitutional supremacy. Rather, it represents the constitutional space within which institutions, particularly courts, are required to act when constitutional text alone is insufficient. Understanding this invisible constitution is essential to understanding how constitutional law develops in practice rather than merely how it appears on paper.

The foregoing analysis also reveals why constitutional silence should be regarded as a constitutional condition rather than a constitutional defect. Defects are capable of correction. Constitutional silence, however, is inseparable from the nature of constitutional governance itself. As long as constitutions endure across generations, circumstances will continue to arise for which constitutional texts provide no direct answer. The challenge is therefore not the elimination of constitutional silence but the development of principled methods for engaging with it. That challenge becomes particularly important when courts are called upon to resolve constitutional disputes in the absence of clear constitutional guidance. The judicial response to constitutional silence inevitably raises questions concerning judicial law-making, constitutional legitimacy and democratic accountability. Once courts move beyond the interpretation of express constitutional provisions and begin supplying answers to questions left unresolved by constitutional text, difficult jurisprudential questions emerge regarding the nature and limits of judicial authority. It is to those questions that this article now turns.

3.0 JUDICIAL LAW-MAKING AND CONSTITUTIONAL ADJUDICATION: THE JURISPRUDENCE OF CONSTITUTIONAL NECESSITY

The relationship between constitutional silence and judicial law-making remains one of the most contested questions in constitutional theory. For centuries, legal orthodoxy maintained that judges do not make law but merely declare what the law has always been. Under this traditional conception, judicial decisions are viewed as acts of discovery rather than acts of creation.¹⁰ While this theory possesses historical significance, it becomes increasingly difficult to sustain within the context of constitutional adjudication. Constitutional disputes frequently arise in situations where

¹⁰ A V Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan & Co Ltd 1959) 193.



the Constitution provides no direct answer, where competing constitutional values point in different directions, or where constitutional silence creates uncertainty regarding the proper course of action. In such circumstances, the judicial function inevitably extends beyond the mechanical application of constitutional text.

The reality is that constitutional adjudication differs fundamentally from ordinary statutory interpretation. Statutes are ordinarily drafted to address specific subjects and are capable of amendment whenever legislative gaps emerge. Constitutions serve a different purpose. They establish enduring frameworks intended to govern future generations and regulate circumstances that constitutional framers may never have contemplated. Consequently, constitutional adjudication often requires judges to engage with questions that exist beyond the immediate reach of constitutional language. The challenge is not merely to interpret what the Constitution says but to determine how constitutional governance should function when the Constitution remains silent.¹¹

This reality exposes the limitations of the traditional debate between judicial activism and judicial restraint. The debate assumes that courts may choose whether or not to intervene in constitutional controversies. In many instances, however, judicial intervention is unavoidable. Courts cannot decline jurisdiction merely because constitutional silence exists. Constitutional disputes demand constitutional answers. Where constitutional text fails to provide those answers, courts are required to engage in what may properly be described as the jurisprudence of constitutional necessity. Constitutional necessity arises where judicial intervention becomes indispensable to the preservation of constitutional order despite the absence of explicit constitutional guidance.¹²

The concept of constitutional necessity occupies an important place in this article because it explains why judicial law-making is often unavoidable. Constitutional governance cannot be suspended whenever constitutional silence emerges. Elections must proceed. Governments must function. Institutions must continue to operate. Rights must be protected. Constitutional crises must be resolved. In many situations, the judiciary becomes the institution responsible for ensuring that constitutional governance remains possible despite constitutional uncertainty. Judicial law-making therefore emerges not as an act of judicial ambition but as a consequence of constitutional necessity.

This understanding finds support within modern jurisprudential thought. H L A Hart acknowledged that legal rules frequently contain areas of uncertainty in which judges must exercise discretion.¹³ Ronald Dworkin challenged Hart's conception of discretion but similarly recognised that judges often confront cases for which no obvious legal answer exists.¹⁴ Both scholars accepted, albeit from different perspectives, that adjudication involves a creative dimension. Constitutional adjudication

¹¹ Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006) 109.

¹² Nwabueze (n 2) 41.

¹³ Hart (n 7) 272.

¹⁴ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 81.



simply magnifies that reality because constitutional disputes frequently involve questions of institutional power, democratic legitimacy and constitutional continuity.

The Nigerian judicial experience provides compelling evidence of this phenomenon. Throughout Nigeria's constitutional history, courts have repeatedly been required to resolve controversies that could not be answered solely through reference to constitutional text. In doing so, they have often relied upon constitutional values, structural principles and broader constitutional objectives. The development of doctrines relating to federalism, democratic accountability, electoral justice and institutional independence illustrates that constitutional law evolves not merely through constitutional amendment but through judicial engagement with constitutional necessity.¹⁵

Some of Nigeria's most distinguished jurists recognised this reality long before it became the subject of academic debate. *Justice Chukwudifu Oputa* consistently emphasised that law must remain responsive to the demands of justice and social reality.¹⁶ Justice Kayode Eso warned against excessive legal formalism capable of defeating constitutional values.¹⁷ Justice *Karibi-Whyte* repeatedly advocated constitutional interpretation that promoted rather than frustrated the objectives of constitutional governance.¹⁸ Similarly, Justice Niki Tobi viewed constitutional adjudication as a purposive enterprise directed towards preserving the integrity of the constitutional order.¹⁹ Although these jurists expressed their views differently, they shared a common understanding that constitutional adjudication cannot be reduced to literal textual interpretation alone.

However, recognizing the inevitability of judicial law-making does not eliminate concerns regarding constitutional legitimacy. Indeed, it intensifies them. If courts possess authority to formulate constitutional principles in response to constitutional silence, what prevents judicial law-making from becoming judicial legislation? What distinguishes legitimate constitutional development from judicial constitutional revision? These questions become particularly important within democratic societies where constitutional authority ultimately derives from the people rather than the judiciary.

It is at this point that this article departs from conventional constitutional theory. Existing debates frequently focus on whether judges make law. Such debates are no longer particularly useful because constitutional practice has already answered the question. The more important inquiry concerns the purpose and limits of judicial law-making. This article therefore advances the proposition that judicial law-making is constitutionally legitimate only where it serves the objective

¹⁵ *Rabiu v State* [1980] 8–11 SC 130; *Attorney-General of Bendel State v Attorney-General of the Federation* [1981] 10 SC 1.

¹⁶ Chukwudifu A Oputa, *Towards Justice with the Law* (Fourth Dimension Publishers 1987) 102.

¹⁷ Kayode Eso, *Thoughts on Law and Jurisprudence* (Spectrum Books Ltd 1998) 61.

¹⁸ M Bello and A Karibi-Whyte, *The History of the Supreme Court of Nigeria* (Spectrum Books Ltd 2013) 214.

¹⁹ Niki Tobi, *Sources of Nigerian Law* (Malthouse Press Ltd 1996) 214.



of constitutional preservation. Judicial intervention must seek to preserve constitutional order, constitutional values and constitutional functionality. Once judicial innovation ceases to serve those purposes and begins creating constitutional arrangements detached from constitutional foundations, it crosses the line from constitutional preservation into constitutional reconstruction.

This distinction is critical because constitutional silence can produce two very different judicial responses. One response seeks to preserve the constitutional order by deriving solutions from constitutional principles. The other seeks to redesign the constitutional order by introducing principles unsupported by constitutional foundations. Both responses involve judicial creativity. Only one remains constitutionally legitimate. The challenge facing constitutional courts is therefore not whether to exercise creativity, but how to ensure that creativity remains faithful to constitutionalism. The foregoing discussion demonstrates that judicial law-making is neither an anomaly nor an aberration within constitutional governance. It is an inevitable consequence of constitutional silence and constitutional necessity. The legitimacy of judicial intervention, however, depends upon the principles that guide it. To understand how those principles operate in practice, it is necessary to examine the actual responses of Nigerian courts to constitutional silence. It is to those judicial responses that this article now turns.

4. JUDICIAL RESPONSES TO CONSTITUTIONAL SILENCE IN NIGERIA: CONSTITUTIONAL DEVELOPMENT BEYOND CONSTITUTIONAL TEXT

If constitutional silence constitutes the invisible constitution and judicial law-making represents the jurisprudence of constitutional necessity, then the most convincing proof of these propositions must be found in actual constitutional adjudication. The true measure of constitutional silence lies not in abstract theory but in the practical manner in which courts respond when constitutional governance confronts questions that constitutional text alone cannot answer. A careful examination of Nigerian constitutional jurisprudence reveals a striking pattern. Some of the most important constitutional doctrines developed by Nigerian courts emerged not from explicit constitutional provisions but from judicial efforts to address constitutional gaps. The growth of Nigerian constitutional law has therefore been shaped as much by constitutional silence as by constitutional text.

One of the earliest illustrations of this phenomenon may be found in *Attorney-General of Bendel State v Attorney-General of the Federation*.²⁰ Although the Constitution established Nigeria as a federation and distributed legislative powers between the Federal Government and the constituent states, it did not provide comprehensive answers to every question concerning the practical operation of federalism. The Supreme Court was therefore compelled to formulate principles capable of preserving the federal balance envisaged by the Constitution. The importance of the decision lies not merely in its outcome but in the Court's recognition that constitutional governance

²⁰ *Attorney-General of Bendel State v Attorney-General of the Federation* [1981] 10 SC 1.



frequently requires constitutional principles to be derived from constitutional structure rather than from constitutional language alone.

The same phenomenon became even more pronounced in *Attorney-General of the Federation v Attorney-General of Abia State & 35 Ors.*²¹ The Constitution recognised the derivation principle and distributed legislative authority over natural resources, yet it remained largely silent regarding the constitutional implications of offshore resource ownership and the precise seaward boundaries of littoral states. The dispute involved issues of enormous economic and political significance, but the constitutional text provided no complete answer. The Supreme Court was therefore required to construct constitutional principles capable of resolving the controversy while preserving the integrity of the federal system. In doing so, the Court demonstrated that constitutional development frequently occurs where constitutional silence intersects with constitutional necessity.

Perhaps no area of Nigerian constitutional law better illustrates judicial engagement with constitutional silence than impeachment jurisprudence. Section 188 of the Constitution outlines the procedure for the removal of a Governor or Deputy Governor. Yet beyond prescribing procedural stages, the Constitution provides remarkably little guidance concerning the substantive standards required to ensure fairness, impartiality and constitutional fidelity throughout the impeachment process. In *Inakoju v Adeleke*,²² the Supreme Court confronted this constitutional gap directly. Rather than treating impeachment as a purely political process, the Court developed constitutional safeguards designed to prevent abuse of power and preserve democratic governance. The significance of the decision lies in the fact that many of the protections recognised by the Court were not expressly stated within the constitutional text. They emerged from judicial efforts to preserve the constitutional values underlying the impeachment process itself.

An even more dramatic illustration is found in *Amaechi v Independent National Electoral Commission*.²³ The dispute presented a constitutional question that neither the Constitution nor electoral legislation had expressly anticipated. The issue was whether votes cast during an election belonged to a political party or to the individual candidate whose name appeared on the ballot. The constitutional framework offered no direct answer. Nevertheless, the Supreme Court formulated a constitutional principle that fundamentally altered Nigerian electoral jurisprudence. Whether one agrees or disagrees with the outcome, the decision remains one of the clearest examples of constitutional development through judicial engagement with constitutional silence. It illustrates the immense influence courts may exercise when constitutional governance encounters questions beyond the contemplation of constitutional framers.

²¹ *Attorney-General of the Federation v Attorney-General of Abia State & 35 Ors* [2002] 6 NWLR (Pt 764) 542.

²² *Inakoju v Adeleke* [2007] 4 NWLR (Pt 1025) 423.

²³ *Amaechi v Independent National Electoral Commission* [2008] 5 NWLR (Pt 1080) 227.



The constitutional significance of judicial responses to silence was further demonstrated in *Attorney-General of Lagos State v Attorney-General of the Federation*.²⁴ The controversy concerning Local Council Development Areas exposed important uncertainties within Nigeria's federal arrangement. Although the Constitution recognised local government administration and prescribed procedures relating to local government creation, it did not comprehensively regulate every aspect of the dispute before the Court. Once again, constitutional silence required judicial intervention. The Court's response shaped constitutional understandings of federalism, local governance and intergovernmental relations in ways that extended far beyond the immediate controversy.

The judiciary's engagement with constitutional silence became equally evident in *Marwa v Nyako*.²⁵ The Constitution fixed the tenure of Governors and Deputy Governors but did not expressly contemplate the constitutional consequences of election nullification followed by fresh elections. Faced with competing interpretations, the Supreme Court was required to reconcile constitutional certainty with democratic legitimacy. The resulting decision supplied constitutional guidance where constitutional text alone proved insufficient. Similarly, in *Elelu-Habeeb v Attorney-General of the Federation*,²⁶ the Supreme Court addressed constitutional uncertainties relating to the removal of a Chief Judge. Although the Constitution contained provisions concerning judicial discipline and institutional responsibility, significant questions remained unresolved. The Court's intervention provided clarity where constitutional silence threatened institutional conflict and constitutional instability.

These decisions reveal a recurring constitutional pattern. Constitutional silence rarely appears in isolation. It usually emerges at moments of constitutional stress involving power, accountability, governance or institutional survival. Consequently, judicial responses to constitutional silence frequently shape the future direction of constitutional development. This observation leads to a broader and more important conclusion. The history of Nigerian constitutional law suggests that constitutional development occurs through two distinct processes. The first is constitutional amendment, through which constitutional text is formally altered. The second is judicial constitutional construction, through which constitutional meaning is developed in response to constitutional silence. While constitutional amendments attract greater public attention, judicial constitutional construction has often exerted an equally profound influence upon the evolution of constitutional governance.

This article therefore advances a proposition that departs from conventional constitutional narratives. Nigerian constitutional development is not driven solely by constitutional text. It is

²⁴ *Attorney-General of Lagos State v Attorney-General of the Federation* [2004] 18 NWLR (Pt 904) 1.

²⁵ *Marwa v Nyako* [2012] 6 NWLR (Pt 1296) 199.

²⁶ *Elelu-Habeeb v Attorney-General of the Federation* [2012] 13 NWLR (Pt 1318) 423.

driven by a continuing interaction between constitutional text and constitutional silence. Constitutional text provides the framework of governance; constitutional silence generates many of the questions that require constitutional answers. The judiciary occupies a central position within this process because it is frequently called upon to determine how constitutional governance should proceed when constitutional text reaches its limits.

However, the same decisions that demonstrate the necessity of judicial intervention also expose its dangers. The power to supply constitutional meaning where constitutional text is silent is one of the most significant powers exercised by constitutional courts. If exercised without principled limits, it risks transforming constitutional adjudication into constitutional revision. The challenge therefore lies not merely in recognising the existence of constitutional silence but in identifying the principles capable of distinguishing legitimate constitutional development from judicial constitutional reconstruction. It is to that question of constitutional legitimacy that this article now turns.

5. CONSTITUTIONAL SILENCE, JUDICIAL LEGITIMACY AND THE LIMITS OF JUDICIAL POWER: FROM CONSTITUTIONAL PRESERVATION TO CONSTITUTIONAL RECONSTRUCTION

The preceding analysis demonstrates that constitutional silence has played a decisive role in the development of Nigerian constitutional law. Yet the recognition of constitutional silence as a constitutional reality does not resolve the more difficult question of legitimacy. If courts may formulate constitutional principles where the Constitution provides no direct answer, what limits exist to prevent judicial intervention from becoming judicial supremacy? Put differently, how can constitutional democracies distinguish legitimate constitutional development from judicial constitutional revision? This question lies at the heart of constitutional governance because the authority of courts ultimately depends not upon political power but upon constitutional legitimacy.²⁷

The traditional response to this dilemma has been framed through the language of judicial activism and judicial restraint. While these concepts remain influential, they are ultimately inadequate as tools for evaluating judicial responses to constitutional silence. A restrained court may permit constitutional breakdown through excessive passivity, just as an activist court may undermine constitutional governance through excessive intervention. The problem is not the level of judicial activity but the constitutional character of judicial reasoning. A court may intervene extensively while remaining faithful to constitutional principles, just as it may exercise restraint while

²⁷ A Barak, *The Judge in a Democracy* (Princeton University Press 2006) 336.



permitting constitutional values to collapse. The legitimacy of judicial intervention therefore depends less upon whether courts act and more upon how and why they act.²⁸

This article proposes that the more useful distinction is not between activism and restraint but between constitutional preservation and constitutional reconstruction. Constitutional preservation occurs where courts derive constitutional solutions from the text, structure, history, values and objectives of the constitutional order. In such circumstances, judicial intervention serves to protect constitutional governance from uncertainty, institutional paralysis or democratic instability. Although courts may develop constitutional principles, those principles remain anchored to identifiable constitutional foundations. Judicial creativity in this context strengthens constitutionalism because it seeks to preserve rather than transform the constitutional order.

Constitutional reconstruction, by contrast, occurs where judicial innovation becomes detached from constitutional foundations and begins to create constitutional arrangements that cannot reasonably be traced to constitutional text, constitutional structure or constitutional values. In such situations, courts cease to act as custodians of constitutional governance and assume a role more closely associated with constitutional redesign. The danger is not that judges exercise creativity. The danger is that creativity becomes untethered from constitutional authority. Once this occurs, constitutional adjudication risks becoming a substitute for constitutional amendment.²⁹

The distinction is particularly important because constitutional silence is capable of producing different constitutional responses. Some silences arise because constitutional framers could not have anticipated future developments. Other silences may represent deliberate constitutional choices intended to leave certain questions within the democratic sphere. Courts must therefore exercise caution before assuming that every constitutional silence requires judicial intervention. The mere absence of constitutional text does not automatically authorise constitutional innovation. Constitutional fidelity requires judges to distinguish between gaps that demand judicial action and silences that require democratic resolution.

The Nigerian constitutional experience provides valuable illustrations of this principle. Decisions such as *Inakoju v Adeleke*, *Marwa v Nyako* and *Elelu-Habeeb v Attorney-General of the Federation* demonstrate how judicial intervention may preserve constitutional order in situations where constitutional silence threatens institutional instability.³⁰ These decisions derived legitimacy not simply because courts acted, but because judicial reasoning remained connected to constitutional

²⁸ Richard A Posner, *How Judges Think* (Harvard University Press 2008) 78.

²⁹ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 413.

³⁰ *Inakoju v Adeleke* [2007] 4 NWLR (Pt 1025) 423; *Marwa v Nyako* [2012] 6 NWLR (Pt 1296) 199; *Elelu-Habeeb v Attorney-General of the Federation* [2012] 13 NWLR (Pt 1318) 423.



values and constitutional objectives. The courts did not seek to create a new constitutional order. Rather, they sought to preserve the integrity of the existing one.

At the same time, certain judicial decisions have generated controversy precisely because they raised concerns regarding the limits of constitutional construction. The enduring debates surrounding *Amaechi v Independent National Electoral Commission* illustrate the difficulty of distinguishing constitutional preservation from constitutional reconstruction.³¹ The significance of such cases lies not merely in their outcomes but in the broader constitutional questions they raise concerning the proper limits of judicial authority. They remind us that judicial engagement with constitutional silence is not inherently legitimate simply because constitutional silence exists.

The concept of constitutional legitimacy therefore requires a more nuanced understanding of judicial power. Constitutional legitimacy is not measured solely by fidelity to constitutional text. Such an approach would render constitutional governance impossible whenever constitutional silence arises. Nor is legitimacy measured solely by the practical desirability of judicial outcomes. Courts may reach desirable outcomes through constitutionally questionable reasoning. Legitimacy instead depends upon whether judicial intervention remains faithful to the constitutional project itself. Judicial responses to constitutional silence must therefore be evaluated by reference to constitutional purpose, constitutional structure and constitutional values rather than immediate political convenience.

This article accordingly submits that constitutional legitimacy in situations of constitutional silence should be assessed through three interconnected inquiries. First, can the proposed judicial solution be traced to identifiable constitutional principles? Secondly, is judicial intervention necessary to preserve constitutional order or prevent constitutional dysfunction? Thirdly, does the intervention remain compatible with democratic governance and the separation of powers? Where these questions can be answered affirmatively, judicial intervention is more likely to constitute constitutional preservation rather than constitutional reconstruction.

The significance of this approach extends beyond Nigeria. Constitutional democracies across the world increasingly confront questions that constitutional framers never contemplated. Technological innovation, digital governance, environmental challenges, artificial intelligence and emerging rights claims continue to generate constitutional controversies beyond the reach of existing constitutional texts. The ability of courts to engage with constitutional silence while preserving constitutional legitimacy will therefore become one of the defining challenges of twenty-first-century constitutionalism.

³¹ *Amaechi v Independent National Electoral Commission* [2008] 5 NWLR (Pt 1080) 227.



Ultimately, constitutional silence is neither a threat to constitutional governance nor a licence for judicial supremacy. It is a constitutional reality that demands both judicial courage and judicial restraint. Courts must be willing to prevent constitutional paralysis where constitutional silence threatens constitutional order. At the same time, they must resist the temptation to convert constitutional silence into an opportunity for constitutional redesign. The enduring challenge of constitutional adjudication is therefore not whether courts should respond to constitutional silence, but whether their responses remain faithful to the Constitution they are sworn to uphold.

6. PRINCIPLED FRAMEWORK FOR ADDRESSING CONSTITUTIONAL SILENCE IN NIGERIA

If constitutional silence is an inevitable feature of constitutional governance and judicial engagement with such silence is often unavoidable, the question that remains is how courts should proceed when confronted with constitutional gaps. The answer cannot lie in unrestricted judicial discretion, nor can it be found in rigid constitutional literalism. The former risks transforming courts into constitutional architects, while the latter risks rendering constitutions incapable of responding to unforeseen challenges. What is required is a principled framework capable of preserving constitutional legitimacy while ensuring constitutional functionality.

This article proposes that judicial responses to constitutional silence should be guided by four interrelated principles: constitutional fidelity, institutional necessity, democratic compatibility and constitutional humility. These principles are not intended to replace existing doctrines of constitutional interpretation. Rather, they are designed to provide a structured methodology through which courts may distinguish legitimate constitutional development from constitutional reconstruction.

The first principle is constitutional fidelity. Judicial intervention must always remain anchored in the Constitution, even where the Constitution provides no direct answer to the dispute before the court. Constitutional fidelity requires judges to search not merely for constitutional text but also for constitutional values, constitutional structure and constitutional objectives. The absence of an express constitutional provision does not entitle courts to formulate constitutional rules based solely upon personal notions of justice, fairness or political desirability. Judicial legitimacy depends upon the ability of courts to demonstrate that their decisions emerge from the Constitution rather than from judicial preference.³²

Constitutional fidelity is particularly important because constitutions speak through more than their words. Federalism, constitutional supremacy, separation of powers, democratic accountability, judicial independence and the rule of law are structural commitments that permeate the constitutional order. Consequently, where constitutional silence exists, courts should seek solutions

³² Nwabueze (n 2) 401.

that reinforce those commitments rather than undermine them. Constitutional development becomes legitimate when it remains connected to constitutional foundations.

The second principle is institutional necessity. Courts should intervene only where judicial action is genuinely required to preserve constitutional governance. Constitutional silence does not automatically create a judicial responsibility to act. Some constitutional questions are better resolved through legislative action, political negotiation or constitutional amendment. Judicial intervention becomes justified where constitutional inaction would result in constitutional paralysis, institutional conflict, democratic instability or injustice.³³

This principle recognizes an important constitutional reality. Not every constitutional silence requires judicial resolution. Democratic governance depends upon multiple institutions exercising their constitutional responsibilities. The judiciary performs a vital constitutional function, but it does not possess exclusive responsibility for constitutional development. Constitutional silence should therefore not become a mechanism through which courts assume functions more appropriately discharged by democratic institutions.

The third principle is democratic compatibility. Constitutional authority ultimately derives from the people. Judicial responses to constitutional silence must therefore remain compatible with democratic governance and political accountability. Courts should be cautious of solutions that effectively remove important questions from democratic deliberation without compelling constitutional justification. Judicial intervention may protect democracy from abuse, but it should never become a substitute for democracy itself.³⁴

The significance of democratic compatibility becomes particularly apparent in disputes involving elections, political representation and governmental powers. In such cases, constitutional adjudication inevitably intersects with democratic choice. Courts must therefore ensure that their responses to constitutional silence strengthen rather than displace democratic legitimacy.

The fourth principle is constitutional humility. Of all the principles proposed in this article, this may be the most important. Constitutional humility requires judges to recognize both the necessity and the limits of judicial power. Courts occupy a privileged position within constitutional governance, but they do not possess a monopoly on constitutional wisdom. Constitutional humility therefore demands caution in situations where judicial intervention may produce consequences extending beyond the immediate dispute.³⁵ The importance of constitutional humility lies in its ability to preserve public confidence in constitutional adjudication. Courts command authority not because they possess political power but because they are trusted to exercise judgment within

³³ Barak (n 11) 337.

³⁴ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 87.

³⁵ Posner (n 29) 295.



constitutional boundaries. A judiciary conscious of its constitutional limits is more likely to command public respect than one perceived as competing with democratic institutions for constitutional supremacy.

The four principles proposed in this article may be distilled into a practical constitutional test. Whenever constitutional silence arises, courts should ask four questions. First, does the proposed solution derive support from identifiable constitutional values, structures or objectives? Secondly, is judicial intervention necessary to preserve constitutional order or prevent constitutional dysfunction? Thirdly, is the proposed solution compatible with democratic governance and the separation of powers? Fourthly, does the intervention reflect constitutional humility and respect for institutional limits? Where these questions can be answered affirmatively, judicial intervention is more likely to constitute constitutional preservation rather than constitutional reconstruction.

The value of this framework lies in its flexibility. It does not attempt to predetermine answers to future constitutional disputes. Rather, it provides a principled methodology for approaching constitutional silence regardless of the context in which it arises. Whether the issue concerns electoral governance, federal-state relations, digital regulation, environmental constitutionalism or emerging constitutional rights, the framework seeks to ensure that judicial responses remain faithful to constitutionalism itself.

Ultimately, constitutional governance does not require a constitution capable of answering every question. Such a constitution would be impossible to draft and incapable of enduring. What constitutional governance requires is a principled method for responding to constitutional silence when it inevitably arises. The framework proposed in this article seeks to contribute to that objective by ensuring that constitutional development remains faithful to constitutional authority, democratic legitimacy and the rule of law.

7. CONCLUSION

This article has argued that constitutional silence occupies a far more significant place in Nigerian constitutional development than is generally acknowledged. While constitutional discourse often focuses on the interpretation of constitutional text, some of the most consequential developments in Nigerian constitutional jurisprudence have emerged from judicial responses to constitutional gaps. The evolution of constitutional law in Nigeria has therefore been shaped not only by what the Constitution expressly provides but also by what it leaves unresolved.

The article advanced the concept of constitutional silence as the *invisible constitution*, the body of unresolved constitutional questions that continually influences constitutional development despite never appearing within the constitutional text itself. It further argued that constitutional silence should be understood as a constitutional condition rather than a constitutional defect. No constitution can anticipate every future controversy or institutional challenge. Consequently,

constitutional silence is an inevitable feature of constitutional governance rather than evidence of constitutional inadequacy.

To address the constitutional challenges arising from such silence, the article proposed a distinction between constitutional preservation and constitutional reconstruction. Judicial intervention remains legitimate where it derives from constitutional text, structure, history and values for the purpose of preserving constitutional order. It becomes problematic where judicial innovation departs from those foundations and assumes the character of constitutional redesign. The article therefore proposed a principled framework founded on constitutional fidelity, institutional necessity, democratic compatibility and constitutional humility as guides for judicial engagement with constitutional silence.

Ultimately, constitutional governance cannot depend upon constitutional text alone. Constitutional silences will continue to emerge as society evolves and new challenges confront constitutional institutions. The enduring challenge for the judiciary is to ensure that when the Constitution provides no direct answer, the response remains faithful to the constitutional order itself. The future of Nigerian constitutionalism may therefore depend not merely on the provisions contained in the Constitution, but equally on the wisdom, restraint and constitutional fidelity with which courts respond when the Constitution is silent.³⁶

8. RECOMMENDATIONS

1. Develop a Coherent Judicial Framework for Constitutional Silence

The Supreme Court of Nigeria should adopt a principled and consistent framework for addressing constitutional silence. Judicial responses to constitutional gaps should be guided by constitutional fidelity, institutional necessity, democratic compatibility, proportionality, and constitutional humility. This approach would ensure that courts preserve the Constitution's integrity without assuming the role of constitutional amendment or legislative policymaking.

2. Strengthen Constitutional Amendment Mechanisms

The National Assembly, in collaboration with State Houses of Assembly, should undertake periodic constitutional reviews to address persistent constitutional silences that have generated recurring litigation, particularly in areas such as succession to public office, federal-state relations, electoral governance, resource control, and executive accountability. Legislative clarification is preferable to prolonged judicial intervention where constitutional omissions have become apparent through experience.

³⁶ Nwabueze (n 2) 417.



3. Promote Constitutional Scholarship on Constitutional Silence

Nigerian universities, research institutes, judicial training institutions, and professional bodies should encourage dedicated research on constitutional silence as an independent field of constitutional law. Greater scholarly engagement would enrich constitutional theory, provide clearer analytical tools for courts, and contribute to the development of a distinctly Nigerian jurisprudence on constitutional gaps.

4. Encourage Institutional Dialogue Among the Arms of Government

Constitutional silence should be addressed through constructive institutional dialogue rather than judicial supremacy. The judiciary should identify constitutional gaps through its decisions while respecting the constitutional responsibility of the legislature to enact reforms where appropriate. Such collaboration would reinforce the separation of powers and enhance democratic legitimacy in constitutional governance.

5. Adopt a Future-Oriented Constitutional Governance Approach

Policymakers and constitutional institutions should anticipate emerging constitutional challenges arising from technological innovation, artificial intelligence, digital governance, environmental protection, cybersecurity, and other evolving areas that may expose new constitutional silences. Future constitutional reforms should incorporate flexible yet principled provisions capable of accommodating societal change while preserving constitutional certainty, democratic accountability, and the rule of law.