

# JUDICIAL INDEPENDENCE IN AFRICA

EDITED BY  
Wahab Egbewole

Wildy, Simmonds & Hill Publishing

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## PREFACE

It was Lord Atkin in the famous case of *Liversidge v. Anderson* (1942) AC 206 at 244 who held that 'the judges are no respecter of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law' which connotes that the judges are appointed to determine issues brought before them without any form of interference from any quarters irrespective of the position and influence. This further strengthens the point that the judicial arm of government must be independent of all other arms of government in all its ramifications as epitomised by the avowed principle of separation of powers.

While it is granted that each arm of government is statutorily provided with powers over certain issues and no arm should lord it over another, the position of the judiciary is rather precarious in the sense that their decisions affect lives and limbs and it must be taken in an atmosphere devoid of any form of interference from any of the other arms of government. However, given the cooperative and collaborative nature of governance, none of the arms can exist in isolation but this situation is further compounded in the African continent because of the emergence of leadership at the helm of affairs and the very young democratic culture in the continent. This state of affairs necessitated the need for a book to chronicle the issues, provide why the issues are still in the continent and make recommendations for the way to achieving the desired independence for the judiciary.

This book, *Judicial Independence in Africa* is put together by legal scholars from diverse backgrounds and jurisdictions across Africa calling attention to the state of affairs in Nigeria, Ghana and South Africa. It looked at the challenges of the African Commission as well as the position under the Islamic Law. It is expected that the book will serve as source materials for academics, jurists and students in this vexed area of our jurisprudence and equally serve as reference book in courts across the continent as the concept of judicial independence remains a work in progress in Africa in particular and the world at large.

It is our hope that the objectives of this book will be served and further expand the frontiers of knowledge in this area.

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# THE NIGERIAN JUDICIARY: PERTINENT NEED FOR REFORMS AND THE AGITATION FOR ITS INDEPENDENCE

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## Abstract

The Nigerian Judiciary is one of the most popular judiciaries in Africa and that it has assisted in the sustenance of democracy in the Nigerian polity would seem settled if the Nigerian democratic journey is considered. Despite this importance, the Nigerian Judiciary has however become a subject of ridicule across different spheres of life.

The problems engulfing the Nigerian judiciary has no doubt called for the need for reforms which need to be done with expediency considering the fast dwindling state of same. These reforms can only however be painstakingly done if the existing order is evaluated and considered.

This article thus tries to evaluate quite cursorily the Nigerian judiciary, the problems bedevilling same, the imperatives of having an independent judiciary and propose reforms which if embarked upon could ensure the Nigerian judiciary regains its pride of place among the comity of judiciaries in Africa.

## Introduction

*The rain it raineth on the just  
And also on the unjust fella:  
But chiefly on the just, because  
The unjust steals the just's umbrella<sup>1</sup>*

The Nigerian judiciary has been in the news in recent times, albeit for the wrong reasons. Never a time have there been more calls for reforms in the judiciary than what we have at present. The imperatives of a reform would be a fall-out of the apparent decay in the judiciary. To anyone who has the faintest acquaintance with happenings in the judiciary in Nigeria, it is not in doubt that the judiciary in Nigeria is in trouble. This has been the recurring song in the mouths of the average Nigerian and has thus brought to the fore the imperative need for reforms in the judicial sector. One thing

<sup>1</sup> Charles Synge Christopher Bowen, Baron Bowen of Colwood (1835-1894), in *Sichel's Sands of Time, Book of Quotations*, Geddes & Grosset, 2009 edited by Judy Hamilton.

is clear: the need for reforms only gives credence to the fact that the existing order is defective.<sup>2</sup>

It would be a grave mistake to think that problems that beset the judiciary are for the judiciary alone. This is because the role of the judiciary in the sustenance of democracy and nation-building cannot be taken for granted as the judiciary has shown itself to be the last hope of the common man and even the rich.<sup>3</sup> Thus, the problems and the fall-outs are common to all and sundry, hence a forum like this.

Under the doctrine of separation of powers, the judiciary is separate and distinct from the other arms of government i.e the Executive and the Legislature. The judiciary thus serves as a watch-dog especially as it concerns the actions or inactions of the other arms of government. That is the ideal model for the judiciary. This was aptly captured by Honourable Justice Oyemade when he noted that:

*I will not allow myself to be intimidated into sending innocent persons to jail. Even if this means losing my job, I am sure of leading a decent life. The only thing we have now in this country is the judiciary. We have seen politicians changing from one policy to another, but the only protection the ordinary people have against all these inconsistencies is a fearless and upright judiciary.<sup>4</sup>*

If the Judiciary is the shield of the people against inconsistencies, is it not an irony in itself to have the judiciary being the mother of all inconsistencies in its judgments and its dispensation of justice? Would this not give credence to the definition of a lawyer/Judge by Ambrose Gwinett Bierce<sup>5</sup> as "one skilled in the circumvention of the law."?

This paper thus seeks to evaluate the judiciary and of course, the problems that have beset it, despite its status as the altar of justice. Bringing the problems to the fore would necessitate highlighting reforms which could take the Nigerian judiciary back to its pride of place in the comity of judiciaries of nations. We should remember that when our noble Lords suddenly become fallible and susceptible to influence, the die is cast for us.

<sup>2</sup> At the annual lecture of the International Dispute Resolution Institute (IDRI) held in Abuja, on the 10<sup>th</sup> May, 2017, the imperative need for judicial reforms came to the fore. See the *Authority*, available at <http://www.authorityngr.com/2017/05/stakeholders-advocate-judicial-reforms-in-Nigeria/> assessed on 1<sup>st</sup> July, 2017 4:35pm

<sup>3</sup> We see every day how the rich rush to court to preserve their rights or prevent the tampering on same.

<sup>4</sup> See Egbewole *ibid* at page 6

<sup>5</sup> *ibid*

## The Nigerian Judiciary

The Judiciary is the third arm of government saddled with the responsibility of interpreting laws and applying these laws in the resolution of conflicts between individuals and groups or between individuals or groups and government and its agencies.<sup>6</sup> It is the "branch of government made up of Judges, Magistrates, Kadis and other adjudicators, which the Constitution saddles with the responsibility of interpreting, construing and applying the laws of the land in the resolution of conflicts and disputes."<sup>7</sup> Section 6 (1) & (2) of the 1999 Constitution (as altered) vests judicial powers in the Judiciary and the Judiciary includes the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, the National Industrial Court, the High Court of the Federal Capital Territory, the High Court of a State, the Shariah Courts of Appeal and the Customary Courts of Appeal.

Under the doctrine of separation of powers, the judiciary is separate and distinct from the other arms of government i.e the Executive and the Legislature. The judiciary thus serves as a watch-dog especially as it concerns the actions or inactions of the other arms of government. That is the ideal model for the judiciary. However, it remains to be seen how and whether the judiciary has been able to attain the status of being a watch-dog for the other arms of government.

Central to the efficiency of the judiciary is the National Judicial Council (NJC) which was only established under the 1999 Constitution<sup>8</sup> with the aim of reducing the control of the executive and legislative arms of government.<sup>9</sup> The NJC basically has the power to recommend the appointment and removal of judicial officers in Nigeria. Its role especially in the removal of judicial officers in Nigeria would be considered much later in the course of this paper.

The importance of the judiciary in Nigeria cannot be over-emphasized as it is the key to the entrenchment of democracy and protection of rights and liberties under any government. Thus Prof. Akin Oyeboade aptly captured the role of the judiciary as follows:

*It is almost axiomatic that the judiciary plays a pre-eminent role in any democratic dispensation. Indeed, a political system can be considered as*

*democratic on the basis of the extent to which the judicial arm is permitted to hold the scales of justice over and above the other arms of government. The source of authority of the judiciary for exercising this critical function is, of course, the Constitution which in fact, captures, in a rather poignant fashion, the interplay of the judiciary, constitutionalism and democracy. For, if good governance has become a modern-day desideratum, human ingenuity is yet to devise a better means of preventing arbitrariness and ensuring social well-being than that of separation of powers, due process of law and independence of the judiciary which, taken together, constitute the hall-marks of a well-functioning democratic setting.<sup>10</sup>*

Thus, from the above and as probably understood by everyone, the judiciary is sine qua non to the effective running of a society. However, the questions that beg to be answered are, "Has the Judiciary fared well in the discharge of these onerous duties? Is the Judiciary really above board in the restoration of the lost last hope of the common man? An average man would readily answer "No" to the questions above while some could say "yes". To us, the judiciary has a chequered history so the answer is not one that can be spontaneously answered. But for both sides of the divide, there are reasons for their answer which would be influenced by their experiences or their perceptions.

### *Problems of the Nigerian judiciary*

The Nigerian Judiciary can be likened to cobwebs where small flies get caught and the great flies break through.<sup>11</sup> The great flies herein are the ones who can circumvent the law and the judicial system to get their way. It thus becomes more ironic when it is seen that it is this same judiciary that is described as the last hope of the common man and is expected to protect the rights of the common man but usually tramples upon same in the discharge of its duties.

We are in an age where the members of the Judiciary do not act rightly; committing acts despicable of their oaths of office. What excuse would a judge who is found with huge sums of money above his income in 10 years, have? In such a situation, you can be sure that the invitation made by Niki Tobi (JSC Retired), will definitely be answered in the negative. The

<sup>6</sup> S.D Kawu, *Extermination of Corruption: The Role of the Judiciary, Anatomy of Corruption in Nigeria: Issues, Challenges & Solutions* (eds) Yusuf O. Ali SAN, 2016

<sup>7</sup> *ibid*

<sup>8</sup> Dadem Y.Y, *Removing the Judge: Challenges to Judicial Independence in Nigeria*, *The Nigerian Law Journal*, Vol 16, No. 1, 2013

<sup>9</sup> See generally the 3<sup>rd</sup> Schedule to the 1999 Constitution for the composition of the NJC and their roles

<sup>10</sup> Paper presented at the National Conference on Changes to Democracy in the New Era, held under the auspices of the Institute of Human Rights and Humanitarian Law, Port-Harcourt, August 27-28, 1999.

<sup>11</sup> Francis Bacon, Baron Verulam of Verulam and Viscount of St Albans, 1561-1626, in the *Apothegms, Book of Quotations*, Geddes & Grosset, 2009

eminent jurist had invited the public to trust the judges in *Buhari v. INEC*<sup>12</sup> when he stated most passionately that:

*Nigerians must realize that some public officers should be trusted to do the right thing, Why not the Judges!*

In a country where suspicion of wrong doing is the past time of its citizens<sup>13</sup>, handling the dispensation of justice like a seesaw which position is dependent on the weight of whoever sits on it, will only further precipitate the polity and threaten the very existence of our society

The problems of the Nigerian judiciary are many-fold no doubt and we could draw a long list of such daunting problems. To our mind however, the problems bedevilling the Nigerian judiciary cut across three (3) areas which are: Corruption-related problems, structural problems and Incompetence. These problems are inter-woven and their combination has no doubt made the judiciary a subject of ridicule. One of them would mean serious trouble for a budding democracy but a collaboration of the three means big trouble; trouble as big as sounding the death knell of the system which it seeks to protect. They shall be discussed albeit briefly for time and space constraints.

#### *Judiciary and corruption*

To say here that the Nigerian Judiciary is corruption free might be done actually with a tongue in cheek. However, that is not to say there are no knights in shining armour but they are indeed few and difficult to discover. These patriarchs would however not mind the diatribe which they get these days being part of the collective body called the judiciary. Of what use are the limbs of a man who is infested with an incurable disease in his heart.

The issue of corruption is not a novel issue anymore in intellectual discourse in Nigeria. Such is the bane of the phenomenon in Nigeria that discourse on it has become a daily recurrence. The phenomenon and its effects are scary and it has gone beyond the stage of nipping in the bud. A simple definition would suffice to the effect that corruption implies undue advantage, abuse of office, undeserved favour obtained through manipulation or rules or status: any untoward conduct occasioned by graft or promise of same. It implies a situation where or when a party performs a service or obligation in exchange of some gratification or refuses to perform his duty as a result of conferment of some benefit or promise of same.

<sup>12</sup> (2008) 19 NWLR (Pt 1120) 246 AT 427 PARAS E-F

<sup>13</sup> Per Niki Tobi (JSC) *BUHARI V. INEC* (SUPRA) AT 427 PARA E

The story of corruption in Nigeria and the lip service paid to it is not dissimilar to the story of a man who murdered both parents of his, and then, when sentence was about to be pronounced, pleaded for mercy on the ground that he was an orphan.

It must be noted at the outset that judicial corruption is criminalized in Nigeria. As a matter of fact, section 114 of the Criminal Code provides as follows:

Any officer who: -

1. Being a judicial officer, corruptly asks, receives or obtains, or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done or to be afterwards done or omitted to be done, by him in his judicial capacity; or
2. Corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon or for any judicial officer, or to, upon or for, any other person, any property, or benefit of any kind on account of any such act or omission on the part of such judicial officer; is guilty of a felony and is liable to imprisonment for fourteen years.

We do not know any other law that expressly criminalizes judicial corruption in this country than this but the law as it stands cannot be seen to be all-encompassing as its crux seems hinged on the belief that Judges are corrupt for the purposes of the benefits that accrue to them. That is not true in all respects as many sundry issues like school ties, family relationship, friendship, reciprocity of gestures et al., influence judicial corruption.

It must also be conceded that there are codes of conduct for Judges in Nigeria and their staffs. However, in the words of My Lord, S.D Kawu, the present Chief Judge of Kwara State, "what is needed is to increase public awareness about these codes and encourage court users and the public to report breaches if any."<sup>14</sup>

It is instructive to compare analytically the judicial system in Nigeria to the one obtained in a country like the United States of America, whose model we seem to be following. It must be noted further that most of the decisions of the courts in the United States are policy decisions, aimed at carrying into effect, or reflecting whatever policies made by the executive arm of the government. In Nigeria, it is not uncommon to have the judiciary

<sup>14</sup> S.D Kawu, *Extermination of Corruption: The Role of the Judiciary, Anatomy of Corruption in Nigeria: Issues, Challenges & Solutions* (eds) Yusuf O. Ali SAN, 2016

give very contrary decisions to the policies of the government and these usually are attributable to corruption.

It is in fact ironic for the judiciary to be called upon to lead the war against corruption when it cannot purge itself of corruption. It has often been said that he who lives in a glass house does not throw stones. The judiciary has also fought the devil of corruption and particularly, we are in an era where judges are being removed or sanctioned on the basis of corruption. It must however be noted that what connotes judicial corruption might not actually be so in reality. Thus, the perception of the public of the judiciary might in every practical sense be different from what the judiciary does in practice. It is thus pertinent to discuss, albeit briefly the forms of judicial corruption in Nigeria and how evident they can get.

### Forms of Judicial Corruption

1. Political Manipulation- This has been described as "an untoward tilting of institutional ethos towards railroading Judges into granting orders in favour of incumbents, failure of which attracts direct or subtle sanctions."<sup>15</sup> It implies a situation where Judges are dragged into the murky waters of politics and get drowned in same. The Katsina Alu and Salami debacle are still fresh in our memories. We are also not oblivious of the Justice Naron case in the Osun State Gubernatorial election tribunal.
2. Monetary corruption- Instances abound where Judges takes bribes in the course of administering "justice". This is probably the commonest form of corruption. It is often stated that he who pays the piper gets to dictate the tune. It is a shame that corruption has bedevilled the Nigerian Judiciary and made the country a laughing stock in the comity of nations. We would remember quite well in Nigeria when a popular politician was discharged and acquitted in Nigeria only to be convicted of the same offences by a UK court.
3. Corruption of favours- Another form of corruption which is often overlooked is the corruption that is hinged on favours. Judges are human beings who have children and their needs to be met. It is not out of place for a Judge whose son/daughter has been assisted in getting a job or admission into higher institutions by a politician, to want to return the favour to the person by giving him favourable orders and judgments. This "rub my back, I rub

<sup>15</sup> Aliagan I.Z (2006) *The Press and the Challenges of Democratic Development in Democracy and Development in Nigeria (Conceptual Issues and Democratic Practice)*, Salisu H. (eds), Concept Publications, Lagos) p.94-119

your back" syndrome is so rife these days that one is left in a state of bewilderment as to what is the future of the Judiciary. Very recently, news broke of an alleged bribery case between Senator Dino Melaye and Hon Justice Akon B. Ikpeme.

4. Corruptions aided by the appointment of personae- Gone are the days that Judges were appointed on the merit. Nowadays, a lot of lobbying based on ethnicity, nepotism, etc pervades the area of the appointment of Judges. We cannot rule out situations where Judges do the bidding of their appointers when they assume their seats.
5. Trial Delays- According to Salawu,<sup>16</sup> "this has been a major reason for a nose dive in the confidence level of Nigerians in the justice delivery system, judicial independence and rule of law." Delays in trials have no doubt delayed the course of justice. We all have known over time that justice delayed is justice denied. Many a case arises where cases are intentionally delayed by lawyers with the tacit approval of the Judges thus frustrating the trial of the case. This portrays some level of corruption.
6. Regulation of finances, including salaries and benefits- The finances or lack of same thereof, of Judges makes them fragile and susceptible to manipulation. According to an author, "control over the purse strings gives many governments a stronghold- if not a stranglehold- over the courts."<sup>17</sup> Instances where Judges express in open court that they have not been paid in a long while would directly or indirectly affect their level of corruption or otherwise.
7. Undue influence through the traditional judicial hierarchy- Many situations exist where judicial superiors (at higher courts) influence judicial decisions of their juniors in the judicial hierarchy.<sup>18</sup>

There are many forms of corruption that bedevil the judiciary in Nigeria. However, some brains are just formatted to aid corruption or accept benefits of corruption. There are instances where people want to become judges not because of the justice they want to dispense but because of the goodies associated with the office of a judicial officer. Thus, it would

<sup>16</sup> Salawu I.O, *Judicial Independence and Rule of Law in Nigeria's Fourth Republic: A Critical Review*. 337: 346

<sup>17</sup> Gloppen S, *Courts, Corruption and Judicial Independence*

<sup>18</sup> See Gloppen and Kasimbazi E (2008), *Elections in Court: the Judiciary and Uganda's 2006 Election Process*, in J. Kilza, S. Mahara and L. Rakner (eds), *Electoral Democracy in Uganda*, Kampala: Fountain Publishers, pp. 53-89

not be surprising if such persons turn out to be corrupt when they become judges.

#### *Structural problems*

Reforms in the judiciary might not have any effect if the structure in place is not corrected or overhauled. Appointing new judges or making reforms without recourse to the structure might be akin to pouring new wine into old bottle effects of which could be devastating.<sup>19</sup> There is thus a need to review the judicial structure in existence in order to achieve the intended. This thus brings the NJC under the spotlight of our discussion.

While the judiciary has long been in existence in Nigeria since the colonial era, the NJC only came into force in 1999.<sup>20</sup> The reason for the coming into being of the NJC was to ensure the independence of the judiciary which was hard to ensure considering the previous legal regimes in the country.<sup>21</sup>

The mischief, probably sought to be cured was the likely arbitrary removal of judges which would have been wanton and likely to impugn the independence of the judiciary.<sup>22</sup> The advent of the NJC is thus a watershed in the annals of the Nigerian judiciary. However, to argue that the effects of the NJC have been all-positive is not totally wrong and this remains to be seen.

#### *Composition*

The members of the NJC are as follows:

- (a) The Chief Justice of Nigeria who shall be the chairman;
- (b) The next most senior Justice of the Supreme Court who shall be the Deputy Chairman;
- (c) The President of the Court of Appeal;
- (d) Five retired Justices selected by the Chief Justice of Nigeria from the Supreme Court or Court of Appeal;

<sup>19</sup> Matthew 9:17 states that "Neither do men put new wine in old bottles: else the bottles break and the wine runneth out and the bottles perish."

<sup>20</sup> Via the 1999 Constitution of Nigeria (as Altered)

<sup>21</sup> Under the 1963 Republican Constitution, the powers of appointment, discipline and removal of judicial officers resided in the President, Prime Minister and the Parliament. See sections 112, 113, 123 and 124 of the 1963 Constitution. Same thing can be said of the 1979 Constitution under which the powers of appointment, discipline and removal of judicial officers lied in the President and the National Assembly. See section 255 of the 1979 Constitution.

<sup>22</sup> For clarity on what the mischief rule connotes, see *Pepper v Hart*

- (e) The Chief Judge of the Federal High Court;
- (f) Five Chief Judges of States to be appointed by the Chief Justice of Nigeria from among the Chief Judges of the States and of the High Court of the Federal Capital Territory, Abuja in rotation to serve for two years;
- (g) One Grand Kadi to be appointed by the Chief Justice of Nigeria from among Grand Kadis of the Sharia Courts of Appeal to serve in rotation for two years;
- (h) One President of the Customary Court of Appeal to be appointed by the Chief Justice of Nigeria from among the Presidents of the Customary Courts of Appeal to serve in rotation for two years;
- (i) Five members of the Nigerian Bar Association who have been qualified to practice for a period of not less than fifteen years, at least one of whom shall be a Senior Advocate of Nigeria, appointed by the Chief Justice of Nigeria on the recommendation of the National Executive Committee of the Nigerian Bar Association to serve for two years and subject to re-appointment. Provided that the five members shall sit in the Council only for the purposes of considering the names of persons for appointment to the superior courts of record; and
- (j) Two persons not being legal practitioners, who in the opinion of the Chief Justice of Nigeria, are of unquestionable integrity.<sup>23</sup>

As straight forward as the composition of the NJC would seem to be, dust has been raised on the practicability or the implications which it has. Perhaps, the main issue is the issue of appointment by the Chief Justice of Nigeria (CJN) which could bring the allegiance of the NJC into question as it is logical for appointees to do the biddings of the appointer. This situation came to the front burner of national discourse when the Justices Katsina Alu and Salami issue rose to the peak.<sup>24</sup>

Commenting on the foregoing, a legal luminary, A.O Mohammed, SAN<sup>25</sup> had the following to say:

*The National Judicial Council as currently constituted is defective. These defects have denied the Council the required freedom and powers to act decisively. The Council is made up of twenty three (23) members,*

<sup>23</sup> Paragraph 20, 3<sup>rd</sup> schedule, 1999 Constitution

<sup>24</sup> Okoye A.O, "Issues in the Membership, Powers, and Autonomy of the National Judicial Council in Nigeria, Nigeria Judiciary: Contemporary Issues (ibid) 379 at 381

<sup>25</sup> Mohammed, A.O (ibid)

inclusive of the Chief Justice, who is the Chairman. Fourteen (14), out of the twenty three members are singularly appointed by the Chief Justice as the Chairman and such appointment is not subject to any control or consultation with any person or body. The five members from the Bar are also appointed by the Chief Justice upon the recommendation of the Nigerian Bar Association. In effect, the Chief Justice, as the Chairman, appoints nineteen out of the twenty – three members of the council. This is not too democratic. Under such undemocratic scenario in the appointment of members of the Council, it is not surprising that majority members perform their duties with predetermined mind-sets of the Chief Justice of Nigeria, their appointer. The apparent mischief inherent in such bizarre arrangement was brought to the fore in what is now known as “Hon Justice Ayo Salami saga”.<sup>26</sup>

The NJC by the above score leaves little to be desired in its composition which consequently has an impact on its actions.

#### Powers of the NJC

Very briefly, the powers of the NJC as enshrined in section 158 (1) and paragraph 21 to the 3<sup>rd</sup> Schedule to the Constitution are as follows:

(a) Recommend to the President from among the list of persons submitted by –

- i. The Federal Judicial Service Commission, persons for appointment to the offices of the Chief Justice of Nigeria, the Justices of the Supreme Court, the President and Justices of the Court of Appeal, the Chief Judge and Judges of the Federal High Court, and;
- ii. The Judicial Service Committee of the Federal Capital Territory, Abuja, persons for appointment to the offices of the Chief Judge and the Judges of the High Court of the Federal Capital Territory, Abuja, the Grand Kadi and Kadis of the Sharia Court of Appeal of the Federal Capital Territory, Abuja, and the President and Judges of the Customary Court of Appeal of the Federal Capital Territory, Abuja, and the President.

(b) Recommend to the President the removal from office of the judicial officers specified in sub-paragraph (a) of this paragraph, and to exercise disciplinary control over the officers.

<sup>26</sup> See also Okpoko, T.J.O, “Reinvigorating National Judicial Council for a Stronger Judiciary in Nigeria, being a paper presented at the two day seminar of the NBA Anti-Corruption Commission on 1/7/2013; Razaq K.O, “The Constitutional Crisis on the Removal of Chief Judge of a State or Chief Justice of Nigeria”, Confluence Journal of Jurisprudence and International Law, Vol. 3, No.2, 2010, pp. 28-34

While the above could be thought not to include Judges of the States (that is, Judges who are not Chief Judges), this perceived dichotomy has been settled quite emphatically by the Supreme Court in the case of *Elelu-Habeeb v A.g Federation & Ors*<sup>27</sup> where the contention that the NJC has disciplinary powers over all judicial officers in the country received tacit judicial imprimatur of the Supreme Court.<sup>28</sup>

#### Removal of Judges

For a judicial officer to allegedly be guilty of misconduct, it is rational for there to be some body of laws regulating their conduct and same are regarded as codes of conduct. These Codes of conduct are of two kinds; those enshrined in the Constitution and those laid out by the NJC. The Constitution provides for two grounds upon which a judge can be removed which are:

- Inability to discharge the functions of office or appointment;
- Misconduct or breach of the Code of Conduct stated in the Constitution.<sup>29</sup>

The Constitution through the Code of Conduct precludes the doing of certain acts such as engaging in private business, collection of bribes and other benefits, abuse of office, membership of associations or organizations considered incompatible with the functions of public office.

The NJC has also prescribed a code of conduct which applies to all judicial officers across the federation. It prohibits judicial officers from acts like improper social relationships, associating with groups that practise invidious discrimination, abuse of power, communicating or commenting on pending cases, sexual harassment, nepotism and favouritism, etc.<sup>30</sup>

According to Dadem, International Standards and Conventions on Ethics and Code for Judicial Officers also regulate the conduct of judicial offices in Nigeria, Nigeria being a signatory to such Standards and Conventions. They include the Bangalore Principles of Judicial Conduct,<sup>31</sup> the Latimer House Guidelines,<sup>32</sup> the Beijing Statement on the Principles of Independence,<sup>33</sup> IFES and USAID Office of Democracy and Governance

<sup>27</sup> (2012) 13 NWLR (PT. 1318) 423 AT 494 PARAS C-E; 495 PARAS D-H; 497 PARAS C-D

<sup>28</sup> See also Okoye A.O, “Issues in the Membership, Powers and Autonomy of the National Judicial Council in Nigeria: Nigeria Judiciary: Contemporary issues (ibid) pp. 379 at 403

<sup>29</sup> See generally part I, 5<sup>th</sup> Schedule to the Constitution. See Dadem (ibid)

<sup>30</sup> See Dadem (ibid)

<sup>31</sup> 2002

<sup>32</sup> 1998

<sup>33</sup> 1997

"Guidance for promoting judicial independence and impartiality (Guidance Principles)", and the International Bar Association, Minimum Standards of Judicial Independence<sup>34,35</sup>

Breaches of these standards are sanctioned by the NJC. It must however be noted that what amounts to these breaches lie within the discretion of the NJC. As a matter of fact, the NJC determines the rules of the game and to whom those rules are applied, hence double standards in the application. These double standards are perhaps done under the garb of human foibles and inadequacies which can however be avoided.

The Holy Books specify quite clearly the need for fairness in the dispensation of justice amongst humans

The Holy Bible: Romans 2 verses 1-3<sup>36</sup> states:

*If you judge someone else, you have no excuse for it. When you judge another person, you are judging yourself. You do the same thing you blame others for doing. We know that when God judges those who do evil things, he judges fairly. Though you are only a human being, you judge others. But you yourself do the same things. So how do you think you will escape when God judges you?*

The Holy Quran Chapter 5 verse 22 states:

*But if thou will judge, judge between them with equity. Lo! Allah loveth the just.*

The imperative need to attain justice in all spheres particularly the NJC cannot be over-emphasized. The NJC, like all administrative bodies have a compelling duty to ensure justice is done. Failure of this would give credence to talks from persons in the nature of Mr. Bumble in Charles Dickens' "Oliver Twist" when he stated that "the law is an ass, a laughable buffoon." The need for sanctity and justice is further brought to the fore by the legendary Hon Justice Akinola Aguda when he noted that:

*It is urgent and imperative that we must be able to effect at least a semblance of fair and just administration of justice, if this nation is to survive.*<sup>37</sup>

The NJC, which is saddled with the appointment and removal of judicial officers, can be rightly described as the foundation for a sound

judicial system. After all, if the system that produces Judges is faulty, the "products" cannot be expected to perform miracles. Seemingly commenting on the need for a solid foundation, my Lord, Hon. Justice Kayode Eso, JSC in the case of *Ifezue v Madugha*<sup>38</sup> had the following to say:

*If the foundation is muddy in one part, the mud would spread throughout and pollute all that flowed from it...Times had changed and the courts had changed with them.*

The double standards with which the NJC apparently deals with Judges is particularly better understood and appreciated if two cases are considered side by side.

*Victoria A. A Ayeni and Olusola Sonuga.*

His Lordship's case of misconduct was that he failed to deliver judgment in a pre-election matter (FHC/AB/CS/31/2011) between Victoria A. A Ayeni and Olusola Sonuga. She adjourned ruling in the pre-election matter till the end of the tenure of office of the candidate whose qualification in pre-election was being questioned. It must be noted that the matter had been filed even before the 2011 general election.<sup>39</sup> He outrightly failed to deliver judgment in the suit denying the plaintiff and her supporters their constitutional right to have their grouse ventilated in court. The term of office which the plaintiff was contesting became over and thus rendered her case academic.

The NJC in its wisdom barred the learned Judge from being elevated to the Court of Appeal or any other judicial body till her retirement. He was also not to be considered for any appointment to any Ad-hoc judicial committee of post till retirement from the Bench. He was sanctioned for "misconduct and alleged injustice" and placed on the NJC "watch list" for the next four (4) years.<sup>40</sup>

*P.K Ojo v. SDV & SCOA Nig Plc*

In this case, it was alleged that the Judge delayed judgment in a suit ID/1279/2007 between P.K Ojo v. SDV & SCOA Nig Plc for 22 months after adoption of written addresses and 35 months after conclusion of evidence. He also did not publish the said judgment until after 40 days, as against the

<sup>38</sup> (1984) 1 SCNLR 426

<sup>39</sup> It is settled that pre-election matters can only be filed at the regular courts before the election; otherwise it has to be filed at the election petition tribunals. See *Wambai v Donatus* (2014) 14 NWLR (PT. 1427) 223 AT 249 PARAS A-C; 257-258 PARAS D-B

<sup>40</sup> Available at file:///accounts/1000/shared/downloads/Nigerianjudgesanctionedplacedonwatch-list-premiumyimesnigeria.html assessed on 5th June, 2016 at 3:43pm

<sup>34</sup> 1982

<sup>35</sup> See generally Dadem at page 83

<sup>36</sup> New International Readers' Version (NIRV)

<sup>37</sup> Aguda T.A, *The Crisis of Justice, Nigeria, 1986*, p.6

7 days required by the Constitution. He was also alleged to have continued to hear the case after he had been notified of the pendency of a motion for stay of execution at the Court of Appeal and that an appeal had been entered.<sup>41</sup> He was also alleged to have failed to administer properly his court Registrar, who prior to the issuance of a writ of attachment in the case, falsely misrepresented to the Deputy Sheriff in a memo dated 28<sup>th</sup> November, 2014 that there was no appeal or motion in the case file as at 28<sup>th</sup> November, 2014 when meanwhile, there were two notices of appeal and two summons to settle records in the court's file.<sup>42</sup> He was also alleged to have given an order upon *ex parte* application substituting the name of a company with another without serving the order of substitution on the affected party or its legal representative.<sup>43</sup>

His Lordship was suspended from office and a recommendation was made to the Governor of Lagos State to remove him from office, a situation which is expected to happen rather sooner than later.

In our opinion, the offence of both Judges are hugely similar but with varying punishments meted out to them thus depicting unfairness. If Judge B delivered judgment after 22 months of adoption of written address, a situation which is bad, Judge A's refusal to deliver judgment at all, especially in a case as time sensitive and interest-filled like a pre-election matter, is worse and if the gravity of their offences is anything to go by at all, Judge A's punishment should be greater than Judge B's but alas, the reverse is the case.<sup>44</sup> The other sundry offences deemed to be committed by Judge B are in our respectful opinion, offences which Judges commit daily. The acts attributed to him are either expressly done by the court Registrar (in the case of misinformation about the status of an appeal or not) and the court Bailiff (in the case of non-service of the order of court). May God forbid a time when it is a Judge who has made the order that ensures the service of the said order on the party against whom it is made.

The draconian style and nature of the decisions of the NJC is dreadful and does not seem to show any sign of respect for equality of persons

<sup>41</sup> Available at file:///accounts/1000/shared/downloads/NJCretiresjudgesoveragefalsificationdelayofjudgment\_PunchNewspapers.html assessed on 5th June, 2016 at 3:48pm

<sup>42</sup> It remains to be seen however whether the offices of the Judge and his Registrar are not different from each other and whether the Judge should be made liable for his Registrar's actions.

<sup>43</sup> The effect of a non-service of an order of court is that a party against whom such order was made is not bound by same. See *Uwazurike v AG Federation* (2013) 10 NWLR (PT. 1361) 105 at 130 Para A; 134-135 Paras G-A; 135 Paras E-F. It can however be argued that the duty of service of a court process on a party never lies on the Judge who made the order.

<sup>44</sup> Justice Rita Ofilu Ajumogobia is currently facing trial for offences relating to corruption.

before the NJC. The NJC is fast becoming a realm of phantasmagoria or fantastic possibilities where anything can be expected from it.

Another example can be seen in the case of a Justice of the Court of Appeal who despite the fact that he was found guilty of corruption, was compulsorily retired. The implication of his compulsory retirement is that he is still entitled to his benefits. This cannot be deemed to be a fair punishment if other cases are considered. One cannot thus fault Prof Akin Oyeboode when he advocated for the lifting of the veil covering the face of the statue of the Lady of Justice so that "she can see that people are not equal and tilt the scale in order to ensure that people get the justice that they deserve."<sup>45</sup>

The point sought to be driven home is that the NJC has made the work of the judiciary difficult. There are certain sacred cows which the NJC would not seem to be ready to leave out to hang. No sensible reform can be done if the NJC is not a part of the exercise. Charity in this instance must begin at home.

Delay in dispensation of justice is also a factor that needs to be looked into in Nigeria. Justice delayed is justice denied no doubt but the system in Nigeria is one which breeds delay. You would be surprised to know that the case being determined at the Supreme Court presently are appeals filed in 2007. Commenting on this phenomenon, Ebunolu Adegboruwa just recently this month noted as follows:

*I just got a judgment in the Supreme Court on Friday, 23<sup>rd</sup> of June; the case started in the high court in 1984, that's 33 years ago; by the time the judgment was delivered it was 33 years, all the litigants had died. Fred Agbaje did everything possible to have the appeal heard before he died, but we were told every time we filed an application for accelerated hearing that they were only treating 2003 appeals. And do (sic), it got to our turn this time because they were now treating 2006 appeals. So, by next year, they will be treating 2007.<sup>46</sup>*

We lend our voice to this reasoning by adding that most of these appeals are pursued to the Supreme Court by legal practitioners who are striving to meet up with qualification for the privilege of Senior Advocate of Nigeria. Thus, whether the parties have died or not or whether they are still interested in the appeal or not, these appeals are filed by lawyers who need the cases for their personal interests.

<sup>45</sup> The Punch Newspaper, Thursday July 6, 2017 page 37

<sup>46</sup> The Punch Newspaper, Thursday July 6, 2017 page 37

The above is not exclusive to the Supreme Court as even the lower courts take unnecessary time in dispensing off matters. This is not attributable to the Judges alone but they also play their part. Dr. Kole Abayomi commenting on this phenomenon had the following to say:

*There's an interesting case that I just concluded, I started it in 2007 and this is 2017. Yesterday, I was to adopt my written address and the judge said, 'sorry, I have had enough cases that I set down to write judgments on during vacation. Therefore, I'd not ask you to adopt; I'd adjourn this case until October'. Of course, you know what she's trying to avoid, just not to be caught by the three-month rule. So, I have to go back in October and say My Lord, I rise and I adopt. My client couldn't understand it and the public do not understand most of the things that you do. What are we going to do about it?*<sup>47</sup>

These delays can be attributed to the structure on ground. Checks on the Rules of Court reveal that there is no provision for "Mention" or "Further Mention" yet they are part of our judicial system. There are instances where cases that ought to have proceeded for hearing are adjourned for mention or pre-trial. Question is, how many cases get settled at pre-trial sessions? In a similar vein, our Judges record in long hand and take their time in doing so. Judges in foreign jurisdictions rarely write manually as their records are taken electronically. What then is the essence of having legal assistants if it is not to facilitate easy dispensation of justice.

The notorious case of *Abiola v 7UP* which started sometime in 1987 has been remitted back to the Federal High Court for trial. Mr Abiola is late and the properties which are the subject matter of the suit have lost value. We then ask, what justice has an order for remittal for trial served? Little wonder why *Niki Tobi JSC (of blessed memory)* in his wisdom noted that "This looks to me as a typical example of the aphorism or cliché that the law is at times an ass. I must quickly remove the ass content in the law and face the reality of the law. So be it."<sup>48</sup>

Our Judges, in a bid to make up with the quarterly return of cases required of them, hastily dispatch cases without recourse to the merits or otherwise of such cases. Sometimes, this is done in flagrant disregard of the right to fair hearing of the parties. Courts strike out cases with impunity in order to meet up with quarterly returns required of them. The law is trite that while justice delayed is justice denied, justice rushed is justice crushed.

<sup>47</sup> The Punch Newspaper, Thursday July 6, 2017 page 37

<sup>48</sup> OKETADE v ADEWUNMI (2010) 8 NWLR (PT. 1195) SC 63 AT 76 PARAS B-C

### *Incompetence*

Putting square pegs in round holes only brings one result: Incompetence. With respect to our Judges, some of them are misfits and are just beneficiaries of indices that should not even be in context in the appointment of Judges. Many Judges that we have today are sons or daughters of retired Chief Judges or Justices of the superior courts. The question that begs to be asked is, if their fathers were competent then, does that ipso facto mean their children are competent? We leave the readers with the answer.

There are many decisions that get derided on appeal because they lack legal reasoning and logic and basically cannot stand the test of time. Many intricate cases abound today and only judges with sound legal knowledge can actually cope with this intellectual drive. But what do we get? Shallow judgments in complete disregard of the law are the order of the day.

An example is a case decided by the Court of Appeal, Ilorin Judicial Division: The case of *Summonu Oyediji v Chief Shittu Ayo*, CA/IL/23/2000 delivered on 12<sup>th</sup> July, 2001. The trial court, in a land matter before it for adjudication had asked the parties to go and submit their case to the Olofa of Offa.<sup>49</sup> The trial court had held that:

*Since both parties succumbed to the overall authority of the Olofa of Offa as regards this matter, I hereby order both parties to go back to the Olofa and to seek further clarification from the Olofa as regards the ownership of the piece of land otherwise known as Lamodi area Offa.*

The Court of Appeal per Muri Okunola, JCA (RTD) in upturning this judgment held thus:

*In conclusion, the definition in section 227 of the 1999 Constitution of Judicial officer or Judicial Authority does not include the office of the Olofa of Offa, hence the purported transfer of his judicial responsibility to the Olofa (sic) tantamounts (sic) to the abdication of the Learned Judge's power under the Constitution to an unauthorized person.*

The Court of Appeal in the case recognized the abdication of duties by the trial Judge. It is not in doubt that land matters are within the exclusive preserve of the High Court and it was thus out of place for the judge to ask that the matter be taken before a Monarch for resolution.

There are many other instances where Judges lose sight of the law and go into issues not related to the law and you keep wondering if the judge was qualified. There was a divorce case which was to be adjourned for

<sup>49</sup> Offa is a town in Kwara State

hearing though the Respondent to the petition had not been attending the court sittings. The office applied that hearing notice be issued and served on the Respondent against the next adjourned date and the Judge retorted that it would be a waste of time as he knew the Respondent would not come even if served. That coming from a judge speaks volume of the incompetence that we are talking about. Many more instances abound and these leave us in a state of bewilderment. When an incompetent legal practitioner is appointed a judge, what does one get? It is trite law that one cannot build something on nothing and expect it to stand.<sup>50</sup>

Why is it that the most of the Judges we have today are the sons or daughters of one retired Judge or another? Are they the only ones qualified for the bench? Has it suddenly become hereditary? Anyways, this is Nigeria where everything goes.

### The Nigerian Judiciary and the Imperatives of Its Independence

An independent, impartial and informed Judiciary holds a central place in the realisation of a just, honest, open and accountable government. A Judiciary must be independent of the Executive if it is to perform its constitutional role of reviewing actions taken by the government and public officials to determine whether or not they comply with the standards laid down in the Constitution and with the laws enacted by the Legislature. In emerging democracies, they have an additional task of guaranteeing that new laws passed by inexperienced Executive or legislative branches do not violate the constitution or other legal requirements. Independence thus protects the judicial institutions from the Executive and from the Legislature. As such, it lies at the very heart of the separation of powers. Other arms of governance are accountable to the people, but the Judiciary – and the Judiciary alone – is accountable to a higher value and to standards of judicial rectitude. The constitution provides for the independence of the judiciary as enshrined in *Section 17 (1) (e)* of the 1999 Constitution which provides that the:

*independence, impartiality and integrity of courts of law and easy accessibility shall be secured and guaranteed.*<sup>51</sup>

Therefore, for the judiciary to perform to its optimal, it should be independent. It is rather unfortunate to note that this provision is under the Fundamental Objectives and Directive Principles of State Policy,

<sup>50</sup> Oketade v Adewunmi (2010) 8 NWLR (PT. 1195) 63 AT 81 Para C; Macfoy v U.A.C Ltd (1962) ACT 152 AT 160

<sup>51</sup> The Constitution of the Federal Republic of Nigeria (as amended) 1999.

whose provisions by virtue of *Section 6 (6) (c)* of the Constitution are non-justiciable.<sup>52</sup> It is therefore made manifest that the constitution itself after providing for the independence of the judicial arm renders such independence unenforceable. This consequently poses a challenge to the judicial arm as to whether it is truly independent.

In addition to the aforementioned, the judicial set-up does not ensure the needed independence for the judiciary to perform its functions impartially. This takes leap from the process of appointment of judges, dismissal of judges, funding and the general conditions of service of judicial officers and personnel which are basically left in the hands of the executive to decide.<sup>53</sup> This can also be buttressed by taking a quick examination into the National Judicial Council which is the body charged with the task of recommendation of Justices and Judges by virtue of 231 (1) of the Nigerian constitution<sup>54</sup> to realize that such a body is actually a Federal Executive Body pursuant to Section 153 (1) (i)<sup>55</sup>. It is therefore discovered that the Judiciary is recommended by a Federal Executive Body, ratified by the Legislative and appointed by the Executive. The questions that begs for an answer is that; Is the Nigerian Judiciary truly independent? If so, why is the judiciary still tied to the apron strings of the Legislative and Executive arm of government taking into cognisance the principle of separation of power? Then again, if the judiciary is truly independent would justice be for sale? Is Judicial Independence critical to the functioning of any democracy?

In every civilized country, courts are the last hope of the common man.<sup>56</sup> It is the third arm of government which protects and ensures democracy as well as interprets the law and administers justice.<sup>57</sup> In Nigeria, the judiciary plays an important role by virtue of Section 6 (1)<sup>58</sup>, as earlier stated its role cannot be over emphasized as it is a stabilizer in the political system and has the extra duty of the protection of the constitution. An independent, impartial and informed judiciary holds a central place in the apprehension of a good, transparent and accountable government. This is necessarily made possible by the provision that charges the judiciary with the function

<sup>52</sup> *ibid*

<sup>53</sup> *ibid*

<sup>54</sup> Section 238 (1), 250 (1) (2), 254B (1) (2), 256 (1) (2), 261 (1) (2), 266 (1) (2), 271 (1) (2), 276 (1) (2), 281 (1) (2) of the Constitution of the Federal Republic of Nigeria.

<sup>55</sup> *ibid*

<sup>56</sup> Hon. Chief Justice of the Federation Mahmud Mohammed In a Presentation at opening of the 2015 All Nigeria Judges' Conference at the National Judicial Institute in Abuja Nigeria: Justice can't be for sale where justice is truly independent, 26 November 2016

<sup>57</sup> Yusuf Ali, The Evolution of Ideal Nigerian Judiciary in The New Millennium by [http://www.yusufali.net/articles/THE\\_EVOLUTION\\_OF\\_IDEAL\\_NIGERIAN\\_JUDICIARY\\_IN\\_THE\\_NEW\\_MILLENNIUM.pdf](http://www.yusufali.net/articles/THE_EVOLUTION_OF_IDEAL_NIGERIAN_JUDICIARY_IN_THE_NEW_MILLENNIUM.pdf) accessed on the 20th July 2017

<sup>58</sup> The Constitution of the Federal Republic of Nigeria (as amended) 1999

and responsibility to determine all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating to the determination to any question as to the civil rights and obligations of any person.<sup>59</sup> As important as the judiciary is to the sustenance of the rule of law and democracy; it is the most vulnerable of the three arms of government. It largely depends on the other arms to perform its functions. For instance, it has no absolute control over who becomes a judicial officer, the removal of judicial officers, and the powers of the purse. This is well against the key indices which are to ensure and facilitate independence of the judiciary. They are; Appointment, Remuneration, Tenure of Office, Removal and Protection of Judges.

In order to establish the significance of the independence of the judiciary and also to discuss the existing setbacks to judicial independence in Nigeria, it is appropriate to examine what judicial independence means, and the key indices in securing judicial independence.

#### *What is Judicial Independence?*

There appears not to be a precise definition of what judicial independence means. However, in simple terminology, judicial independence can be defined as the ability of a judge to decide a matter free from pressures or inducements. In other words, it could mean the ability of the Judiciary to be independent by being separate from government and other concentrations of power.<sup>60</sup> The principal role of an independent Judiciary is to uphold the rule of law and to ensure the supremacy of the law.<sup>61</sup> There are two types of judicial independence: institutional independence and decisional independence. Institutional independence means the judicial branch is independent from the executive and legislative branches while decisional independence is the idea that judges should be able to decide cases solely based on the law and facts, without letting the media, politics or other concerns sway their decisions, and without fearing penalty in their careers for their decisions. Different countries however deal with the idea of judicial independence through different means of judicial selection, or choosing judges and one way to promote judicial independence is by granting life tenure or long tenure for judges,<sup>62</sup> which ideally frees them to decide cases and make rulings according to the rule of law and judicial

<sup>59</sup> Section 46 (1), *ibid*

<sup>60</sup> Daudu J. B. "The Independence of the Nigeria Judiciary in the light of Emerging Socio-Political and Security Challenges". A key note speech available at <<http://www.nba.org.ng/web/theindependenceofthenigerianjudiciary>> accessed on 16/7/2017, p. 1.

<sup>61</sup> *ibid*.

<sup>62</sup> Lord Woolf, *The Rule of Law and a Change in the Constitution*, 2004 Camb L J 317; Tom Bingham, *The Business of Judging: Selected Essays and Speeches* 55-68 (Oxford 2000)

discretion, even if those decisions are politically unpopular or opposed by powerful interests.<sup>63</sup>

Judicial independence protects the judicial institution from the executive and from the legislature. As such, it lies at the very heart of the separation of powers. Other arms of governance are accountable to the people, but the Judiciary – and the Judiciary alone – is accountable to a higher value and to standards of judicial rectitude.<sup>64</sup> It is on this basis that the United Nations adopted basic principles on the independence of the judiciary.<sup>65</sup> That is, before it can be held that the judiciary is truly independent, the following principles have to be in place.

#### *Basic Principles on the Independence of the Judiciary encapsulated by United Nation.*

The following basic principles, formulated to assist Member States of the UN in their task of securing and promoting the independence of the judiciary should be taken into account and respected by governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.<sup>66</sup>

First, the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.<sup>67</sup>

Secondly, there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the court be subject to revision. The principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.<sup>68</sup>

<sup>63</sup> *ibid*

<sup>64</sup> Felix Frankfurter, *An Independent Judicial System* [www.u4.no/recommended-reading/an-independent-judicial-system/.../921](http://www.u4.no/recommended-reading/an-independent-judicial-system/.../921) accessed on the 19th July 2017

<sup>65</sup> The United Nations Human Right (Office of the Commissioner) Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> accessed on the 25th July 2017

<sup>66</sup> *ibid*

<sup>67</sup> *ibid*

<sup>68</sup> *ibid*

Thirdly, the independence of the Judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the Judiciary.<sup>69</sup>

Fourthly, everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

Finally, the judiciary have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

In line with the above principles to secure and promote the independence of the judiciary a level of judicial independence is entrenched in Canadian Constitution, awarding superior court justices various guarantees to independence under sections 96 to 100 of the Constitution Act, 1867. These include rights to tenure (although the Constitution has since been amended to introduce mandatory retirement at age 75) and the right to a salary determined by the Parliament of Canada (as opposed to the executive).<sup>70</sup> In 1982 a measure of judicial independence was extended to inferior courts specializing in criminal law (but not civil law) by section 11 of the Canadian Charter of Rights and Freedoms, although in the 1986 case *Valente v The Queen* it was found these rights are limited. They do, however, involve tenure, financial security and some administrative control. The year 1997 saw a major shift towards judicial independence, as the Supreme Court of Canada in the Provincial Judges Reference found an unwritten constitutional norm guaranteeing judicial independence to all judges, including civil law inferior court judges. The unwritten norm is said to be implied by the preamble to the Constitution Act, 1867.<sup>71</sup> Consequently, judicial compensation committees such as the Judicial Compensation and Benefits Commission now recommend judicial salaries in Canada.

Then again, in Hong Kong, independence of the judiciary has been the tradition since the territory became a British crown colony in 1842.<sup>72</sup> After the 1997 transfer of sovereignty of Hong Kong to the People's Republic

of China pursuant to the Sino-British Joint Declaration, an international treaty registered with the United Nations, independence of the judiciary, along with continuation of English common law, has been enshrined in the territory's constitutional document, the Basic Law. In recent years, this independence has been put into question after a number of interventions from China on several cases which swayed rulings in the Executive's favour, most notably the Hong Kong Legislative Council oath-taking controversy of 2016.<sup>73</sup>

*The Application of the basic principles of Judicial independence within the Nigerian context*

Many today have expressed their concerns over the failure of the executive and legislative arms of government to uphold the independence of the courts in the discharge of their duties. The possibility that the independence of the judiciary may be in danger in Nigeria has even been made by high ranking judges. The Chief Justice of Nigeria, Justice Mahmud Mohammed has confessed that the country's judiciary is not independent as it is supposed to be.<sup>74</sup>

According to him, the judiciary cannot be said to be independent in a country where only one percent of the national budget is given to the institution. Justice Mohammed, who spoke at the opening of the 2015 All Nigeria Judges' Conference at the National Judicial Institute in Abuja, begged the Executive and the Legislature to ensure the proper independence of the Judiciary as it is the last hope of the common man and the only independent institution in any democracy.<sup>75</sup> The nation's chief Judge said that in keeping with the aim and objective of the National Judicial Institute, the 2015 Conference accord participants the avenue to discuss and disseminate information about any part of its activities to the extent deemed justified by the Board of Governors generally as a contribution towards knowledge.<sup>76</sup> He further stated that;

*The judiciary is the only indispensable institution in any democracy. Indeed, it would not be an exaggeration to state that the judiciary has been the lynchpin to the stability of our democracy. Despite the oft publicised*

<sup>69</sup> *ibid*

<sup>70</sup> Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (McGraw-Hill Ryerson 1987); John Bell, *Judicial Cultures and Judicial Independence*, 4 *Cambridge YB Eur Legal Studies* 47 (2001).

<sup>71</sup> *ibid*

<sup>72</sup> «The Basic Law of the Hong Kong Special Administrative Region of the Peoples Republic of China» Chapter 1, *basiclaw.gov.hk*, 17 March 2008, accessed 2016-07-14.

<sup>73</sup> Hundreds of Hong Kong lawyers in silent march against Beijing oath ruling". *South China Morning Post*, 8 November 2016.

<sup>74</sup> Opinion of Hon. Chief Justice Mahmud Mohammed, Nigeria: Justice can't be for sale where judiciary is truly Independent. <http://allafrica.com/stories/201511260112.html> accessed on the 21st July 2017

<sup>75</sup> *ibid*

<sup>76</sup> *ibid*

shortcomings, it cannot be denied that the judiciary has worked assiduously to live up to its description as the last hope of the common man. The very right of a candidate to stand for an election has in fact been made sacrosanct by the decision of our courts. It was also a court that underpinned the independence of the civil service from the influence of political parties with the ban on civil servants being card carrying candidates of political parties while in service. The judiciary similarly adjudicated in disputes between states and the federation, which have had a lasting stabilizing fiscal effect upon the Nation as seen in the resource control case. These understated contributions, among the numerous judicial contributions that are so often forgotten, have nevertheless proven to be pivotal to the strengthening of our democratic values. However, these notable decisions have been achieved in spite of limitations to the fiscal and physical independence of the judiciary.<sup>77</sup>

In a country where the judiciary is free to uphold the rule of law it would definitely reflect on the democracy of that country. The 7<sup>th</sup> American President once remarked in a speech to congress that;

*all the rights secured to the citizens under the constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous judiciary.*<sup>78</sup>

It is however a source of great concern that in a country where an arm of government is appropriated with less than once percent of the national budget, it's difficult to refer to the judiciary has been truly independent.<sup>79</sup> The Constitution prescribes the institutional independence of the judiciary, a fact now acknowledged by the other arms of the government with the recent resolutions by the federal and some state governments to pay the judiciary its outstanding and future budgetary allocations as at when due. However, it is sad to note that the states judiciaries continue to encounter a further burden of facing difficulties in accessing these paltry funds from their executives in order to function.<sup>80</sup> The Executive and the legislature have failed to remember that judicial independence is not only pertinent but also necessary to the existence of a country, because it is the independence that gives credibility to the scales of

<sup>77</sup> Ibid 26

<sup>78</sup> Edenfield, Paul L. "No More the Independent and Virtuous Judiciary?: Triaging Antidiscrimination Policy in a Post-Gilmer World." *Stanford Law Review* (2002): 1321-1357.

<sup>79</sup> Opinion of Hon. Chief Justice Mahmud Mohammed, Nigeria: Justice can't be for sale where judiciary is truly Independent. <http://allafrica.com/stories/201511260112.html> accessed on the 21st July 2017

<sup>80</sup> ibid

justice and allows the citizenry to be rest assured that justice is not indeed for sale.

### *The Distinguishing Elements and Challenges of The Concept of Judicial Independence in Nigeria*

The concept of judicial independence has many elements which can broadly fall under the headings of:

- (i) Appointment and Removal of judicial officers and judicial staff;
- (ii) Security of tenure and remuneration of judges and supporting staff;
- (iii) Budgetary provisions (process);
- (iv) Individual and institutional freedom from unwarranted interference with the judicial process by the executive arm of government and politicians.

#### *1. Appointment and Removal of Judicial Officers and Judicial Staff*

Persons selected for judicial office should be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.<sup>81</sup> In the selection of judges, there shouldn't be any discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.<sup>82</sup> To have a vibrant Judiciary, care must be taken from the onset in the selection or appointment process. Care must be taken that only highly trained, competent, ethical and intelligent men and women are recruited. They must be creative because their creative role in the society is important in carrying out their responsibilities to ensure a balanced society.<sup>83</sup> More so as their decision becomes prudent which will and in the development of the law. Underscoring the importance of appointing competent judicial officers to the bench, Charles Evans Hughes states:

*A poor judge is perhaps, the most wasteful indulgence of the community. You can refuse to patronize a merchant who does not carry good stock, but you have no recourse if you are haled before*

<sup>81</sup> Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly resolutions in November and December 1985

<sup>82</sup> ibid

<sup>83</sup> Sylvester Shikyil, *Challenges of Judicial Independence in Nigeria*

a judge whose mental or moral goods are inferior. An honest, high minded, able and fearless judge is the most valuable servant of democracy, for he illuminates justice as reinterprets and applies the law, as he makes clear the benefits and the short comings of the standards of individual and community rights among a free people.<sup>84</sup>

Putting it more succinctly, Oputa JSC<sup>85</sup>said:

... No one should go to the bench to amass wealth, for money corrupts and pollutes not only the channels of justice but also the very stream itself. It is a calamity to have a corrupt judge. The passing away of a great advocate does not pose such public danger as the appearance of a corrupt judge on the bench, for in the latter instance, the public interest is bound to suffer and elegant justice is mocked, debased, depreciated and auctioned. When justice is bought and sold, there is no more hope for society. What our society need is an honest, trusted and trustworthy Judiciary.

In capturing the harm that a corrupt judge will inflict in the society UWAIS JSC said:

A corrupt judge is more harmful to the society than a man who runs amok with a dagger in a crowded street. The latter can be restrained physically. But a corrupt judge deliberately destroys the moral foundation of society and causes incalculable distress to individuals through abusing his office while still being referred to as honourable.<sup>86</sup>

Dr. Akinola Aguda<sup>87</sup> seemed to be thinking along these lines when he said:

It is beyond dispute that to sustain a democracy in the modern world, an independent, impartial and upright Judiciary is a necessity.<sup>88</sup>

Chief Afe Babalola (SAN) giving a lecture on 'The Role of The Judiciary in The Sustenance of Democracy in Nigeria', stated that;

<sup>84</sup> Charles Evans Hughes in 1925 as part of a Presidential address to the American Bar Association.

<sup>85</sup> Oputa C, "Judicial Ethics, Law, Justice and the Judiciary", A Journal of Contemporary Legal Problems Vol. 1 No. 8

<sup>86</sup> Uwaifo JSC valedictory speech, reproduced in (2005) I SCNJ at 20

<sup>87</sup> Aguda A, The judiciary in the government of Nigeria, New Horn Press, Usadem, 1983.

<sup>88</sup> Oputa C, "Judicial Ethics, Law, Justice and the Judiciary", A Journal of Contemporary Legal Problems Vol. 1 No. 8.

when appointment of men and women to the bench is premised on extraneous considerations such as god-fatherism, political connections, religious leanings, "federal character" (without any regard for merit and competence) and monetary inducements, the ultimate victim is JUSTICE. The society is bound to suffer and bear the brunt of the consequences of having incompetent judges on the Bench.

Two methods of appointments can be discerned from the Constitution of the Federal Republic of Nigeria 1999 namely:

- (i) The first method is appointment by the President or Governor acting on the advice of the National Judicial Council and subject to confirmation by either the Senate or the House of Assembly of a State as the case may be. The judicial officers affected by this method of appointment are Chief Justice of Nigeria,<sup>89</sup> President of the Court of Appeal,<sup>90</sup> Chief Judge of the Federal High Court,<sup>91</sup> Chief Judge of The High Court of Justice FCT Abuja,<sup>92</sup> Chief Judge of State High Court,<sup>93</sup> Grand Khadi of the Sharia Court of Appeal FCT Abuja,<sup>94</sup> Grand Khadi Sharia Court of Appeal of States,<sup>95</sup> President of the Customary Court of Appeal FCT Abuja,<sup>96</sup> President of the Customary Court of Appeal of a State<sup>97</sup> and President of the National Industrial Court. The real makers of the appointment appear to be the National Judicial Council.<sup>97</sup>
- (ii) The second method of appointment is by the President or Governor acting on the recommendation of the National Judicial Council. No confirmation by either the Senate or House of Assembly is required. Judicial officers in this category are: Justices of the Supreme Court of Nigeria,<sup>98</sup> Justices of the Court of Appeal,<sup>99</sup> Judges of the Federal High Court,<sup>100</sup> Judges of the High Court of Justice FTC Abuja,<sup>101</sup> Judges of the High Court of Justice of States,<sup>102</sup> Khadis of the Sharia

<sup>89</sup> Section 231(1) CFRN 1999.

<sup>90</sup> Section 238(1) Ibid

<sup>91</sup> Section 250(1) Ibid.

<sup>92</sup> Section 256(1) Ibid.

<sup>93</sup> Section 271(1) Ibid.

<sup>94</sup> Section 261(1) Ibid

<sup>95</sup> Section 276(1) Ibid.

<sup>96</sup> Section 266(1) Ibid.

<sup>97</sup> Section 281(1) Ibid.

<sup>98</sup> Section 231(2) CFRN 1999.

<sup>99</sup> Section 238(2) Ibid

<sup>100</sup> Section 250(2) Ibid

<sup>101</sup> Section 256(2) Ibid.

<sup>102</sup> Section 271(2) Ibid.

Court of Appeal FCT Abuja,<sup>103</sup> Khadis of the Sharia Court of Appeal of States,<sup>104</sup> Judges of the Customary Court of Appeal FCT Abuja,<sup>105</sup> Judges of the Customary Court of Appeal of States,<sup>106</sup> and Judges of the National Industrial Court.

Discretion is vested on the President or Governor even in relation to the above. While they cannot appoint a person, who has not been recommended by the Council, they are not bound to appoint a person on whom a favourable recommendation has been made. Where the President or the Governor turns down a person recommended by the Council or the Commission, a non-recommended person cannot be appointed. The Council or Commission must be requested to recommend other persons. This is where the politicking comes in. Appointments with Judicial Service Commission at the State level are often made based on political affiliation and political accounts are taken into consideration on the case of recommendation. For example, in the composition of the State Judicial Service Commission, it is to be comprised of the following members:

- (a) The Chief judge of the State who shall be the Chairman;
- (b) The Attorney General of the State;
- (c) The Grand Khadi of the Shariah Court of Appeal of the State if any;
- (d) 2 Members who are legal practitioners and who have been qualified to practice as legal practitioners in Nigeria for a period of not less than 10 years; and
- (e) 2 other persons not being legal practitioners who in the opinion of the Governor are of unquestionable integrity.<sup>107</sup> The appointment of the Attorney General of a state and 2 members from the private bar and 2 other persons who are non-legal practitioners to the Judicial Service Commission are often abused in practice. They are appointed contrary to the constitution based on political considerations and more often than not are used to veto important decisions of the Chief Judge of the state especially where the decisions do not go down well with the interest of the state. Appointment is based on undue emphasis on geopolitical or ethnic considerations and in the process utterly incompetent people are appointed based on these considerations. Removal of judicial

<sup>103</sup> Section 261(2) Ibid.

<sup>104</sup> Section 276(2) Ibid.

<sup>105</sup> Section 266(2) Ibid.

<sup>106</sup> Section 281(2) Ibid.

<sup>107</sup> See Part II of the Third Schedule to the CFRN 1999

officers under our present dispensation is done by the President or Governor upon an address presented by at least two third majority of the appropriate legislative house calling for such removal on the ground of misconduct or inability to discharge the functions of the office (in the case of the Chief Justice of Nigeria/State Chief Judge) or on the recommendation of the appropriate judicial service commission (in the case of other judicial officers).

It is clear from the above that appointment and removal of judges in Nigeria have been mainly in the hands of politicians, civilians or military as the case may be. A lot of judges have faced and some are still facing harassment at the hands of politicians. During the 2nd Republic, the nation witnessed spate of harassment of some judicial officers by politicians.<sup>108</sup> For instance, sometime in 1982, a frantic attempt was made to remove the then Chief Judge of Bauchi State, Hon. Justice Piper. He was later forced to retire at the end of 1982. At about the same time the then Chief Judge of Benue State Hon. Justice J. M. Adesiyun was having a rough time with the State legislature. The then Chief Judge of Cross Rivers State Hon. Justice Ileofreh was not having it easy with the executive. In July/August 1982, a determined effort was made by both the executive and the legislature of Borno State to remove the then Chief Judge, Hon. Justice Kalu Anyah. He was eventually removed in early 1983.<sup>109</sup> The Chief Judge of Plateau State, Hon. Justice A. O. Obi was also under press attack by a political party in the state. His appointment was even challenged although unsuccessful in the court. Also in Sokoto State, the Chief Judge of Sokoto State also had it rough with the legislature on grounds that were strictly political but she challenged the action of the legislature and successfully too at the Federal High Court sitting at Abuja.<sup>110</sup> Also, the mellow drama between the out gone Chief Justice of Nigeria, Justice Aloysius Katsina Alu and the suspended President of the Court of Appeal, Justice Ayo Isa Salami. In brief the suspension of the President of the Court of Appeal (PCA) Justice Ayo Isa Salami by the National Judicial Council (NJC) over his refusal to apologize to the NJC and the then Chief Justice of Nigeria (CJN), Justice Aloysius Katsina Alu, and his compulsory retirement by President Good luck Jonathan who acted under his constitutional authority and the subsequent recall of Isa Ayo Salami from Suspension by the NJC which suspended him and the refusal of President Good Luck Jonathan to

<sup>108</sup> "Epilogue" To Agudu T. A. "The Judiciary in the Government of Nigeria", Pp. 175 – 182.

<sup>109</sup> He subsequently challenged his removal in court. See Hon. Kalu Anya Vs Attorney General of Borno State & Ors (1983) FCA/K/141/81 of 12/4/83 (1984) 5 NCLR 401.

<sup>110</sup> See the Judgment of the Federal High Court of Nigeria Abuja in Hon. Justice Aisha Sani Dahiru Vs National Judicial Council & 3 ors Suit No. FHC/ABJ/CS/426/2008 (Unreported) delivered on the 6th of November 2008.

approve the acts of the NJC raises questions regarding the partisan nature and level of Independence within the Nigeria Judiciary.

## 2. Budgetary Provisions (Process)

The involvement of the Federal<sup>111</sup> Government of Nigeria and State Government as the case may be in the budget process of Courts in Nigeria is an indication of the extent of judicial independence in Nigeria. Unchecked domination of one branch over the other can produce dysfunctional budgetary allocation process. In Nigeria, this plays down especially at the state level. Clear out constitutional provisions are recklessly ignored by the Governors of the States particularly with regards to capital expenditure for state judiciaries. The constitution provides: "Any amount standing to the credit of the Judiciary in the consolidated Revenue Fund of the State shall be paid directly to the heads of the Courts concerned".<sup>111</sup> This provision rather than be complied with by the State government is often breached especially where the head of Court within the state is not in the good books of the Governor of the State. This dysfunctional budgetary allocation has given rise to disastrous situation for the Judiciary.<sup>112</sup> Absence of funds can lead to non-availability of physical structures or grossly inadequate structures like Court halls, chambers, Registries and offices for supporting staff which will in turn affect the flow of cases and other essential services thus leading the system not been able to face the demand and deliver the requisite justice demanded.<sup>113</sup> Sometimes salaries and allowance of supporting staff can be too low and in arrears for months thereby creating an atmosphere of frustration and discontentment, which normally breeds indiscipline corruption and eventually breakdown of the system. It is rather unfair that the Executive arm determines the army of officers it maintains every year and the Legislature makes laws about the disbursement of revenue.<sup>114</sup> Of course, the Legislature and the executive between them can always vote what they want for themselves; whilst the judiciary, the 'third arm' is allocated what the other two deem fit. It leaves the judiciary in a position of going on bended knees to request for whatever it needs. If anything at all, the situation discussed above does not make for the independence of the Judiciary.

<sup>111</sup> Section 121(3) CFRN 1999.

<sup>112</sup> Universal Charter of the Judge (Central Council of the International Association of Judges) (1999)

<sup>113</sup> "Epilogue" To Agudu T. A. "The Judiciary in the Government of Nigeria" op cit, Pp. 175 – 182.

<sup>114</sup> Agbakoba, The Judiciary cannot be Independent without Financial autonomy. <http://www.vanguardngr.com/2013/01/judiciary-cant-be-independent-without-financial-autonomy-agbakoba-san/> accessed 25<sup>th</sup> July 2017

## 3. Security of Tenure and Remuneration of Judges and Supporting Staff

It is said that Magistrates, Area and Customary Court Judges and Shariah Court Judges are under the Constitution of the Federal Republic of Nigeria not covered by the term "Judicial Officers". They are appointed, promoted and subjected to disciplinary control by the various states Judicial Service Commission,<sup>115</sup> even though they perform the bulk of judicial work and closer to the grassroots, their usefulness is undermined. One wonders why they can be referred to as non-judicial officers. Remuneration at the Superior Courts of records level has been greatly improved upon in recent years even though there can still be room for improvement, compared with their colleagues in other developing and transition states particularly having regard to the volume of work and the environment in which they operate. The major problem has to do with judges of the lower courts. They are not covered. They take home peanuts. Their salaries, allowances, environment and social facilities both in their places of work and family matters are pathetic. This paves way for manifest corruption and ineptitude and generally lack of seriousness to work. Notwithstanding the improved salaries of the Superior Courts of records, allegations of corruption, continuously rears its ugly head in the cause of public discourse and judges of superior courts have been dismissed on proven allegation thereby casting a huge question mark on the independence of the Nigerian Judiciary. Only recently, some justices of the Court of Appeal were dismissed by the National Judicial Council for receiving bribes on the course of hearing of election petition cases.<sup>116</sup> We also witnessed the probing of judges of the High Courts, a Customary Court of Appeal judge, and a Shariah Court of Appeal Judge who were investigated and arrested by security operatives for allegedly carting away large sums of money in Akwa Ibom State in an election petition tribunal. Two factors propel judicial officers to engage in corruption namely:

- (1) Greed. This simply mean that some judges want to style themselves after the ostentations lifestyles of politicians. They also want to live a life of affluence, by amassing so much wealth without thinking of the consequences of such actions.
- (2) Habit – There seems justification to conclude that some judicial officers appeared to carry over this habit from the lower bench to the higher bench.

<sup>115</sup> Paragraph 5 Part II of the Third Schedule to the CFRN 1999.

<sup>116</sup> Oputa C, "Judicial Ethics, Law, Justice and the Judiciary", A Journal of Contemporary Legal Problems Vol. 1 No. 8

*4. Individual and Institutional Freedom from Unwarranted Interference with the Judicial Process by the Executive arm of Government and Politicians.*

The history of the Judiciary around the world demonstrates that the greatest danger of interference comes from other government institutions or political parties. An independent Judiciary must not only be independent in unwarranted interference with the judicial process by the executive arm of government and politicians but it must appear to be independent. This brings into operation the popular adage **"Justice must not only be done, but also must seem to be done"**. To remain just, the courts must not be influenced by any outside sources or appear to be capable of such influence. To aid such a perception, they must have no real or apparent contact with a political party. If such contact exists, they would appear to be biased in favour of the policies of that party or if the party controls the state, to be biased in favour of the state, succumbing to pressures from the executive arms to inappropriate interference with judicial independence. Access to judges outside official channels has been one of the greatest problems that further threaten the independence of the Judiciary in Nigeria.<sup>117</sup> Governors of states have direct access to judges within the state even as it relates to matters in court and lawyers and clients often boast of their accessibility to judges or even to panel of an election petition hearing particular cases. Thence the unbridled access to judges and justices amount to self-erosion by the Judiciary of the principle of independence of the Judiciary.

*5. Court Pronouncements*

This is however not to say the Judiciary have not at all performed creditably in some spheres of human endeavours. The courts have made notable pronouncements in the judgments delivered during this democratic dispensation, testing the supremacy of the constitution are the interpretation of the laws used by the government in the pursuit of its economic policies like Revenue Allocation to states and local governments.<sup>118</sup> The Courts also made pronouncement on funding of newly local government in Lagos State,<sup>119</sup> this decision must have paved the way for the promulgation of the "Monitoring of Revenue Allocation to Local Government Act 2005". The Courts have also decried recklessness in the registration of political parties

by its decision in *INEC Vs MUSA*<sup>120</sup> and more recently, the tenure of the five Governors on tenure elongation.

To summarise the Judiciary is the mighty fortress against tyrannous and oppressive laws. The importance of an independent Judiciary cannot therefore be over emphasized. It is not an overstatement to assert that the Judiciary is the greatest asset of a free people. The Judiciary by the nature of its functions and role is the citizen last line of defence in a free society that is the line separating constitutionalism from totalitarianism.<sup>121</sup> More often than not, the Judiciary has been the sacrificial lambs on the altar of societal imperfection and contradictions. It is however, an incontestable fact that the judiciary occupies a pre-eminent position in the administration of justice not only in Nigeria but in every sane society where there is respect for the rule of law as opposed to rule by brute force. It therefore follows that the independence of judiciary is necessary for the sustenance of the Rule of Law and Democracy.

**Proposed Judicial Reforms in Nigeria/Recommendation**

The need for reforms is brought to the fore by the fact that a bad judicial system has overreaching effects on our economy. When the judicial system is bad, it does not augur well for investment which could also retard economic growth. It is no longer a knotty domestic issue but one that has far reaching effects on the international economy.

Recently, the Chief Justice of Nigeria (CJN) directed that reforms be made in the Judiciary. It is a good development although the composition of the reform panel seems like putting new wine in old bottle. The reform Committee<sup>122</sup> was saddled with the task to "coordinate a comprehensive reform of the country's judiciary."<sup>123</sup> The Chairman of the Committee is Mrs. Bilikisu Bashir, the Secretary of the Federal Judicial Service Commission whose appointment to head the committee was because in the words of the CJN, "you were carefully chosen for the assignment basically because you are the engine room of the federal judiciary. You are in the administration; you have been in the administration. You ought to know what our problems are, because as they say, the wearer of the shoe knows where it pinches. At least, it is our duty to lay the first foundation

<sup>117</sup> *ibid*

<sup>118</sup> See *Buhari Vs Obasanjo* (2005) 2 NWLR (PT 910) 245; *Buhari Vs Obasanjo* (2005) 13 NWLR (PT 941) p. 1. (SC); *Ojukwu Vs Obasanjo* (2004) 12 NWLR (PT 886), p. 169.

<sup>119</sup> See *AGF Vs AG Abia State* (No 2) (2006) 6 NWLR (PT 764) 542. (Resource Control Case), *AG Abia State Vs AGF* (2003) 4 NWLR (PT 809), p. 124.

<sup>120</sup> (2003) 3 NWLR (PT 806) p. 72.

<sup>121</sup> See Umaru, E. "The Role of the Judiciary in sustaining Democracy in Nigeria", in Oyeyepo, Gummi, Umezulike (Eds), *Judicial Integrity, Independence and Reform: Essays in Honour of Hon. Justice M. L. Uwais* (GCON), Enugu: Snapp Press Ltd, 2006 at 178.

<sup>122</sup> Known as the Steering Committee

<sup>123</sup> The Punch Newspapers, Monday July 17, 2017 page 20

for solving our problem; nobody can come from outside to salvage the Nigerian judiciary. The solution must come from within us."<sup>124</sup>

We however have a counter opinion in respect of the above because good reforms cannot come from "within" the system due to the closeness and relationships that exist among the persons in the system. Knowing where the shoe pinches might not necessarily stand the wearer in a position to amend the shoe. Most times, a shoe cobbler, who is a professional and who of course would not have the chance to wear the shoes, is better suited to mend the shoes to suit the wearer. Thus, good reforms can only come from outside the judicial sector, those who have nothing to lose and those who are not within the system.

It might be extreme sometimes but when one does a thing for many years and it does not work, why not do something else? We cannot expect to do a thing the same way and get different results. The mixture of the primary colours of red and yellow would always bring orange. But if you think it is extreme, perhaps the following are not:

1. Ensuring the independence of the judiciary would ensure that the judiciary is impartial in the discharge of its duties. This can be done by making the judiciary indeed independent in all realms inclusive of appointment, remuneration, promotion and removal. The independence of the judiciary is however undermined by the mode of appointment of the Judges. In the words of Kawu J, "This constitutional arrangement on the appointment and removal of judicial officers by the President or Governor may likely mitigate against the judiciary playing its proper role in the fight against corruption if it is realised that majority of the high profile corruption cases involve both the Executive and the Legislature."<sup>125</sup> Appointments should be done on merit.
2. Application of laws ensuring fast-track determination of criminal trials especially as they border on corruption- In Nigeria, it is rampant for cases in Nigeria to be frustrated by undue and incessant delays in the determination of criminal trials. As a means of abating this phenomenon of delays, there are laws ensuring the speedy administration of criminal justice in Nigeria. Such laws include the **Administration of Criminal Justice Act, 2015** and the **Court of Appeal Practice Directions, 2013**. It must however be noted that while it is not the duty of the Judiciary to make these laws (except of course the Practice Directions made by the Head

<sup>124</sup> Ibid

<sup>125</sup> Ibid

of the Courts), it is the sole and unmistakable duty of the Judiciary to ensure the interpretation and application of these laws. It is our belief that of due credence are given to these laws, we might gradually be saying goodbye to corruption. There is also a need for a monitoring team to monitor the adherence with these laws.

3. There is a need to create special courts or tribunals on corruption. This would reduce the workload of Judges and ensure that criminal trials on corruption are done on a daily basis and at a fast pace.
4. There should be increased efforts by stakeholders in the Judiciary to ensure that the Judiciary does not fight a lone battle. There should be concerted efforts by all the arms of government alongside civil societies, professional bodies particularly the Nigerian Bar Association to increase the vigour and the clamour for judicial competence in the fight against corruption.
5. There should be the creation of different law schools for judges and lawyers. After university education, anybody that intends to go to the bench should be made to attend a Judges' law school. This would give him more time to get acquainted with the rudiments of being a judge and also avoid a situation where judges descend into the arena of dispute by almost arguing cases like counsel.
6. Our Judiciary and our law as a whole must give more credence to morality than it is being done. Moral laws are usually taking the back seat behind the "legal" laws. It must however be noted that a society of a high moral standard, imbued with a virile judiciary will no doubt stand a good stead in its battle against corruption. It has been noted that "The control of corruption is better seen as standing on the confluence of law and morality. The law can seek to punish every corrupt act, but its effectiveness would be in doubt if the society it seeks to regulate is not propelled by high ideals rooted in morality...it is the sense of opprobrium in which the society regards a certain conduct that would determine whether that undesirable conduct would endure or be eradicated. Law simpliciter cannot do the trick."<sup>126</sup> The Judiciary should ensure that it does not deliver judgments or orders short of the moral angle of our lives. The level of moral decadence in the society these days is alarming and there is thus an urgent need to curb the menace especially as it relates to future generations.

<sup>126</sup> Adegbite L., "Towards the Evolution of a Corrupt-Free Society: The Role and Duties of the Citizenry", in Awa U, Kalu and Yemi Osinbajo (eds.), *Perspectives on Corruption and other Economic Crimes in Nigeria* (1991), p. 153

7. There is need to grow a corruption-free culture amongst the citizenry and the judiciary has a big role to play in this respect. The Judiciary must ensure that its judgments are laced with enhancing a modest and upright culture with particular diatribe for a departure from the said culture. Judicial education of an identified culture is key. According to **Waziri**, "To stop corruption and other economic crimes, the society needs urgently the growth of a culture to be developed among the people, and this must be done through education... (which) must be expanded massively before effective control on corruption can be achieved... Given the right type and level of education, an acceptable and useful political development will emerge with political factors which can be used as powerful weapons against corruption and economic crimes."<sup>127</sup>
8. This point might be somewhat strange but it is practical. As regards corruption, there should be a slight change in the burden of proof of corruption and the law should be so applied in that manner. It has been argued that "A slight amendment, modification or suspension of Section 33(5) of the Constitution of the Federal Republic of Nigeria, 1979, as amended (now 1999 Constitution), which stipulates that: "every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty" would be necessary. There should be a provision to the effect that the burden of proving that an officer in the public or private sector is not living at a level beyond his legal or lawful income should be on him. Such a provision, though against the present right of a citizen to be presumed innocent until proven guilty would be reasonably necessary in the light of present day experiences to stem the rising tide of official corruption in the establishments earlier enumerated." Once you are a public officer or civil servant and you are seen living beyond your means, it is only logical for the burden to shift to him to show how he came about the expensive lifestyle.
9. There should be more steps to be taken on corruption problems associated with enforcement of provisions of the law relating to corruption and economic crimes under the domestic jurisdiction when it assumes an international character especially because the Nigerian law does not allow trial of an accused person in absentia.<sup>128</sup>

<sup>127</sup> Waziri A.A., "Anatomy of Corruption and other Economic Crimes

<sup>128</sup> Ayoade M.A., *Eradication of Corruption and Other Economic Crimes Within the Administration of Justice- (Problems and Prospects)* (eds) Perspectives on Corruption and Other Economic Crimes in Nigeria, Kalu A.U., Osinbajo, Y., (Federal Ministry of Justice, Lagos) 1991

- Procedures for such trials which include extraditions, judicial assistance, recognition of foreign penal judgments in domestic courts and transfer of offenders and execution of sentences of foreign courts are usually cumbersome and not easy to come by.
10. More man-power should be provided in terms of judicial officers. More Judges should be appointed and these appointments should be based on merit. The more number of Judges we have, the less likelihood of a Judge getting a particular case as he would covet. The implication of this also is that cases are tried and concluded early which make the whole anti-corruption exercise easier.
  11. The Judiciary should confer with the Legislature in ensuring that the state of Nigerian laws as they are, are made better. Most Nigerian criminal laws on corruption are inadequate, ineffective and not complex enough to accommodate the complex corrupt cases. The consequence of this is that "Since a judge is expected to apply the law and the penalty prescribed, it may be the case that the punishment imposed by the judge is not commensurate with the magnitude of the crime and the indignation which the society feels towards the offender."<sup>129</sup>
  12. Investigative and Prosecuting agencies, which are part of the judicial system, are also clogs in the wheels of the Judiciary in its fight against corruption. The manner in which the Prosecuting agencies conduct their cases leave so little to be desired and the courts would not have a choice than to decide the cases they way(s) they are presented. How many convictions have been secured by our prosecuting agencies on case of corruption in recent years? What we get is media trial and enough dust to change the complexion of an albino.
  13. The public perception about the judiciary must be made to change. There is usually conviction by people on the pages of newspapers and in their houses. Where for instance, as was seen in the Dasuki gate issues, that names of certain politicians came up as having received money from Dasuki whether directly or indirectly, anytime such persons were exonerated (for apparently not being connected to the crime), people begin to subject such courts to ridicule claiming that the judges who man such courts are corrupt.
  14. Our anti-corruption laws should also be strengthened so as to make punishments actually commensurate with the offences committed.

<sup>129</sup> Kawu Ibid

The ready example that comes to mind is the case of **Atiku Kigbo** who reportedly stole billions but was only sentenced to two years imprisonment with an option of N750, 000.00 fine which he gladly paid. The judge found him guilty in the case but when it came to his punishment, the Judge had no discretion in the matter but to apply the punishment as stated in the extant laws. The extant laws just made blanket provisions for the offence without making variations based on the figure or amount of money stolen. At this stage, a Judge cannot be expected or be seen to apply a punishment not circumscribed in the law.<sup>130</sup>

15. There should be strict (not rigid) adherence to precedence by the bench. We see examples of cases where Judges without any just cause/reason make express turnaround from their previous judgments thus making the law uncertain. This with respect could be another form of judicial corruption and a solution must be found to same to the effect that precedence is followed jealously.
16. The holding of monthly meetings of heads of superior courts is suggested, especially the Court of Appeal. Most of the decisions of the Court of Appeal are conflicting and there is absolutely no principle of law that does not have a decision in its favour. It is difficult to advise clients on what is the current position of the law as the position of the law is not settled on any case. When meetings are organized, it gives room for comparison of notes and judgments and ensures stability.
17. The quality of Judges in their appointments should be increased. Instances abound where persons who are not qualified to sit on the bench and never had a minute of practice are appointed as Judges just because they are qualified lawyers. This affects the nature of their judgments and causes what may be termed as "corruption of the brain." An unqualified judge would do all he can to hide his incompetence and ensure that the whims and caprices of his appointers are obeyed and followed.
18. The executive and security agents must act in concert with the judiciary to ensure the fight against corruption is successful. The Dasuki case has stalled because the Department of State Security has refused to release Dasuki on bail despite many courts granting same. Dasuki's lawyers have claimed they cannot proceed with the case because Dasuki has been deprived access to them. When cases

come up, both the EFCC and the DSS trade blames on in whose custody the accused person is and who has the duty to produce him.

19. The extant law governing criminal procedure in Nigeria is the **Administration of Criminal Justice Act, 2015**. However, the law does not provide for what happens when a Judge who has partly heard a matter stops hearing the matter as a result of transfer or elevation. The consequence of this is that the trial of the case commences de novo irrespective of the state at which the matter was before the stall.
20. The modes of appointment into the NJC should be revisited. The apparent almighty powers of the CJN in this regard must be bridled down. The reason for this should be a query that "what if the CJN himself is guilty of the alleged misconduct?" can he be a judge in his own case or appoint the judges in his own case? The answer is an obvious "No". The composition of the NJC should include more legal practitioner than Judges, activists, trade unionists, trade unionists, spiritual leaders, representatives of anti-corruption agencies, security agencies, etc so as to avoid the issues we have now.
21. The policy that when petitions are written against Judges but are unproved would mean dealing with the petitioner is wrong and would not encourage the writing of petitions by persons.
22. The codes of conduct of judicial officers should be clearer and more spelt out so as to attain clarity in the law.
23. Sequel to (2) above, the punishments for the offences should be spelt out and clearer to meet the offences prescribed. The punishments should not be at large and should be circumscribed to attain certainty.
24. It must be noted that no single Justice of the Court of Appeal or the Supreme Court has ever been punished for running afoul of the NJC code of conduct.<sup>131</sup> The net should be extended to the higher bench. Who knows what would be found therein.
25. There is a need for the protection of whistle blowers especially as they relate to the judiciary. In a case where the rule on whistle blowing provides for prosecution if the information is found to

<sup>130</sup> Ibid

<sup>131</sup> It must be noted that the NJC apologized to and reinstated Hon. Justice Isa Ayo Salami after his initial suspension and nothing was done to Hon Justice Katsina Alu. The apology

be false could discourage people from embarking on such. Let such whistles be blown and where they are found to be false, a vindication of the person against whom such whistle is blown is enough.

26. There should be an independent monitoring team for the assessment of sitting Judges and the quality of their judgments. The norm is usually a review by the body created by the judiciary but having an independent body, comprised of lawyers another persons of credible character would go a long way in achieving the intended.

## Conclusion

A lot has been said about the roles which the judiciary plays in the entrenchment of democracy in Nigeria. In *Onagoruwa v. Inspector General of Police*,<sup>132</sup> the Court of Appeal, per TOBI J.C.A (as he then was) held as follows:

*Nigeria is a democracy and by the grace of the Almighty God, it will remain a democracy for all times. The foundation for any democracy is anchored on the Rule of Law both in its conservative and contemporary meaning. Putting it naively, we are paid mainly and essentially to uphold the Rule of Law in the entire polity. And so, once we fail to uphold the Rule of Law, anarchy, despotism and totalitarianism will pervade the entire society. The social equilibrium will be broken. Law and order breaks down. Everybody will be his own keeper and God for us all. We, as Judges, cannot afford to see society decay to such an irreparable level. We must rise up fully to our duties by vindicating the tenets of the Rule of Law in our practiced democracy.*

Without the judiciary and a serious one at that, we have a situation which Thomas Hobbes rightly described as follows: "To this war of every man against every man, this also in consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is common power, there is no law, where no law, no injustice. Force, and fraud, are in war the cardinal virtues. No arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death: and the life of man, solitary, poor, nasty, brutish and short."<sup>133</sup>

offered to Hon Justice Isa Ayo Salami could only mean one thing, that Hon Justice Katsina Alu was guilty. It remains to be seen if and how the two Justices could be vindicated at the same time considering the nature of the accusations made by them against each other.

<sup>132</sup> (1991) 5 NWLR (Pt. 173) 593 at 650

<sup>133</sup> Chapter 12 of the Leviathan, 1651 available at <http://www.rjgeib.com/thoughts/nature/>

There is a seemingly apparent need for the society to take a stand-point on the need to have reforms in the judiciary as the judiciary is sine qua non to our development as a nation. We cannot afford to stand aloof and disinterested. A famous writer once noted that:

*We know what happens to people who stay in the middle of the road. They get run over.*<sup>134</sup>

<sup>134</sup> [hobbes-quotes.html](http://hobbes-quotes.html) assessed on 4th July, 2017

<sup>134</sup> Aneurin Beran (1897-1960). See the Observer, 1953