THE LIMITATIONS OF THE JUDICIARY UNDER MILITARY REGIMES IN NIGERIA

BY

DAVID CARL JOHN

BEING A THESIS SUBMITTED TO THE POSTGRADUATE SCHOOL AHMADU BELLO UNIVERSITY IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS (LL.M.)

DEPARTMENT OF COMMERCIAL LAW, FACULTY OF LAW

AHMADU BELLO UNIVERSITY, ZARIA.

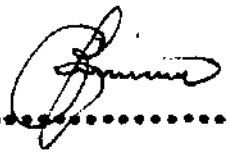
1993.

COPYRIGHT*

ALL RIGHTS RESERVED, INCLUDING THE RIGHT TO REPRODUCE THIS WORK OR PORTION THERE OF EXCEPT WITH THE PRIOR PERMISSION OF THE AUTHOR

D E C L A R A T I O N

I hereby declare that I am the Author of this Thesis in its entirety. It has been written after an assiduous and extensive Research work. Nobody had ever presented it in any previous application for a higher Degree. All quotations, citations and references are indicated with specific acknowledgements.



.....

D. C. JOHN.
STUDENT.

C E R T I F I C A T I O N

This Thesis entitled; "The Limitations of the judiciary under military Regimes in Nigeria", meet the regulations governing the degree of Master of Laws (LL.M.) of Ahmadu Bello University and is approved for its contribution to knowledge and literary presentation.

..... 6th Oct. 1995

CHAIRMAN SUPERVISORY COMMITTEE — DATE

..... 5th Oct., 1995

MEMBER, SUPERVISORY COMMITTEE — DATE

..... 5/10/95

HEAD OF DEPARTMENT PUBLIC LAW. — DATE

..... 14/6/96

DEAN, POSTGRADUATE SCHOOL — DATE.

A C K N O W L E D G E M E N T

I am very grateful to my supervisor, Mrs. Ayua (Mrs), who worked tirelessly to see that my Research is completed successfully. Her useful suggestions and directions helped me in no small measure at every progress of my work. I also owe my thanks to Mr. Mahmud Jamo, my other supervisor whose intellectual contribution and advice enriched the contents of my work immensely.

I extend my thanks to professor John Samba, my former Head of Department, Commercial Law, F Ahmadu Bello University, Zaria, now the Dean, Faculty of Law, Benue State University for his unusual interest in my work.

Perhaps, it will not be too much to express my appreciation to my present Acting Head of Department Mr. T.A.T. Yagba who continued to encourage me to expedite my work.

Finally, my thanks go to Mrs. Ruth S. Yahaya who carefully typed this work.

I assume responsibility for any defect in form or substance in this Thesis.

D E D I C A T I O N

This Thesis is dedicated to all those that believe in achieving success through private and independent struggle. I also dedicate this work to my parents Mr and Mrs John Anga for grooming me into what I am today.

A B S T R A C T

BACKGROUND TO THE STUDY.

Law and justice are as old as mankind. There is no society that can exist without Law and justice. It can also be said that no political system will succeed if it lacks a sustainable legal framework. Nigeria as a country is no exception. Since independence and infact before it and thereafter, Nigeria had been trying to establish a sound political system based upon a strong and formidable legal framework. But the frequent intervention of the military in the political arena and the inability of the judiciary to effectively interprete the supreme law of the land (i.e. the Constitution) made this impossible. Hence the essence of this research.

For instance before Nigeria got her independence from the British in 1960, there were some forms of legal framework in existence. In the northern part of Nigeria, there was the Sharia Laws applicable to the Muslim and native customary laws and customs applicable to the northern minorities. In Southern and other parts of Nigeria, native laws and customs were applicable.

With the colonisation of Nigeria by the British around the 18th and 19th century, English Common Law, doctrines of equity and good conscience was introduced into Nigeria. The Sharia Laws, native Laws and customs already in existence were allowed to exist but subject to

to alteration and modifications based upon 'repugnancy test' of equity and good concience.

At independence in 1960, the Nigerian judiciary remained almost the same as the British Colonialists established it.

The new civilian regime took over the political administration of Nigeria under the 1960 independent constitution and the 1963 Republican Constitution. These constitutions were based upon the British parliamentary system of government. This marked an important march towards the practice of democratic system of government in Nigeria.

Unfortunately, the civilian regime did not last long. There were reports of official corruption, mismanagement and embezzlement of public funds by government officials. Ethnicity, regionalism, and sectionalism were the politics of the new civilian regime.

This bad political situation gradually pushed Nigeria into anarchy. The military quickly moved in and took over the civilian government through a bloody coup d'etat on the 15th January, 1966. The judiciary found it rather difficult to question the validity or invalidity of the new military regime. This marked the end of the first republic and the civil war started in 1966.

The military held on to power even after the civil war from 1966 to 1970. There were series of coup d'etats and counter coup d'etats even within the military. It was on the 1st October, 1979 that the military regime of Major General Murtala/Obasanjo

handed over political power to the civilian regime of Shehu Shagari. Thus began the second Republic with the 1979 presidential constitution.

Like the 1960 and 1963 constitution; the Executive, legislative and judicial powers were enshrined in the 1979 Federal Constitution. The constitution of the Federal Republic of Nigeria, 1979, was declared to be the supreme Law of the land with democratic principles of separation of powers, Rule of Law and independence of the judiciary.

The civilian regime lasted for only four years (1979-1983) and it was about to begin its second term, but unfortunately the military struck again on the 31st December, 1983. Again the judiciary was in a state of indecision either to declare the military putsch illegal or not.

The Buhari/Idiagbon's military regime did not last long. It lasted for about 20 months (December 31, 1983 - August 27, 1985). General Babangida took over by a counter coup d'etat on 27, August, 1985. Babangida military regime also witnessed series of counter coups which were unsuccessful with lost of several lives. He promised to handover to the civilian regime in August 27, 1993. It proved futile and led to the most serious historic political impasse in Nigeria following the annulment of the June 12, 1993 election by the Babangida regime. Once more the Nigerian judiciary was plunged into serious confussion. Court's rulings and orders were more often than not disobeyed especially by the military.

Several high courts were passing series of injunctions and orders against the rulings and decisions of similar courts of egual jurisdiction. Even the Supreme Court was denied the power to interprete or adjudicate on matters affecting the military in power.

The Babangida regime was forced to 'step-aside' and usherred in the Interim National Government of Ernest Shonekan to serve as a temporary civilian administration until another election was held.

The interim National Government did not last long. It was 'technically' overthrown and replaced by General Sani Abacha, another military regime. At the time of the writting, the Abacha regime is finding it difficult to govern the unstable political system. Meanwhile, the judiciary seems to be awaken to its constitutional function of interpretation and adjudication of conflicts and disputes between the civilians and the military in power by making series of Judicial Pronouncements. The military always countered the courts decisions by passing 'ouster clauses' decrees which prohibits the courts from deciding any matter that involves the military administration.

This dissertation is concerned with the handicaps or limitations of the judiciary whenever there was a military putsch. The problems of which the research work will be unearth and possible solutions will be made.

NECESSITY OF THE RESEARCH WORK

The incessant change of government in Nigeria by extra-constitutional means (coup d'etats) especially by the military and the incapacity of the judiciary to question the validity or invalidity of these military regimes makes this study important.

In addition to the above, the military regimes usually pass out decrees and edicts which not only oust the jurisdiction of the courts, but also suspend or amend the constitution thereby making the judiciary too weak to function properly makes this study possible.

Since Nigeria got her independence from Britain in 1960, she was not able to practice democracy properly because of frequent military intervention. The supreme law of the land, that is the constitution which provided for the seperation of power, Rule of law and independence of the judiciary is either suspended in part or modified by military Decrees and edicts. This created serious limitations on the part of the judiciary, hence the need for this study.

POSSIBLE PROBLEMS THE RESEARCH WORK WOULD UNEARTH.

The problems which the research work will highlight is the continous and frequent causes and effects of military intervention in Nigerian politics by extra constitutional means.

Another problem is the effect of military legislation e.g. the Ouster Clauses in the Military Decrees and Edicts on the performance of the judiciary. It has been observed that such ouster clauses inhibit the judiciary from functioning properly under the

military regime.

Finally, the research work, would critically examine the short comings of the judiciary under the military government and, then advance possible solutions. Suggestions will be made also to help the judiciary to stem the tide of limitations placed upon the judiciary by military legislations.

SEQUENCE OF THE ENTIRE RESEARCH WORK

Chapter One takes a general look of the Nigerian judiciary from historical perspective. It starts by examining the meaning and functions of the judiciary and ends up by analysing the Nigerian judiciary before the advent of the Colonialists, during the Colonial rule; at independence and after independence.

Under Chapter Two, the independence of the judiciary is critically and meticulously examined under a constitutional Government and under military Government with a view to establishing the basis and reasons for the limitations of the judiciary under military regimes in Nigeria.

This gradually takes us into the study of the judiciary and the military government when there is a change of Government through extra-constitutional means. This is discussed extensively under chapter three.

In Chapter Four, the various limitation of the judiciary under military regime such as the effects of ouster clause, Decrees and Edicts in the exercise of legislative and judicial power; the est-

ablishment of military tribunals in place of ordinary or regular courts; the nature and manner of appointment and removal of judicial personnel and the poor funding of the judiciary. This actually limits the judicial Review power of the courts in no small measure.

Finally, Chapter Five analyses and pinpoints the problems associated with the research work such as the limitations of the judiciary whenever there is a change of government by extra-constitutional means, Suggestions are also made as to how the courts should react in the face of such limitations. This is to inable the courts find possible ways of countering such limitations so that the courses of justice will not be unduly stultified.

TABLE OF CONTENTS

	PAGE
Title Page	i
Declaration	ii
Certification	iii
Acknowledgement	iv
Dedication	v
Abstract	vi - xiii
Table of Contents	viii - xv
Table of Statutes ----------	xvi - xix
Table of Cases ----------	xx - xxii
Abbreviations	xxiii - xxiv

CHAPTER ONE

1.1.1	The Meaning and Defination of Judiciary	1-3
1.2	The Nigerian Judiciary in the Pre-Colonial Period	4-10
1.3	Nigerian Judiciary during the Colonial Era	11-20
1.4	The Nigerian Judiciary at Independence and after Independence	21-27

CHAPTER TWO

INDEPENDENCE OF THE JUDICIARY

2.1	Introduction	28-32
2.2.1	The Meaning of Judicial Independence	32-37

		PAGE
2.3	Independence of the Judiciary under the Constitutional Government	37-39
2.3.1	Independence of the Judiciary Under the 1960 and 1963 Constitutions	30-49
2.3.2.	Independence of the Judiciary Under the 1979 Constitution	49-56
2.4	Independence of the Judiciary Under the Military Government	57-75
2.4.1	Independence of the Judiciary Under the Interim National Government and the Abacha Regime.....	75-93

CHAPTER THREE

THE JUDICIARY AND THE MILITARY GOVERNMENT.

3.1	Introduction	94-96
3.1.1	Nature of Military Regime	97-102
3.2	Legal and Political Justifications of Military Intervention in Nigeria's Constitutional Development	102-127
3.3	The Modus Operandi of Military Regimes in the exercise of legislative power in Nigeria	127-132

CHAPTER FOUR

LIMITATIONS OF THE JUDICIARY IN A MILITARY REGIME.

4.1	Introduction	133-134
4.2	The effects of Ouster Clauses on Judicial Powers.....	135-145

		PAGE
4.3	The Judiciary and Military Tribunals	145-155
4.4	Personnel of the Judiciary	155-157
4.4.1	Appointment and Removal of Judicial Officers under Military Government...	157-165
4.5	Funding of the Judiciary	165-169
	CHAPTER FIVE	
	CONCLUSION	
5.1	Observations	170-174
5.2	Suggestions and Conclusion	175-184.
	BIBLIOGRAPHY	185-188.

TABLE OF STATUTES

		PAGE
A.	NIGERIAN STATUTES	
1.	1861 Treaty of Session	6,7
2.	Colonial Ordinance No.3, 1863.....	7
3.	Supreme Court Ordinance Ni.4 of 1876.....	8
4.	Supreme Court Ordinance No.11 of 1863.....	7
5.	Supreme Court Proclamation No.6 of 1900...	11
6.	Native Court Proclamation No.9 of 1900....	11
7.	Native Court Proclamation No.25 of 1901....	11
8.	Protectorate Proclamation No.4 of 1900...	12
9.	Native Court Proclamation No.1 of 1906....	12
10.	Native Court Procalamation No.5 of 1900..	12
11.	The Supreme Court Ordinance No.6 of 1914.	13
12.	Provincial Court Ordinance No.7 of 1914..	13
13.	Native Court Ordinance No.5 of 1918.....	14
14.	Protectorate Ordinance No.45 of 1933.....	14
15.	West African Court of Appeal Ordinance No,47 of 1933.....	15
16.	Native Courts Ordinance No.44 of 1933....	15
17.	Supreme Court Ordinance No.33 of 1943....	15
18.	The Native Courts (Colony) Ordinance No.7, 1943.....	16
19.	Magistrate Courts Ordinance No.43 of 1943.	16
20.	W. A.C.A. Ordinance No.30 of 1943.....	16
21.	Children and Young Persons Ordinance No.41 of 1943.....	16
22.	Nigerian Constitutional Order-in-Council No.1, 1954.....	16

		PAGE
23.	Native Courts Law No.6 of 1956 of New Nigerian.....	17
24.	Penal Court Laws No.18 of 1959 Cap.89 of New Nigerian.....	17,18
25.	Criminal Procedure Code Law of New Nigerian No.11 of 1900	17
26.	Court of Resolution Law No.17 of 1900.....	18
27.	Western Region of Nigeria Laws, Cap.31 of 1959.....	18
28.	Customary Court Laws No.1 of 1959.....	19
29.	Independence Act 1960 (8 & 9 Eliz 2. C.53.	20
30.	Nigerian Constitution Order in Council No. 1652 L.N. 159 of 1960 Section 1.....	20
31.	The Nigerian Independent Constitution 1960 Sections 1, (2) 105-109, 115-119.....	20,21,22,23 20,26,37,40,41,49
32.	Designation of Ordinance Act No.57, 1961...	20
33.	Mid-Western Region (Transition Provision) Act 1963 No.19 of 1963.....	20
34.	Constitution (Transition Provision) Act, No.21 of 1963.....	20,41
35.	The Republican Constitution 1963..... Section 120.....	23,37,40,41,47,48
36.	The Constitution of the Federal Repu..ic of Nigeria 1979, - Sections 167,169,175,254, 42(1).....	30,38,39,49,50.
37.	The Northern Region 1960 Constitution....	47
38.	Eastern Region 1960 Constitution Section 54.	47
39.	The Constitution of Federal Republic of Nigeria (Enactment) Decree No.25 of 1978....	121

B. OTHER NIGERIAN LEGISLATIONS

1. Constitution (Suspension and Modification) Decree No.1, 1966 Sections 3,(2)b,5,6..... 57,60,98,130

2. The F.M.G.(Constitution Basic Provision) Decree No.32 of 1975 Section 6..... 57,130

3. Decree No.45 of 1965 The forteiture of Assets e.t.c. (validation) Decree 1968.... 66

4. The F.M.G. (Supremacy and Inforcement of Powers) Decree No.28 of 1970..... 65,67,98, 128

5. The Constitution of the Federal Republic of Nigeria (Enactment) Decree No.25 of 1978,189..... 129

7. Robbery and Firearms (Special Provisions) Decree of 1970..... 67

8. Petroleum Production and Distribution (Anti-sanotage) Decree of 1975..... 68

9. Armed Forces and Police (Special Powers) Decree of No.24 of 1967..... 62

10. Constitution (Suspension and Modification) Decree No.1 of 1984 - Section 14..... 57,60

11. The F.M.G. (Supremacy and Enforcement of Powers) Decree No.13 of 1984..... 60,98

12. State Security (Dtention of Persons)Decree No.2 of 1984..... 59,66

13. Recovery of Public Property (Special Military Tribunal(s) Decree No.3 of 1984..... 68,70

14. Public Officers (Protection Against False Accusation) Decree No.4 of 1984..... 148

15. The Special Tribunal (Miscellaneous Offences) Decree No. 20 of 1984..... 148

16. Civil Disturbance (Special Tribunal) Decree No.55 of 1987..... 153

PAGE

17. Presidential Election (Invalidation of Court Orders) Decree No.41, 1993..... 89,111

18. Political Parties (Dissolution) Decree No.9 of 1984..... 66

19. Transition to Civil Rule (Political Programme) Decree No.19 of 1987..... 153

20. Presidential Election (Basic Constitutional and Transitional Provision) Decree No.13 of 1993 Section 19..... 82

21. Constitution (Suspension and Modification) Decree No. 107 of 1993..... 90,130,132,137

22. Interim Government (Baisc Constitutional Provision) Decree No.61 of 1993..... 82,85,126,131,137

23. Constitution of the Federal Republic of Nigeria (Suspension) Decree No.58, 1993.... 86,131,137

24. Constitution of the Federal Republic of Nigeria (Suspension) Decree No.59 of 1993.. 86,131,137

TABLE OF CASES

PAGE

NIGERIAN CASES

1. Awolowo v. Usman Sarki and Anor (1962) L.L.R. 177.. 43,48

2. Amadu Tijani v. Secretary Southern Nigeria (1901) 3 N.L.R. 21 7

3. Adamolekun v. The Council of University of Ibadan (1968) N.M.L.R. 60..... 65,111,136,142

4. Abiola & Ors v. The Federal Military Government (Unreported) Suit Ni.LD/2046/93... 86,87, 171

5. A.G. of 14 SDP States v. The A.G. of the Federation & A.Gs of all N.R.C. States (Unreported)Suit No.SC/140/93 86,87,171

6. Akintola v. Aderemi & Adegbenro (1962) W.N.L.R. 185 44,48

7. Arch Bishop Okogie & ORS V.A.G. Lagos State (1981)1 N.C.L.R. 218 51

8. Bide v. Ibrahim & ORS (Unreported)Suit No. N.S. H.C/IEP83 of 10/9/83 53

9. Chief V.O. Onabanjo v. The Special Military Tribunal, Lagos Zone Area (Unreported)Suit No.M/106/84 74,151,177

10. Chimaroke v. Nwabueze & ORS. (Unreported)Suit No.FCA/E/178/183 of 18/10/83 53

11. D.PP v. Chike Obi (1961)1 All N.L.R. 199..... 41,48,51

12. Dawodu v. Danmola (1958) 3 FSC 46 7

13. Dokun Ajayi Gabiyi v. Alhaji Mustapha & 6 ORS (1992) 8 N.W.L.R. 139 at 148..... 120

14. Doherty v. Balawa (1961) All N.L.R. 604..... 45,149

15. Haliday v. Alapatira (1881)N.L.R.I 9

16. Ikoro & ORS v. Ukpai (Unreported) Suit No.F.C.A./ E/174/83 of 10/9/83..... 54

		PAGE
17.	Ikorie v. Ukiwe & ORS (Unreported) Suit No.FCA/E/175/83 of 18/10/83.....	521
18.	Jackson v. Gowon (1967) Vol.9, p.87.....	143, 149, 150.
19.	Kadiya v. Ar (Unreported) Suit No.S.C. 99/1983 of 30/9/83.....	53
20.	Lakanmi and Kikelomo v. A.G. Western States & ORS. (1971) 1 U.I.L.R. 218	24, 59, 65, 67, 100 110, 138, 142, 177
21.	Minere Amakiri V. R.M. Inowan (Unreported) Suit No. PHC/232/73, of March 22, 1973.....	73
22.	Onoh and ORS. v. Uwobodo (Unreporred) Suit No. F.C.A./E/ 168/83.....	53
23.	Obi v. Mbakwe & ORS. (Unreported) Suit No. HON/EP 1183/H.C Owem.....	53
24.	Olawoyin v. Commissioner of Plice (1961) 2 All NLR 203 at 215.....	45, 48
25.	State v. Ivony Trumpet (1984) 5 N.C.L.R. 736.	52
26.	Shugaba Darman v. Minister for Internal Affairs (1981) 2 N.C.L.R. 459.....	50
27.	State v. Arthur Nwankwo (1985) 6 N.C.L.R. 228	54
28.	Tony Momoh v. Senate of National Assembly (1984) 5 N.C.L.R. 736.....	51

ABBREVIATIONS

N.L.R.	-	Nigerian Law Report
All.N.L.R.	-	All Nigeria Law Report
N.N.L.R.	-	Northern Nigeria Law Report
W.N.L.R.	-	Western Nigeria Law Report
N.R.N.L.R.	-	Northern Region Nigeria Law Report
W.R.N.L.R.	-	Western Region Nigeria Law Report
E.N.L.R.	-	Eastern Nigeria Law Report
N.M.L.R.	-	Nigerian Montly Law Report
N.W.L.R.	-	Nigerian Weekly Law Report
N.C.L.R.	-	Nigerian Constitutional Law Report
L.L.R.	-	Lagos Law Report
U.I.L.R.	-	University of Ife Law Report
S.C.N.	-	Supreme Court of Nigeria
F.S.C.	-	Federal Supreme Court
N.L.J.	-	Nigerian Law Journal
C.L.R.	-	Cyprus Law Report
A. C.	-	Appeal Cases
Q.B.D.	-	Queen's Bench Division
EXC.	-	Exchequer
K.B.D.	-	King's Bench Division
H.L.	-	Honse of Lords
W.L.R.	-	Weekly Law Report
M.C.H.Rev.	-	Michigan Review
Pak. S.C.	-	Pakistan Supreme Court
E.A.R.	-	East African Report
J.A.L.	-	Journal of African Law.

OTHER ABBREVIATIONS

D.PP.	-	Director of Public Prosecution
A. G.	-	Attorney General
Q. C.	-	Queen's Counsel
J.C.P.C.	-	Judicial Committee of the Privy Council
S.M.C.	-	Supreme Military Council
F.M.G.	-	Federal Military Government
Const.	-	Constitution
A.J.C.	-	Advisory Judicial Committee
A.F.R.C.	-	Armed Forces Ruling Council
P.R.C.	-	Provisional Ruling Council
F.E.C.	-	Federal Executive Council
N.C.S.	-	National Council of State
N.C.N.C.	-	National Council of Nigeria and Cameroon
N.P.C.	-	Northern People's Congress
A.G.	-	Action Group
C.I.A.	-	Central Intelligence Agency
P.L.C.	-	Public Limited Company
C.B.N.	-	Central Bank of Nigeria
N.A.PLC.	-	Nigerian Airways Public Limited Company
N.E.P.PLC.	-	National Electric Power Public Limited Company
N.P.A.PLC.	-	Nigerian Ports Public Limited Company
U.S.A.	-	United States of America
Nig.	-	Nigeria
L.E.D.B.	-	Lagos Executive Development Board
S.D.P.	-	Social Democratic Party
N.R.C.	-	National Republican Convention
I.B.B.	-	Ibrahim Badamasi Babangida

C H A P T E R O N E

THE NIGERIAN JUDICIARY FROM HISTORICAL PERSPECTIVE.

1.1 THE MEANING AND DEFINATION OF JUDICIARY.

The 'Oxford Advanced Learner's Dictionary of Current English' defined judiciary to mean the judges of a state collectively; the system of Law Courts in a country:[1].

Also, the Chamber Universal Learners' Dictionary' defines judiciary as a country's body of judges, or its courts of justice'[2].

L.B. Curzon defines judiciary simply as the 'term applied to the judges collectively'[3].

From the above definations, the judiciary can be seen as a collective agglomeration of judges who administer law and justice in a country. This administration of justice is usually done through the Law Courts or Court system in the country. By this we mean the legal system of a country as established by a constitution or any other legislation in a given country; For example, Nigeria, India or Great Britain.

To understand the true meaning of the judiciary, it is worthwhile to 'examine the functions and powers of the judiciary.

---

1. See the 3rd Edition by A.S. Hornby, published in 1977 at page 466.
2. See the International Students' Edition by E.M. Kirkpatrick. Published in 1985, page 391.
3. See Dictionary of Law, 3rd Edition published in 1988 at page 243.

The 1979 Constitution of the Federal Republic of Nigeria Vested judicial functions and powers in the Superior Courts of record in Nigeria'[4].

Sub-section (6) a-d of Section 6 elaborately defined the functions and powers of the judiciary'[5]. It includes among other things, the adjudication of conflicts, disputes and resolution between persons, or between government or authority and any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person. It also includes the interpretation of the constitution or any statute or legislation in Nigeria.

All these functions are performed by the judiciary through its 'agents' and 'organs' i.e. the judges and the Courts.

Such powers extend (notwithstanding anything to the contrary in the constitution(, to all inherent powers and sanctions of a court of law.

In order to be able to perform its duties fearlessly and impartially, the constitution attempts to grant the judiciary some amount of independence from the other two arms of government namely; the Executive and Legislature. This also forms the basis of the doctrine of separation of powers in a democratic system of government.

---

4. See section 6(1-3) and S.6 (5) & 6.

5. Ibid, the 1979 constitution.

1.2 THE NIGERIAN JUDICIARY IN THE PRE-COLONIAL PERIOD.

Prior to the advent of the Colonialists to what is now known as Nigeria, there had been a system of administration of justice.

For instance, in the northern part of Nigeria, the Law that was administered was the Islamic law of Maliki sect written in the holy books like the Koran, Sunna or Hadith'[8]. That is, the practices and traditions of the prophet Mohammed, the consensus of Islamic jurists and the analogical deductions from the Koran, Sunna or hadith.

In the Southern, Western, Eastern parts of Nigeria and some parts of Northern Nigeria (I.E. the middle belt): the law in force was the unwritten customary laws.

The system of justice was usually formed by traditional rulers and village chiefs in the various societies and communities.

In Sourthern Nigeria, especially in Old Yoruba and Benin Kingdoms, there were the 'Baale Courts' and 'Oba Courts' exercising judicial functions based upon their local customs and practices.

In the East and middle belt areas, of Nigerian such as the 'classless societies' of Igbos, Tivs, Jukuns and the Kajes; the type of law in practice was the Customary laws, norms and values

---

8. See A.A. Fyzee, 'Outlines of Mohammedan Laws (3rd Edition 1964) Page 18-21.

of each Community made by their various village heads, lineages and clan heads.

It should also be noted that the political and or cultural and religious leaders played important roles in the decisions of the customary or local laws of each village, Community, Society and Clan; Such as the Emirs in the North, the Onis and Obas in the South and the lineages or clan heads in the Middle Belt areas. Another important fact to be noted is that the customary laws vary from one society to another.

The presence of the British Merchants and Missionaries was noticed in the Coastal regions by the year 1861. Trade dispute between the local traders and British Merchants were common. This led to the establishment of "Indigenous Courts' which tried disputes between the foreigners and ordinary citizens of the coastal towns.

As time went on, the British government decided to start consular activities. In addition, the customary laws in practice at that point in time were strange to the foreigners because, it was different from their British system of common law and equity.

To satisfy these yearnings, the British consul established 'consular courts' to function side-by-side with the 'indigenous courts.'

The consular courts were to settle disputes between the British Merchants and local traders; while the indigenous courts

tried local disputes between the local citizens interse.

Equity courts were also established jointly by the foreigners and indigenous traders in the coastal towns of Benin, Bonny, Brass, New Calabar, Oyo, Calabar and other Coastal towns around Lagos area for the purposes of settling trading disputes. Equity Courts based their decisions on the general notion of justice and fairness. They were of universal acceptance by the populace.

In 1872, the equity and consular courts were formally established by the british government by an order in council. The courts were under the control of the British Consul.

Now the British eventually took over the administration of what is to be known as the Lagos Colony took a form of treaty of session in 1861.

By the treaty, King Dosunmu (the then head and ruler of Lagos) was alleged to have signed the said Treaty with the British Colonial administrators of Lagos which purported that Dosunmu covenanted,

> "... to give, transfer and confirm unto the Queen of England; her heirs and successors forever the part of Island of Lagos, with all rights, profits, territories and appurtenances whatsoever there onto belonging (sic)...9"

---

9. See appendix 1 of the Treaty (quoted by T.O. Elias; In 'NIGERIA land Law and Custom: 1953' 2nd Ed. at page 7.

It is most respectfully submitted that, Chief Dosunmu was an illiterate and not a lawyer to understand the legal implication of the said Treaty. Hence, it cannot be said that he transferred the Lagos Island to the British heirs forever.

What is more, Dosunmu was not the owner of Lagos land and the best he could be was the 'Trustee' of Lagos Island, as such the principle of "Nemo dat quod non Habet" applies. Which means, he could not transfer the property that was not his own. This however, is an academic argument.

In the case of Amodu Tijani V. Secretary, Southern Nigeria,[10] the court held that it is a traditional rule of customary law which prevented the free transfer of land between two completely unconnected persons.'[11]

The practical effect of the 1861 Treaty of Cession was the entrenchment of the British in Lagos area and the importation en masse of the British Common Law, doctrines of Equity and the legal System in 1862.

By virtue of Ordinance No.3 of 1863, the British Administration introduced English Law formally into the Lagos Colony and by the Supreme Court Ordinance,[12] the first Supreme Court came into

---

10. (1901) 3 N.L.R. 21

11. See also Dawodu V. Danmole, (1962) 1 W.L.R. 1053, or 1958) 3 F.S.C. 46.

12. See Supreme Court Ordiance No.11 of 1863.

existence which has both Civil and Criminal jurisdiction.

In 1866 the British settlement of Lagos, Gold Coast Sierra Leone and The Gambia were placed under one government. A court of both Civil and Criminal jurisdiction was established in place of the Supreme Court. Jury trial was introduced and appeals lay from this court to the West African Court of Appeal (W.A.C.A.) and from the latter to the judicial committee of the privy Council (J.C.P.C.) in England.

In 1874, the Gold Coast Colony was Created following the Amalgamation of Lagos and Gold Coast. The Supreme Court Ordinance of 1876.[13] established a Supreme Court for the Colony.

It was enjoined to apply the Common Law of England, the doctrines of Equity and the Statutes of general application which were in force on the 24th July, 1874; and also, the local laws and Customs which were not repugnant to natural justice, equity and good conscience, nor incompatible with any statute.

The British extended their influence into the hinterland carrying their laws with them. But they were hesitant to change the Status quo of the Islamic law and the Customary laws. So they allowed it to go on that way with some limitations and modifications.

What is more, the indirect rule system introduced by the colonialists meant that they would allow the local rulers administer

---

13. No. 4 of 1876.

the kingdoms under their control and supervision. Hence, any change to English common law had to be gradual.

In 1886, a separate government was established for the Lagos Colony and a new Supreme Court Ordinance similar to that of 1876 was promulgated. Under the 1886 Order-in-Council the legislature of the Colony was empowered to make laws for the protectorates in the neighbourhood over which the British Government had acquired jurisdiction.

It must be noted that whenever there was a conflict between a Common Law rule and a doctrine of equity on the same matter, the doctrine of equity shall prevail. The statutes were to apply subject to local circumstances.

Thus, where a statute was thought applicable but there was no local circumstances permitting its application within Lagos or any other territory under British Control, it was not to apply. Hence, the Bankruptcy Act of 1869[14] of England was not applicable because the machinery for its applicability were absent.'[15]

In the Northern part of Nigeria, the Royal Niger Company (R.N.C.) which traded along the banks of River Niger was empowered to administer justice in the territories it was operating.

---

14. No. 32 and 33 Vict. C.71.

15. See Halliday v. Alapatira (1881)N.L.R. 1.

It established some courts which functioned until 1899 when the company's charter was revoked.

The Oil Rivers protectorate later to be known as the Niger Coast protectorate was established in 1885. prior to its establishment, Consuls had been appointed in 1872 and they were empowered to observe treaties made between the British government and the local Chiefs and to make rules and regulations for peace and good government.

The combined effect of the received English law, the Courts and the relegation of indigenous courts and Laws led to the emergence of a new Society consisting of the indigenous people who had embraced the English Culture and preferred it to their traditional life pattern. This marked the beginning of the conflict of Cultures now noticeable in several parts of Nigeria."[16]

It should be borne in mind that all orders in Council were to be observed e.g. the Treaties which were made between the British Government and the Local Chiefs as well as the rules and regulations for the peace, order and good government of "British Subjects." This phrase is defined to mean; " all persons, natives and others properly enjoying Her Majesty's (i.e. The Queen of England) protection in specified territories."[17]

---

16. See; O. Adewoye: "prelude to the legal profession in Lagos 1861 - 1880; (1970). J.A.L. 98 at p.101.

17. See A.O.Abilade, 'The Nigerian Legal System' (London) published by Sweet and Maxwell (1979).

1.3 NIGERIAN JUDICIARY DURING THE COLONIAL ERA

After the revocation of the Charter of Royal Niger Company in 1899, the latter was amalgamated to the Niger Coast protectorate of Southern Nigeria in 1900. The High Commissioner for the protectorate established a Supreme Court by the Supreme Court proclamation of 1900",[18] which altered the reception date of the Statutes of general application to the 1st January, 1990.

In 1906, the protectorate of Southern Nigeria and the Colony and protectorate of Lagos were amalgamated to form the colony and protectorate of Southern Nigeria.

A new Native Court enactment; the Native Court proclmations,[19] was made for the new territory. The Native Courts proclamation of 1901",[20] which replaced the 1900 Native Courts proclamation provided that the Civil and Criminal jurisdiction of a Statutory Native Court in a district was to be exclusive of any jurisdiction by any traditional Authority."[21]

Thus, in any distric where there was a Statutory native court no indigenous court had any jurisdiction.

---

18. No.6 of 1900.
19. No.9 of 1900.
20. No. 25 of 1901.
21. Ibid S.12.

This native court system was defective in that the British were ex-officio members. Local Chiefs who served as members of the Native Court Clerks often received Bribes and even tried cases.

The protectorate of Northern Nigeria came into existence on January 1st 1900 with a High Commissioner appointed to make laws for the protectorate. He established a Supreme Court for the protectorate by the protectorate proclamation 1900".[22] It also established provincial courts in all the provinces manned by administrative officers; and cantonment courts established were presided over by learned magistrates.

All the courts had civil and Criminal jurisdiction. The Native Courts established",[23] were manned by Emir's and or village heads.

The Courts administered Customary laws not repugnant to natural justice and humanity as well as the Statute of general application that were in force in England on 1st January, 1900.

In 1906, there was a reformation in the Native Courts which led to the establishment of the Alkali Courts and the Judicial Council".[24] Under the reformation, any inmate of the

---

22. No. 4 of 1900.

23. See Native Court proclamation No.5, 1900.

24. Native Court proclamation No.1, 1906.

household of a plaintiff of defendant could appear for him.

It is noteworthy that the legal system in the protectorate of Northern Nigeria was slightly better than that in the Colony and protectorate of Southern Nigeria; particularly in respect of the Native Courts System. Whereas, the head Chiefs in the northern protectorate were empowered to appoint members of Native Court with the approval of the Resident, in the Colony and protectorate of Southern Nigeria no Chief had such powers.

Also the British administrators deemed it fit to establish provincial Courts manned by administrative officers because of the shortage of qualified personnel and the need to ensure that litigants obtained justice cheaply.

On the 1st January, 1914, the Colony and protectorate of Southern Nigeria and the protectorate of Northern Nigeria were amalgamated to form the protectorate of Nigeria. This led to the political unification of Nigeria as well as her legal system.

One Supreme Court was established for the whole country by the Supreme Court Ordinance 1914."[25] Provincial Courts[26] similar to those of the North were established from where appeals lay to the Supreme Court. The Courts were

---

25. No. 6 of 1914.

26. Ordinance No. 7 of 1914.

to administer Common Law, Equity and the Statutes of general application. The Supreme Court had original and appellate jurisdiction in Civil and Criminal Cases.

The Native Courts Ordinance 1918", [27] established Native Courts of Grades; A, B, C and D with A having the highest jurisdiction and power and D the lowest; they all had Civil and Criminal jurisdiction. Native Courts had jurisdiction over the indigenous natives, but the 'Natives' who were either government servants or not subject to the jurisdiction of the said court, were subject only if they consented to the jurisdiction of the said courts or if the resident consented on their behalf in civil cases or the leutenant Governor in Criminal Cases. The Governor could exempt any person or class of persons from the jurisdiction of Native courts.

In 1933, due to the criticisms levied against the Native courts system some major reforms were introduced in the Nigerian Legal System.

This was effected by the protectorate Ordinance of 1933". [28] It established a high court and a magistrate court but divested them from the jurisdiction to try matters relating to land.

---

27. NO.5 of 1918.

28. NO.45 of 1933.

The Supreme Court and the High Courts were courts of equal jurisdiction under this reform. Appeals from the Magistrate Courts lay to the High Court or Supreme Court. And with the establishment of the West African Court of Appeal (W.A.C.A.) in 1955 following the enactment of the ordinance establishing it,"[29] appeals from the High Courts and the Supreme Court lay to W.A.C.A; while appeals from W.A.C.A. lay to the Judicial Committee of the Privy Council (J.C.P.C.) in England.

It was in this same year that legal practitioner had their first test of appearance in Magistrate Courts as of right. Later in the year, the Provincial Court System was abolished. Under the Native Court System, ~~4~~ two Courts;

1. The Native Court of Appeal and
2. Final Native Court of Appeal

were established".[30] Appeals from the Native Court lay to these courts or to the Magistrate Courts or to the High Court. If there was no right of appeal to any of these courts appeals lay in general to the district officer. The district officer must sit as president of any Native Court whenever the court was hearing any suit relating to land.

In 1945, Series of Statutes were passed to reform the legal system. The Supreme Court Ordinance 1945".[31]

---

29. Ordinance NO.47 of 1933.
30. See Native Courts Ordinance No.44 1933.
31. No. 33 of 1943.

established a Supreme Court of justice for the whole country in place of the supreme court of Nigeria and the High Court of the protectorate. The Native Courts (Colony) ordinance 1945",[32] slightly amended the Native Courts (Colony) Ordinance 1933. There was also the Magistrate's courts ordinance 1943"[33], the West African Court of Appeal (W.A.C.A) Ordinance 1943",[34] amended W.A.C.A. Ordinance of 1933 slightly, and the children and young persons ordinance 1943",[35] established juvenile Courts to try young offenders.

The magistrate Courts ordinance 1943 established new magistrates courts throughout the country to replace Commissioners' Courts of the Supreme Court in the Colony and magistrate courts in the Protectorates. Under this ordinance, the Native Courts had original and exclusive jurisdiction over legal matters brought before them for trial. The Supreme Court was precluded from interferring with the Native Court original and exclusive jurisdiction.

Under the 1954 Constitution, Nigeria became a Federal Republic with three regions viz; East, West, North and the Federal territory of Lagos. The Constitution established the Federal Supreme Court of Nigeria and High Courts in eace region".[36]

---

32. NO.7 of 1943.
33. No.43 of 1943.
34. No. 30 of 1943.
35. No. 41 of 1943.
36. See 'Nigerian Constitutional Order in Council No.1 1954.

The Western and Eastern Regions of Nigeria introduce Customary Courts while Northern Nigerian established the Native Courts.

In 1956, Northern Nigeria establishe a customary court of Appeal known as the Moslem Court of Appeal which was replaced in 1960 by the Sha ria Court of Appeal. It heard Appeals from the Native Courts in all Civil and Criminal disputes which are brought on appeal.

In 1960 the court of Resolution was established to adjudicate in the jurisdictional disputes between the High Court and the Sharia Court of Appeal. The District Courts were also established and having Civil jurisdiction only. The Magistrate Courts had both civil and criminal jurisdiction. The Criminal procedure Code Law 1960 which came into operation on the same day provided for the establishment of Magistrates' Courts to replace the preexisting Magistrates' Court and to exercise criminal jurisdiction.

Another northern region statute which came into operation on that day was the penal Code Law 1959.

The Native Courts Law 1956 of Northern Nigeria",[37] established the Native Courts of Grade A, A limited B,C and D. Appeals from the Native Courts B,C and D lay to the Native Court of Appeal presided over by the Resident. The Native Courts A,B,C and D

---

37. NO.6 of 1956 Northern Nigeria.

were presided over by Emirs and Chiefs and had Civil and Criminal jurisdiction. While appeals from A and A Limited lay to the High Court. Appeals from sharia Court of Appeal lay to the High Court Constituted by two judges. During these periods, the following courts existed namely; The High Court, Magistrate Courts, District and provincial Courts, the Sharia Court of Appeal, Court of Resolution and Native Courts.

It was as a result of the panel of jurists that was set up in 1958 by the Northern Regional government to modify the legal system of the region that a change was effected. Following the jurists' advice and recommendations, the penal Code Law and the Criminal procedure Code Law were enacted and made applicable to the whole of the Northern Region".[38]

The Court of Resolution",[39] was given birth to'.

It should be observed that the court of resolution has never sat for a day since it was established.

The Customary Court Law 1957 established four Grades of Customary Court in Western Nigeria".[40] They were A.B.C, and D. Grades A & B were presided over by legal practitioners and Lawyers were allowed to appear before them. Appeals from grades A and B Courts lay to the High Courts, while appeals from C and D lay

---

38. See penal Code Law No.18, 1959 and C.P.C. Law No.11., 1960.
39. See Court of Resolution Law No.17, 1960.
40. W.R.N. Laws 1959 Cap.31.

to higher customary court of appeal. During this period, the High Court and the Magistrate's Courts existed in the Region. The Customary Courts had both Criminal and Civil jurisdiction.

The Customary Courts law 1956,[41] established two systems of courts in the East namely, District courts grade A and B and County Courts. Appeals lay from the District Courts to County Courts. In the Absence of County Courts, appeals lay to the Magistrate's Court from there to the High Court and from the High Court to the Federal Supreme Court.

Notice should be taken that the Federal Supreme Court had original jurisdiction in;

(a) Disputes between Regions;

(b) Disputes between the Regions and the Federal Government;

(c) Cases arising from treaties involving foreign representatives in Nigeria and;

(d) Case relating to validity of Federal Laws.

Appeals from the Federal Supreme Court now lay to the judicial committee of the privy Council (J.C.P.C.) in England, not to West African Court of Appeal (W.A.C.A.) since it ceased to exist under the 1954 constitution.

---

41. No. 1 1956.

Also, a revised edition of the laws of the Federation of Nigeria and Lagos containing ordinances in force on June 1, 1958 was prepared. It contained 12 valumes consisting of subsidiary legislation and English statutes extending to Nigeria.

By the independence Act of 1960",[42] Nigeria became an independent and Sovereign Country within the Commonwealth on 1st October, 1960. It consisted of a Federation with the Federal Territory of Lagos and the Northern, Western and Eastern Nigeria. There was the promulgation of the federal and Regional Constitutions by the Nigeria Constitution order in Council 1960".[43]

BY virture of the Designation of Ordinance Act 1961"[44] enactments made by the Federal legislature (Parliament) were to be called 'Acts' and those made by Regional latures were called 'Laws'.[45]

The Court System remained the same at independence, But, with the establishment of a fourth region, (the Mid-West) was created in 1963",[46] Courts similar to those of the West were introduced in the Region. However, the court System at independence and thereafter shall be discussed in the following subheading.

---

42. October,1, 1960 Independence (8 and 9 Eliz. 2 C.55).
43. S.I., 1960 No. 1652, L.N. 159 of 1960.
44. No. 57 of 1961.
45. See Obilade A. (1986): 'The Nigerian Legal System'. (London) Sweet and Maxwell (1979) P.38-39.
46. See MidWestern Region (Transitional provision) Act 1963 (No.10 of 1963) Constitution (Transitional Provision) Act 1963 (No.21 of 1963).

1.4 THE NIGERIAN JUDICIARY AT INDEPENCE AND AFTER INDEPENDENCE.

At Independence in 1960, the Nigeria judiciary remained almost the same as it was during the Colonial rule especially under the 1954 Constitution. Under the 1954 Constitution, the Nigerian Judiciary was regionalized. But the Bar, the Bench and the public opposed the regionalization of the judiciary".[47]

Under the 1960 independence Constitution, the Federal Supreme Court was established for the whole country". [48] It was conferred with original, appellate and advisory jurisdiction. In addition to any other jurisdiction conferred by parliament, the Federal Supreme Court had exclusive original jurisdiction in any dispute between the Federation and the ERegions or between Regions interse".[49] It also had a final say on questions of interpretation of the Federal and Regional Constitutions".[50]

It was further provided that the legislature of Region may establish courts of law for that Region".[51]

---

47. See The Memorandum submitted to the Lagos Constitutional Conference in 1954, West Africa, 6 February 1954.

48. See Section 104 of 1960 Constitution.

49. Ibid Section 107.

50. Ibid Section 108.

51. Only the Western Region did so by creating the Western Nigeria Court of Appeal. See Court of Appeal Edict No.15, 1967 of Western State.

It should be noted that the Federal Supreme Court of Nigeria was not the final Court of Appeal. Appeals from the Federal Supreme Court lie to the judicial committee of the Privy Council (J.C.P.C.) in Britain as the highest court of law in Nigeria".[52]

Provisions were made for the establishment of judicial service commissions both at the Federal and Regional level for the appointment of the various judges in Nigeria".[53] However Chief justices were appointed by the Governor-General or Governors on the advice of the prime Minister or premiers as the case may be. Other judges of the Federal Supreme Court were appointed by the Governor-General on the advice of the Federal judicial Service Commission.

The Laws applied by the Nigerian judiciary at independence in 1960 were almost the same as it was during Colonial rule in addition to the various Federal and Regional Constitutions and other bye-laws in 1960.

Under the Republican Constitution of 1963, the Nigerian judicial System remained almost the same as it was under the 1960 constitution but with some modifications. Howevers there

---

52. See Section 114 of the 1960 Constitution.

53. Ibid Section 105 of 1960 Constitution, Section 50(1) of Northern Nigeria Constitution, 1960; Section 49(1) of Western State Constitution, 1960.

was a remarkable structural change in the Nigerian judiciary under the 1963 constitution.

It was found inelegant for a Republic to subject any aspect of its government to a foreign body. And so, appeals from the supreme court of Nigeria no longer lie to the judicial committee of the privy council (J.C.P.C.) in britain. The Supreme Court of Nigeria became the final court of Appeal".[54]

However, appeals previously pending, except on Chieftancy or constitutional matters, were allowed to be continued and heard at any time before October 1 1964.

By Section 120,"[55] the Nigerian judiciary is now independent from Colonial Control by the United Kingdom (Britain) in principle and practice.

However, the Federal and Regional judicial service commission which were responsible for the appointment and removal of judges of various levels of the judiciary were abolished under the 1963 Constitution. This provision seems to suggest creation of political influence in an area which ought to be politically neutral".[56] Under the 1963 Constitutional particularly section 112(1), the Chief justice of Nigeria was to be appointed by the

---

54. See Section 120 of the 1963 Republican Constitution.

55. Ibid 1963 Constitution.

56. See also B.O. Nwabueze op. cit. pp.289-290 where although he concluded that the judicial service commission system is to be preferred, yet he said enough to come to the conclusion that the institution was not the only alternative.

president on the advice of the prime minister and the High Court judges are to be appointed by the Governor on the advice of the Regional premiers.

So far we have seen how the Nigerian judiciary was in the first Republic i.e under the 1960 and 1963 Constitutions which were based upon the Westminster parliamentary system of Government.

However, there was a serious political crisis soon after the independence in 1960. It led to the Nigerian Civil War which lasted from 1966 to 1970. The eventual military putsch of January 15, 1966 and the counter coup of July 29, 1966 led to the first change of Government by extra constitutional means in Nigeria. At the point in time, the Nigerian judiciary was faced with the serious problem of applying or interpreting the constitutional provisions vis-a-vis the Military R Decrees and Edicts simultaneously".[57] A critical appraisal of these ouster clauses in the Decrees and Edicts will help us in understanding the limitations of the judicialy under a military regime.

When the Military handed over power to the civilians under a presidential system of government in 1979, the 1979 Federal[57b]

57a. See S.6 of the Constitution (Suspension and modidification) Decree No.1 of 1966; See also the case of Makanmi & ORS V. A.G. Western Nigeria (1971)1 U.I.L.R. 201.

57b. See Chapter VII, Part I of 1979 Constitution.

Constitution provided fine and elaborate provisions for the judiciary.

The judicial structure as well as the Laws applicable to the whole country was almost the same as it was under the first Republic (i.e. 1960 - 1963) and thereafter.

However, some minor changes were introduced during the subsequent Military administration. For instance, they established a body which came to be known as the Advisory Judicial Committee (A.J.C.) who advice the highest military authority (e.g. the Supreme Military Council (S.M.C.); or the provisional Ruling Council (P.R.C.) where applicable) on the appointment and removal of judicial officer. There were also several Military Decrees which suspended or modified the democratic Constitution".[58]

The Civilian administration lasted for only four years (1979-1983) when it was again toppled by the Military on the 31st December, 1983. Again, the judiciary was confronted with the issue of determining the legality or illegality of the Military regime and the validity or invalidity of the ouster Clauses Decrees and Edicts".[59]

---

58. See The Constitution (Suspension and Modification) Decrees No. 1 of 1984, No.58 & 59 of 1993, No.61 and 107 of 1993, Under the Buhari Babangida, Interim National Government (I.N.G.) and the Abacha regimes.

59. Ibid.

However, as was stated earlier, these issues enumerated above will be critically examined particularly under chapters three and four respectively.

By and large, it can be said that perhaps, looking at the judiciary from the historical perspective, especially under the 1960, 1962 and 1979 Constitutions as well as under the Military regimes, it can be said that the judiciary in Nigeria is really developing gradually, not with standing the frequent Military intervention in the political system. The major problem that seem to bedevilled the progress of the Nigerian judicary in the administration of justice is the incessant change of government by extra constitutional means.

The judiciary usually finds it hard to adjudicate and interprete the constitution freely in the face of Military Decrees and Edicts.

This creates serious limitations of the judiciaryunder Military regime particularly in the area of its application of judicial review power.

To understand these limitations we shall examine the independence of the judiciary under the Constitutional and Military administration

For instance, where there is supremacy of the Constitution, there will be separation of powers between the Executive, legislative and judicial arms of government. This separation of power doctrine usually allows each organ to function according to the laid down provisions in the Constitution without any encroachment of function by any other organ against another organ. Thus, the judiciary will have the power to effectively apply its judicial review power. But under a military regime, such separation of power doctrines are absent. The military authority acts as both the Executive and legislature. The judiciary thereby finds it difficult to assert its independence. Hence, there is absence of rule of law and independence of the judiciary. Under such situation, it is easy to expect limitations of the judiciary under a military regime.

C H A P T E R T W O

INDEPENDENCE OF THE JUDICIARY

2.1 INTRODUCTION.

Separation of powers is the pillar of the independence of the judiciary. In 1748, Montesque, a Franch philosopher and political Scientist, Propounded the now famous Doctrine of Separation of powers. He drew a rather sharp distinction between the legislative, Executive and judicial powers of the state and insisted that these powers should be exercised by separate and distinct bodies of functionaries of the state. The separation of powers distinguishes a parliamentary democracy from totaliterian regime, where the ruling junta in variably always concentrates all the powers of the state in their own handds.

The concept of separation of powers arose from the need to ensure the restraint of governmental powers by dividing that power, without carrying that division to an extreme incompatibility with effective Government.

A constitutional democracy which pre-supposes a balanced system of divided or shared powers, is the only system within individual citizens can ever hope to enjoy any measure of independence and freedom from arbitrariness and governmental

lawlessness.

The attainment of justice is the purpose of which the emplicated office of jurisprudence is dedicated. Primarilly, it is the courts that the ordinary citizens look to in their quest for justice. It is therefore pertinent to enquire into the independence of the courts in the administration ofjustice under the military regime. This is how the 'August asembly' of jurists, the international commission of jurists, pointed out in their meeting at New Delhi, India that".[1]

> "An independent judiciary is an Indispensable reguisite of a free society under the Rule of Law. Such independence implies freedom from interference by the executive of legislature with the exercise of the judicial function, but does not mean that the judge is entitled to act in an arbitrary manner. His duty is to interprete the Law and the fundamental principles and assumptions that underline it. It is implicit in the concept of independence that provision should be made for the adequate remuneration of the judiciary and that, a judge's right to the remuneration settled for his office should not, during his term of office be altered to his disadvantage."

The 1960, 1963 and 1979 constitutions of the Federal Republic of Nigeria enumerated the three branches of Government viz; the legislature, the executive and the judiciary as separate

---

1. See "The New Delhi Conference of international commission of jurists; under the topic; "The Rule of Law in a Free Society." p.11.

and distinct. But powers given to each are delicately balanced by the powers of the other two.

Thus, the chief justice of Nigeria and the state Chief judges swear-in the president of the Federation and the State Governors respectively".[2]

The legislative branch makes the law. While the Executive branch can also make deligated legislation. The judicial branch, by interpretation and the doctrine of precedent especially (Stare decisis) also make "Judge-Made" Laws.

The judicial branch has the power of judicial review and can declare laws made by the legislature unconstitutional, null and void. While, the legislative branch can pass a law, the sole purpose of which is to nullify and make ineffective a judgment of even the highest court of the land.

The legislative branch passes all laws, but the Chief executive will have to assent by signing the bills into Law. The Courts cannot ammend the constitution, but they can interpret and explain the meaning of the laws and constitution as they apply to changing legal, political, economic, and social conditions. These court decisions may have the effect of altering the meaning

---

2. See sections 167, 169, 175 and 254 of the 1979 Constitution. See also the Sixth Schedule of the same Constitution.

of constitutional law, while leaving the constitution itself unchanged. That was how the United States constitution of 1787 was made morethan one hundred years ago and has been kept alive (subject of course to some few Amendments). And that is how any constitution can be animated and made to serve the needs of generations yet unborn.

The complete separation of the legislative, executive and judicial powers of the state of nation is impossible. The reason is that Government is an art as well as a practical science with the single aim, which is the advancement of the common good. That being so, the three co-ordinate powers of the State Constitute one brotherhood, working side by side with mutual tolerance and co-orperation. The primary end of the state is justice, the building and the maintainance of a just society where no man is oppressed, the maintenance of the juridic order.

To this end, the legislature, by the laws it passes, emciates the general norms of justice, while the Executive overseas these laws as they apply at large. But the state, through the judiciary, pronounces justice in the concrete. When a dispute arises, the issue becomes a practical issue of where does justice lie in that particular case? The judiciary is assigned the peculiar and the particular responsibility of resolving issues in disputes authoritatively. It can also

pronounce that the law has been violated and that the justice of the case demands a judgment in favour of one party or the other. This important function of adjudication is assigned to the judiciary.

2.2.1 THE MEANING OF JUDICIAL INDEPENDENCE.

Independence of the judiciary means that the judicial organ should be allowed to freely perform its functions of interpretation of laws and settling disputes as provided by the supreme constitution of the land. It should not be hindered in any way in carrying out its function. The legislative and Executive branches of government should not interfere or exercise any power that is prejudicial to the functioning of the judiciary.

This does not mean that the judicial organ should infringe upon the powers and functions of the legislature of Executive when exercising its judicial review power.

For independence of the judiciary to be applicable, there must be strict adherance to the principles of the Rule of Law and separation of powers. In addition, there must be strict compliance to the supremacy of the constitution.

In defining what judicial independence means; Honourable Justice Chukwudifu Oputa J.S.C. (as he then was) enumerated what the judicial independence is and what it is not in his well

researched article titled; "The independence of the judiciary in a Democratic society its need, its positive and negative aspects".[3]

He said judicial independence means;

1. The decision of important and controversial cases and issues on the basis of merit and principle rather than on the basis of expediency.

2. It means resisting the pressure of hysteria and fanaticism.

3. It is that ingredient which allows a judge to rise above passion, above public and above the politics of the moment.

4. It insulates the judge from Executive violence, legislative violence and mob hysteria and violence.

5. Without judicial independence no judge, however brilliant and hardworking, however well prepared by qualities of heart, mind and professional training can give full effect to the enduring values enshrined in our constitution.

---

3. See Hon. Chukwudifu Oputa in the journal of Contemporary legal problems. (Justice) Vol. I. No.3, July 1990. Page. 21 - 22.

He further stated what the judicial independence is not, in the same article thus:[4]

"The independence of the judiciary does not mean or does it imply that judges should have unlimited powers No, for as Cicero observed during the hey day of Roman jurisprudence - "We are all slaves of the law so that we may be free". St. Augustine re-echoed that sentiment too. Judicial independence does not give the judge the license to treat counsel and witnesses as he likes or to sit when he likes; to rise when he likes thus leaving; trailing behind him a backlog of unheard and part-heard matters ... Every judge should appreciate that counsel and witnesses are as much indispensable functionaires of justice delivery as the judge himself ... Witnesses, learned counsel and the judge - these form the judicial tripod. Remove one leg of a tripod and it will collapse ..."[5] In relation to the above, a one time British prime minister said;

> "The Principle of the complete independence of the judiciary from the Executive is the foundation of many things in our Island life..."

It is paharps one of the deepest gifts between us and all forms of totalitarian rule. The only subordination which a judge knows

---

4. See Chukwudifu Oputa J.S.C. (as he then was) Op. Cit. page. 21.

5. Chukwudifu Oputa. Loc, cit. p.21.

in his judicial capacity is that which he owes to the existing body of legal doctrines enunciated in years past by his brethren on the bench. And to laws passed by parliament which have received the Royal assent".[6]

Thus said John Marshall; [7]

> "A judge must be completely independent with nothing to influence him or control him but God and his conscience".

Also Mr. Justice Buba Ardo, a one time chairman of the defunct constitutional Review committee once observed that;

> "It is a very poor government indeed whose judiciary is nothing but a dependent appendage of the executive".[8]

The independence of the judiciary therefore implies that the judiciary shall have its own separate administration under the umbrella of say, the judicial service commission or committee of the Federal and State levels, which should take charge of the welfare and discipline of all judges and the judicial staff and provide and maintain all necessary infrastructure and

---

6. See Churchill (Hansard 1954) as quoted by Oputa J.S.C. Op. Cit page.22.

7. The 3rd Chief justice of U.S. Supreme Court.

8. See Hon. justice Mohammadu Buba Awo, "Separation of powers under 1979 Constitution". In the Nigerian Bar Journal Vol.XVII, No.2, 1986 p.26.

equipment for the due performance of their functions.

The judiciary shall control its own finances from funds to be budgeted for its capital and recurrent services by the government and become completely self accounting.

Subject to the general guidelines as the government may deem necessary to give, the judiciary should be left free to perform its day-to-day functions without direction, dictation or control from any quarters. That is what independence of the judiciary means.

All said and noted, it can now be said that judicial independence deals with how free the judiciary is from any governmental control as regards manner of appointment of judicial officers; their removal, quantum and source of their remuneration; the freedom and immunity they have in the performance of their functions. It also includes their qualifications and moral character, their comportment in society and the structural relationship of the judiciary with the other arms of government.

It should be understood that the independence of the judiciary, strictly speaking, is often secured under a democratic or constitutional government. However, under the Military Government, independence of the judiciary appears to be obscure. This will be examined in a later topic. But first, we shall examine the independence of the judiciary under the constitutional

government.

2.3 INDEPENDENCE OF THE JUDICIARY UNDER THE CONSTITUTIONAL GOVERNMENT.

The independence of the judiciary is indeed 'properly workable' under a democratic and constitutional government. This is because, the democratic government operates under the provisions of the constitution. Under a constitution, the powers and functions of the various organs of Government, namely, Executive, legislative and judicial organs e.t.c. are specified and properly codified to suit the operation of a democratic government. The principles and doctrines of separation of powers and the Rule of Law are provided for.

Also the supremacy of the constitution is declared by the enabling provision".[9]

The United Nations declared that;

> "It is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression that human rights should be protected by the Rule of Law"10

These rights have been reproduced by many countries in their

---

9. See the 1960, & 1963 Constitutions, particularly Sections 1,4,5 and 6 of the 1979 Constitution of the Federal Republic of Nigeria.

10. The 1948 United Nations Declaration of Human Rights.

constitutions and are known as the Fundamental Human Rights".[11]

The judiciary is enjoined to adjudicate on any issue that touches on these fundamental rights in addition to its other function of interpretation of laws and settling of disputes. Under section 42 of the 1979, constitution, Nigerian High Courts are empowered to properly adjudicate on any issue or matter in which any person alleges that any of the provision of this chapter has been, is being or is likely to be contravened in any state in relation to him".[12]

Some of the essential attributes of the Rule of law are;

a. The state, persons and authorities are subject to law.

b. All individual rights, freedom and liberty should be protected and enforced by the government.

c. The impartiality of judges in protecting and enforcing principles of Rule of Law without fear or favour from any quarter.

d. No government, person or authority should encroach upon the powers of the judiciary in the enforcement of the Rule of Law.

e. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the law and insist that every accused is given a

---

11. See the 1787 U.S. Constitution as well as the 1960 and 1963 Constitutions of Nigeria, particularly Cap.IV of the 1979 Constitution.

12. See S.42(1) of 1979 Constitution (Cap.IV.).

fair trial.

f. There should be constitutional provisions forth the the law makers giving them powers to make laws that will guarantee popular election on adult franchise; freedom from discrimination on the basis of sex, assembly and association.

g. The Executive, legislative and judicial powers should be clearly stated in the constitution. There should be a constitutional provision particularly ensuring the independence of the judiciary".[13]

It is only the courts that have been arrogated the power to determine all legal rights as enshrined in the constitutions of the world.

Hence, to ensure the independence of the judiciary, there must be the practice of the rule of law, separation of powers and constitutional supremacy.

2.3.1 INDEPENDENCE OF THE JUDICIARY UNDER THE 1960 AND 1963 CONSTITUTIONS.

The 1960 and 1963 Constitutions of Nigeria provided some degree of independence to the Nigerian judiciary. This can be

---

13. See 1948 United Nations Declaration of Human Rights.

seen in the areas of appointment, tenure of office, jurisdiction of the courts, interpretation of the constitution, powers, practice and procedure in the various courts.

For instance, sections 105 and 116 of the 1960 Constitution provided for the appointment of the Chief justice and judges of the Federal Supreme Court as well as the Chief judge and judges of the Regional High Courts.

This is similarly provided under sections 112 and 122 to 124 of the 1963 Constitution. Sections 106 and 117 of the 1960 Constitution provided for the tenure of the Chief justice and judges of the Federal Supreme Court and Regional Chief Judge and judges."[14] The jurisdictional powers of the courts are provided under sections 107 and 109 of the 1960 Constitution and section 114 and 116 of the 1963 constitutions. The powers, practice and procedure in the various courts are provided under section 113 of the 1960 constitution and section 121 of the 1963 constitution respectively. The courts were given the powers to interprete the constitution and other legislations under section 108 of 1960 constitution and section 115 of the 1963 constitution accordingly. What is more, section 109 of 1960 constitution and section 116 of the 1963 constitution gave the supreme court power to advise the government on any legal matter.

---

14. See the equivalent under section 113 and 123-124 of the 1963 constitution.

From the above, it can be seen that the 1960 and 1963 constitutions provided for the independence of the judiciary. most important is the provision that relates to the general appointment, promotion and discipline of judicial officers which is provided under section 121 of the 1960 constitution".[15] In addition, the judicial service commission was established under section 120 of the 1960 constitution.

It is doubtful to say that the 1960 and 1963 constitutions did not provide for any judicial independence as we have noted above. But when we begin to examine the decisions of the superior courts from 1960 to 1966, we will begin to ask ourself whether indeed there was any judicial independence within the said period.

The first case that comes to mind was the sedition case of D.P.P. V. CHIKE OBI".[16] In this case, the defendant was charged before the Lagos High Court with sedition under section 51(1) of the Criminal Code for distributing phamplets called, "The People, Facts, that you must know." It contained seditious publication to wit,

> "Down with the enemies of the people, the exploiters of the weak and oppressors of the poor... The days of those who have enriched themselves at the expense of the poor are numbered. The common man in Nigeria can today no longer be fooled by sweet talk at election time only to be exploited and treated like dirt

15. See also sections 122-124 of the 1963 Constitution.
16. (1961)* ALL NLR 186.

> after the booty of office has been shared among the politicians..."

This case was highly and seriously argued by the Attorney General of Nigeria and the accused counsel".[17]

The learned Chief judge of Lagos High Court was so perturbed that he referred the matter to the Supreme Court for a case stated on the exact interpretation of section 50(2)(a), and section 51 of the Criminal Code. Part of the ruling of the Supreme Court with reference to the charge of sedition under s.50 and 51 of the Criminal Code reads; "... the section does not in my view prevent fair criticism of the Government and only prohibits publications made with the intention of exciting hatred and contempt, or disaffection against, inter alia, the Government".[18a] Brett F.J. (as he then was), while concurring to the leading judgment of the Chief Justice of the Federation said:[18b]

> "... There is one fact to which our attention was not drawn by counsel but which I do not feel able to ignore; The constitution entrust the courts with the task of deciding conclusively whether or not any legislative measure contravenes chapter III of the Constitution, and I do not wish to say anything which might suggest that the courts are evading their responsibilities. Nevertheless, it is right that the courts should remember that their functions is to decide whether a restriction is reasonably justifiable in a democratic society, not to impose their own views of what the law ought to be ..."

---

17. See Cases and Materials on Constitutional Law in Nigeria by D.O. Aihe and P.A. Oluyede. p.110-114.

18a. Op. Cit per Ademola C.J.F. (as he then was)at page 115 of the report.

18b. IOC. Cit p.115 at p.116 of the report.

From the foregoing ruling of the court, one is not left in doubt the independence of the judiciary was not strictly followed under the 1960 constitution.

Another case worthy of mention was the deprivation of the services of a British Barrister to the late Chief Obafemi Awolowo in the great treasonable felony case culminating in AWOLOWO V. MINISTER FOR INTERNAL AFFAIRS".[19] In this case, the plaintiffs were charged with treasonable felony and conspiracy contrary to sections 41(b) and 518(b) of the Criminal Code. While they were indetention, they retained the services of a Queen Counsel from Britain (not a Nigerian Lawyer) to defend them. But on coming to Nigeria, he was refused entry into Nigeria at the Airport by the immigration department under the authority of the minister of internal affairs acting under section 13 of the Immigration Act. The plaintiffs complained that the refusal to admit the Queen counsel into Nigeria to defend them is prejudicial to their best interest as their liberty is in jeopardy and constitutes a denial to them of their right to be defended by counsel of their choice.

Udo-Udoma J. (as he then was) in part of his ruling said".[20]

> "... I must state at once that I do not accept as sound proposition of submission that the provision contained in section 21(5) (c) of the 1960 constitution, liberally interpreted can be construed to entitled anyone to bring a counsel from the United

---

20. See Case and Materials on Constitutional Law in Nigeria by D.O. Aihe and Oluyede at page 92.

> Kingdom for the purpose of defending him in a criminal charge. To accept that interpretation, would be to strain language. The constitution is a Nigerian constitution meant for Nigerians in Nigeria. It only runs in Nigeria. The Natural consequence of this is that the legal representative contemplated in section 21(5) C Ought to be someone in Nigeria, and not outside it..."

The application by the plaintiffs for an injunction against the acts of the immigration department (defendants) was refused.

The above case also clearly shows the government meddling in the affairs of the judiciary.
The learned justice cannot be said to be acting independently without any government interference because the plaintiffs were members of a political party (Action Group) and a leading member of the opposition party in the Federal Parliament. The first defendant was a member of Northern Peoples Congress (N.P.C.), the Party in Power. What is more, there was political turmoil in Nigeria at that point in time (1962), particularly in the then Western region.

Other cases that clearly show government meddling with the independence of the judiciary are the cases of AKINTOLA V. ADEREMI AND ADEGBENRO".[21] In this case there was an alleged wrongful removal of the premier by the Governor of the Western region. The case was politically explosive'. The case was decidéd in

---

21. (1962) E.N.L.R. 185.

favour of the government of the day (the defendant) which culminated to the serious political impasse in the Western region in 1962 that even led to the death of the Premier, Akintola.

The deprivation of Children's right to political education by a regional law led to its challenge in the case of OLAWOYIN V.A.G. Northern Region".[22]

All the above cases were decided in favour of the Government of the day. This made Professor Nwabueze to remark that:-

> "... The fact that with one exception, all the constitutional cases went in favour of the government deprived the decision of much of their legitimating effect ... The point here is not that every one of the decisions handed down by the Nigerian Supreme Court between 1960 and 1965 was necessarily wrong in law but that they should all have gone in favour of the government was remarkable and naturally created the impression of political bias ... the situation was all the more lamentable because most of the decisions concerned individual liberties. To what purpose people were prompted to ask where civil liberties guaranteed in the constitution of every violation of them, however flagrant seeming received the sanction of the Courts".23

The one exception was the case of DOHERTY V. BALEWA".[24] The decision was unexpectedly against the government. Thus Professor Jegede while commenting said:

---

22. (1961) ALL N.L.R. 203.

23. B.O. Nwabueze. The Presidential constitution of Nigeria. C. Hurst & Co. (London) 1982) P.242.

24. (1961) I ALL N.L.R. 604.

> "What is remarkable in Balewa's case is not so much the reasoning provided by the Supreme Court but the fact that the Supreme Court effectively checked excesses of the exec executive..."25

In this case, the Supreme Court held that the Commissions and Tribunals of Enquiry Act 1961 was ultra vires in so far as it purported to give wider powers to a commission than parliament could grant under the constitution. On further appeal to the judicial committee of the privy council, their lordships made it clear that some of the powers disallowed by the Supreme Court were in fact ultravires.

Professor Ezejiofor, commenting on the attitude of the judges during the same period said:

> "The judges probably feared that active interventionist policy of interpreting the constitution in a liberal spirit would lead to open confrontation with the politicians and the consequent weakening of judicial authority. Consequently, most of them were anxious to render decisions favourable to the government aid its supporters. Indeed, they behaved as if it was their duty to adopt challenged measures of the authorities as valid and find arguments to justify them ... The extraneous activities of some judges were such that they did not deserve public sympathy as mere victims of Political and social pressures, nor did such

---

25. The Supreme Court of Nigeria, Op.cit. p.123. See another comment, Nwabueze Op. cit. p.276.

> activities inspire confidence in them as independent and impartial custodians of justice".26

One of Nigerian Statesman, the late Chief Obafemi Awolowo took the view that the executive arm of the Government bribed and Cajoled sections of the judiciary in toeing executive line in practically all major issues of the day in which it had interest".[27]

Likewise, under the 1963 Republican Constitution, the independence and dignity of the judiciary was firmly entrenched. But the means or modalities to ensure that judiciary was actually made independent from any governmental interference was practically made impossible owing to the 'Political Climate' at that point in time (1963 - 1970).

Under the 1963 Constitution, special provisions were set out for the appointment and removal of judges; their salaries, immunities and security of tenure of office. The judges of the Supreme Court and Lagos High Court were appointed by the President on the recommendation of the Prime Minister".[28] While the High Court judges of the Regions were appointed by the Governor of each region on the recommendation of Regional Premiers".[29] The

---

26. A.B. Kasunmu (ED). The Supreme Court of Nigeria 1956 -60 Heineman Educational Books (Ibadan) 1977. p.89.
27. Obafemi Awolowo; Path to Nigeria's Greatness 4th Dimension Pub. Co. Ltd 1977-80. p.136
28. S.112&125 of 1963 Constitution.
29. S.51 of the Eastern & Northern Nigeria Constitution of 1963, and S.49 w/Nig. Const. 1963.

elaborate provisions for dismissal of judges were also entrenched in the constitution".[30] The salaries of both the judges of the Supreme Court and Lagos High Court were charged upon the consolidated Revenue Fund of the Federation, while those of the Regions were charged upon their regional consolidated Funds.

All the above provisions were made to ensure the independence of the judiciary. But government interference particularly, the executive was always felt in the administration of any case that involves the Government as we have already seen in the cases of D.P.P.V. Chike Obi",[31] Awolowo V. Minister of Internal Affairs",[32] Akintola V. Aderemi & Anor",[33] and Olawoyin V.A.G. N/ Region".[34] e.t.c.

Thus, Professor Abiola Ojo remarked that:-

> "... in conclusion, it may be said that the history of the Bill of Right entrenched in the 1963 constitution and their judicial interpretation and application, do not commend them to present or future generation of Nigerians"...35

---

30. S 113(2) a & b, of the 1963 Constitution.
31. (Supra).
32. (Supra).
33. (Supra).
34. (Supra).
35. Abiola Ojo, "Fundamental Human Rights in Nigeria: 1963 and 1963 and 1979 Constitutional Provisions" Nig. Journal of contemporary law 1977-80 p.136.

It can be said that both the 1960 and 1963 constitutions of Nigeria gave room for the independence of the judiciary, but the government in power did not allow the courts to practicalize it as professor Ezejiofor Commented".[36]

2.3.2. INDEPENDENCE OF THE JUDICIARY UNDER THE 1979 CONSTITUTION.

Just like the 1960 and 1963 constitutions, the 1979 constitution provided an elaborate provisions to guarantee the independence of the judiciary.

For instance, appointment of justices and Chief Justice of the Supreme Court is to be made by the President on the advice of Federal Judicial Service Commission (now known as Advisory Judicial Committee) subject to the approval of the senate (now provisional Ruling Council) by a simple majority of the state".[37] The same applies to the appointment of the President of the Court of Appeal and the justices of the Court of Appeal";[38] the Chief Judge and Judges of Federal High Court";[39] the Chief and judges of state High Courts";[40] President of Customary Court

---

36. See footnote 26 above.
37. Section 211(1) & (2) of 1979 Constitution.
38. Section 218 of 1979 Constitution.
39. Ibid, S.229
40. Ibid, S.235.

of Appeal and its judges; 41 and the Grand Kadi and Kadis of the Sharia Court of Appeal respectively".[42]

It should be noted that under the Military administration, it is the executive head that makes the judicial appointments acting on the advice of the Advisory judicial committee.

It should also be remembered that the 1979 Constitution also provided some degree of independence not only as regards the appointment but also interms of promotion and tenure of judicial offices".[42]

Nothwithstanding the above constitutional guarantee of independence of the judiciary, there appears to be some interference by the executive and sometimes legislature in the activities of the judiciary. This makes it plausible to examine the working of the Courts under the 1979 constitution. In the second Republic.

Indeed, the Nigerian judiciary during the period under review seems to have some degree of independence. This was examplified in the locus classicus case of: SHUGABA DARMAN V. MINISTER FOR INTERNAL AFFAIRS".[43] This was the case involving illegal deportation to chad of the majority leader of Great Nigeria People's Party (G.N.P.P.) in Borno State. The court

---

41. Ibid S 241
42. Ibid Section 255, 256 and 257.
43. (1981)2 N.C.L.R. 459, see also 1982)3 N.C.L.R. 915.

held that the Minister for Internal Affairs does not possess unfettered discretion in matters even involving national security where individual liberty is at stake. An accused person, it further held, must be given adequate opportunity to answer to charges preferred against him. The deportation order against Shugaba was nullified. Monetary damages worth ₦50,000 was awarded against the Federal Government as a punitive measure for the callous and degrading manner in which its agents had treated the majority leader.

This presents a radical departure from the holdings of the courts in the first Republic".[44] While, the courts decisions under the 1960 and 1963 constitution were more in favour of the Government than individuals litigants, the courts decisions under the 1979 Constitution appears to be more in favour of individual litigants against the Government. This shows that the courts are beginning to be aware of their independence and are asserting it fearlessly.

This can be further illustrated in the case of ARCH BISHOP OKOJIE & ORS. V.A.G. LAGOS STATE",[45] where the Lagos State Government wanted to abolish private primary and secondary

---

44. See D.PP. V. Chike Obi, Awdowo V. Minister of Internal Affairs in foot notes 14 and 19 above.

45. (1981) INCLR 218, See Also Tony Momoh V. Senate (1984)5 NCLR 736.

institutions in the State. A liberal interpretation was given to "medium for the dissemination of information". Schools were construed as medium and as such coverred by the constitutional provision relating to freedom of expression and the press. Thus, the court granted an injunction against the Lagos State Government from carrying out its plan to abolish private primary and secondary schools.

This was a success of individual or group rights over the government on the issue of fundamental rights.

In another case, STATE V. IVORY TRUMPET[46] where the accused persons were charged with publishing seditious materials which attacked the person of the Governor, Jim Nwobodo. Araka C.J. (as he then was) in discharging and acquitting the accused persons made the following important observations:

> "I feel no doubt that any construction of the law on sedition in this country should be against the background of a profound national committment to the principle that debate on public issues should be unrihibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasant sharp attacks on government and public officials".47

It cannot be doubted that as far as the interpretation of the fundamental human rights of citizens were concerned, the judiciary

---

46. (1984) 5 NCLR 736.

in the second Republic lived up to expectation. They were determined to ensure that the experience in the first Republic does not repeat itself.

However, their performance in election petition cases in 1983 was dismal. For instance, in the unreported case of KADIYA V. LAR[48] in plateau State, Obi J Okoye C.J. (as he then was) showed such open bias in favour of the incumbent governor, Solomon Lar, that on appeal, the Supreme Court had to rule that the Chief Judge be excluded from the tribunal as it ordered a retrial of the case on its merits.

A similar order of exclusion was made against three judges of an election court at Umuahia, Imo State, because of what the Federal Court of Appeal described as outrageous and reprehensible conduct on their part".[49] Also in other cases like OBI V. MBAKWE & ORS.[50] There was an open charge that the court was assisting the State Governor to frustrate by means of delay tactics, the challenge of his re-election. In another case of BIDA V. IBRAHIM & ORS",[51], the action of Niger State Election Court seems to suggest bias in favour of the respondent because of the time limitation given by the court which obviously constituted

---

48. SC 99/1983, of 30/9/83. See also Onoh & ORS, V. Nwobodo FCA/E/168/83.

49. See Chimaroke V. Nwabueze & ORS. FCA/E/178/83 of 18/10/83.

50. Suit No, HOM/EP, 1183HIC. Owerri.

51. Suit No. W.S.S.C/IEP/83 of 10/9/83.

a serious handicap to the petitioner in the presentation of his case.

The Federal Court of Appeal had to use very strong language in two cases arising from election in two Federal Constituencies in Imo State. In one of the cases, a petition was allowed without hearing of any kind being granted to the first respondent. In reversing the decision, it was said that it was a travesty of justice and perverse for a court to shut out parties from being heard".[52]

Notwithstanding these shortcomings mentioned in the few cases above, the judiciary in the 2nd Republic, that is, under the 1979 constitution had some degree of independence better than under the 1960 and 1963 constitutions.

Infact, the cases of Shugaba[53] and particularly the case of STATE V. ARTHUR NWANKWO,[54] which is the loc us classicus case, as far as the interpretation of the relationship between individual and government as regards the freedom of expression and the press under the 1979 constitution and the law of sedition as contained in the Criminal Code is concerned. Here, the accused

---

52. See Ikoro & Ors V. Ukpai FCA/E/174/83 of 13/10/83, and Ikoris V. Ukiwe & ORS. FCA/E/175/83 of 18/10/83.

53. (Supra).

54. (1985)6 NCLR. 228.

who was contesting for a gubernatorial office against the incumbent governor, Jim Nwobodo, in Anambra State, published a book which contained many uncomplimentary remarks about the governor and his administration. He was charged and convicted for the publication of seditious material at a High Court. But on appeal to the Federal Court of Appeal, it was held that the section of the Criminal Code Making provisions for sedition was contrary to section 35 and 41 of the 1979 constitution and therefore, by implication nullified from the first day of October, 1979. Olatawura JCA (as he then was) in the above case admonished that:

> "Those who occupy sensitive post must be prepared to face public criticisims in respect of their office so as to ensure that they are accountable to the electorate. They should not be made to feel they live in an ivory tower and therefore belang to a different class. They must develop thick skin and where possible, plug their ears with cotton wool. If they feel too sensitive or irascible, they are within their constitutional rights to sue for defamation, but they should not use the machinery of government to invoke criminal proceedings to gag their opponent as the freedom of speech guaranteed will be meaningless."[55]

Thus, one could not but agree to the observation made by professor Nwabueze that;

---

55. Ibid, p. 756 of the report.

"The Nigerian judiciary has since the inception of the presidential constitution exhibited a commendably active liberalism in the enforcement of constitutional restrictions upon governmental powers ... viewed against the background of their part performance. This record of vigorous vigilant courageous activism is most refreshing and encouraging".[56a]

The next topic for consideration is the independence of the judiciary under Military administration.

56a B.O. Nwabueze: Nigerian presidential Constitution, Longman (1985) p. 328.

2.4 INDEPENDENCE OF THE JUDICIARY UNDER THE MILITARY GOVERNMENT

It is noteworthy that the regimes of Ironsi, Gowon and Murtala despite their abolitionist traits on the democratic institution, left the structure of the judiciary virtually untouched. This can be seen from the important Decree No.1 of 1966[56b] and Decree No. 32 of 1975[57]. The same may be said of the Idiagbon and Buhari regimes as well as the Babangida regime. See particularly Decree NO. 1 of 1984".[58]

The courts and judicial officers continued to operate and function in the normal way, except for the introduction of judicial Tribunals which were more common under the Buhari and Babangida administrations. But the significant and dangerous modification that occurred since the Military takeover was in relation to the appointment and tenure of the Chief Judges and judges of the various State High Courts, the President and judges of the Federal Hich Court; the Grand Kadi and Kadis and judges of the various Sharia Court of Appeal and the President and justices of the court of Appeal throughout Nigeria were appointed by the Supreme Military Council acting on the advice of the newly Created Advisory Judicial Committee".[59] Under the

56b. The Constitution (Suspension and Modification) Decree No. 1 of 1966.
57. F.M.G. Constitution (Basic provision) Decree of 1975.
58. The Constitution (Suspension and Modification) Decree of 1984.
59. See F.M.G. Constitution (Basic provision) Degree No.32 of 1975.

the constitutional Government, especially in the 1979 Constitution, the appointment, tenure and removal of judicial officers was done by the president or Governor of the State (as the case may be) acting on the advice of the Federal or State Judicial Service Commissions subject to the approval of the Senate or the State Houses of Assembly (as the case may be) by a simple majority".[60] Institution of the Advisory judicial committee under any Military dispensation should be discouraged because the power of appointment and dismissal of judicial officers is left to the whims and caprices of the incumbent headship of the Federation or State. This may give him the power to easily manipulate the Advisory Judicial Committee - knowing the nature of 'Our' Military regimes in Nigeria - to his advantage. Since the government in power controls the Consolidated Revenue from which the judges arepaid.

The retirement of Chief Justice T.O. Elias soon after the third coup that brought General Buhari to power is a case in point.

In the "Cleaning up" exercise initiated by the new administration for ridding all government functionairies of "dead woods", persons charged with declining productivity,

---

60. See, SS.211, 218, 229, 235, 241, 246, 252 and Particularly SS. 255-257 of the 1979 Constitution.

poor health, corruption, inefficiency, abuse of office or of old age were removed".[61] Chief Justice Elias (as he then was) retired from the Judiciary for obscure reasons".[62]

The official reason was that the retirement was on health ground. But this was hardly convincing because three months thereafter, the retired Chief Justice was elected a judge to the International Court of Justice at the Hague.

The history of judicial independence under a Military regime will be incomplete without considering the 'ouster clauses' in most Military Decrees and Edicts. Th question of Ouster clauses in Decrees and Edicts often occurs in Military Legislations dealing with property and rights e.g. The detention Decrees".[63] These Military legislations usually preclude the courts from the functions assigned to them by the Supreme Law of the land i.e.

---

61. See Daily Times; 18th August, 1975, p.1.

62. See New Nigeria; 21st August, 1975 p.18.

63. See State Security (Detention of persons) Decree. No. 2 of 1984. See also the case of Lakanmi Kikelomo and ORS V. Attorney General of Western Nigeria (1971)1 U.I.L.R. 201.

The Constitution.

Some of these Military legislations called Decrees and Edicts are as follows:

i. The Constitution (Suspension and Modification) Decree No.1 of 1966 under the Gowon regime".[64] This decree suspended and modified some parts of the 1963 Constitution.

ii. The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970",[65] which establish the doctrine of Unchallengeability of Military Decrees.

iii. Constitution (Basic Provisions) Decree No.32 of 1975, which left the Principle that a Decree is Superior to the Constitution since the Constitution can be amended by a Decree".[66]

Under Decree No.1 of 1966 the provisions of the 1963 Constitution empowering parliament and Regional Legislatures

---

64. See also Constitution (Suspension and Modification) Decree No. 1 of 1984.

65. See also The F.M.G. (Supremacy and Enforcement of the powers) Decree No. 13 of 1984.

66. See also Decree No.1 of 1966 and Decree No.1 of 1984. (Supra).

to establish new Courts or confer additional jurisdictions were suspended. The supreme court no longer had jurisdiction to determine disputes among the Regions (now States) or between Regions (States) and the Federal Government".[67]

Section 1(2) and (b) of Decree No.1 of 1966 are most important in the sense that s.1(2) after providing that the constitution shall have the force of law throughout Nigeria, went on to say that nothing in the constitution shoul render any provision of a decree void to any extent whatsoever. Section 6 reads:

> "No question as to the validity of this or any other decree or any edict shall be entertained by any Court of Nigeria."

The reaction of the Courts were more in favour of the Government as we had already seen in the cases of Adamolekun V. The Council of University of Ibadan".[68] and D.P.P. V. Chike Obi".[69] e.t.c.

Decree No. 1, Constitution (suspension and Modification) Decree of 1984 also suspended quite a good number of the provisions of the Constitution, especially the suspension

---

67. See Decree No.1 of 1966, Schedule 1 (suspended provisions of the federal constitution), 1963.

68. (1968) N.M.L.R. 253.

69. (supra) see footnotes Nos 41 and 42 above.

of section 1(3) thereof which gave the 1979 Constitution Supremacy over other laws, once such laws are inconsistent with the constitution. Section 1 of the above Decree No.1 now reads,

> "This Constitution as amended by this or any other Decree is Supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria".

This made the Decrees Superior even to the Constitution.

Mention must also be made to Decree No.2 state security (Detention of persons) Decree of 1984 which gave the Chief of staff, Supreme headquaters power to detain any person or persons without trial if he is satisfied that such persons act is prejudicial to state security or has contributed to the economic adversity of the nation and no court shall challenge his action".[70]

Section 4 of decree No.2, of 1984 gives immunity to legal or judicial process to any person for anything done in pursuance of the decree. Decree No.2 of 1984 also suspended all provisions relating to the fundamental Rights in the 1979 Constitution.

---

70. See. S.4 of the Decree and also The Armed forces and police (Special powers) Decree No.24 of 1967.

The Courts were excluded from entertaining any question about any infraction or violation of the provision of the Decree. Section 219 of the 1979 Constitution which confers right of appeal from the Federal High Court, State High Court, State Sharia Court of Appeal and State Customary Court of Appeal is made inapplicable to matters pertaining to the Decree. So also section 259 of the 1979 Constitution relating to references to the Court of Appeal and the Supreme Court of questions of Law which was excluded from matters pertaining to the Decree.

Decree No. 13; The Federal Military Government (Supremacy and Enforcement of powers) Decree of 1984 re-enacted the preamble to Decree No. 28 F.M.G. (Supremacy and Enforcement of power) Decree of 1970; which asserted in unmistaken words, after the Supreme Court decision in Lakanmi & Anor. V.A.G.W./Regions;[71] that there had been an effective abrogation of the pre-existing order by an abrupt Military revolution. The Decree excludes all civil proceedings in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree".

---

71. (supra).

Judicial independence deals with how free the judiciary is from any sort of governmental control as regards its manner of appointment of judicial officers, their removal, quantum and source of their remuneration; the freedom and immunity they have in the performance of their functions. It also includes their qualifications, moral character, comportment in society and the structural relationship of the judiciary with other arms of government. Some of these factors have been affected by Military administration as we have noticed earlier.

Indeed, the concept of the rule of law and the independence of the judiciary will be purposeless if the quality of the judiciary was brought in question.
As Bernard Schwarts stated;

> "Unless those appointed to the Bench are competent and upright and free to judge without fear and favour, a judicial system however sound its structure may be on paper, is bound to function poorly in practice. That is why the problem of judicial selection and tenure is the pivotal one in all the discussions of the proper administration of justice". [72]

The immediate problem that confronts the judiciary when there is a Military putsch is whether or not to recognise the new administration and what its attitude should be towards the law and actions of the new rulers.

---

72. See, 'American Constitutional Law', page 30.

In Nigeria, it is always a mixed reaction. After the first coup of 1966, the Courts behaved as if nothing had happened and certain decisions were given as if the old order under the 1963 constitution was still in existence".[73]

Judicial reactions later become realistic by recognising that a fundamental change had taken place and that the law had to be seen in line with the new order."[74] Sadly, the final court of Law (the supreme Court) seriously blundered by rejecting the claim of the military administration that it was a revolutionary government that did not owe its authority, power or existence to the pre-existing legal order".[75] The consequence was a firm reminder to the Courts of the limits of their competence by the promulgation of the federal military government (Supremacy and Enforcement of powers) Decree".[76]

The first problem therefore, is for the judiciary which had been used to nullifying legislations and actions of the

---

73. See Lakanmi's and Adamulekun's Cases (Supra) see also chapter one.

74. See Adamulekun V. The Council of University of Ibadan (1968) N.M.L.R. 253.

75. See Lakanmi & Ors. V.A.G. N/region and ORS. (1971) U.I.L.R. 21).

76. No. 28 of 1970.

executive and the legislatures under the civilian regime was forced to summersualt under thw Military regime aS its independence was affected.

The 1979 Constitution democrated or provided for separation of powers on all the three organs of government".[77]

The implication of this was that judicial powers of the competence to settle disputes judiciably was the exclusive preserve of the courts. However, consequent upon the unlimited legislative powers of the Federal Military government, some decrees not only lay down offences and their punishment, but also go on to determine guilt or settle issues which normally should have been left to the judicial arm of government. There have been several cases in which decrees have dissolved registered associations;"[78] confiscated and forfeited assets of named individuals and Institution,[79] and arrested detained and released such person".[80]

---

77. See Sections 5-7 of 1979 Constitution.

78. E.g. The Nigerian Medical Association; the political Parties (Dissolution) Decree No. 9. of 1984.

79. See Forteiture of Assets e.t.c. (Validation) Decree No. 45 of 1968. See also R Lakanmi's Case (Supra).

80. See. State Security (Detention of persons) Decree No.2 of 1984.

All these were done without adjudication or through any judicial process. Worthy of note is the Supreme Court ruling in Lakanmi's Case"[81] that a legislation which forfeits and confiscated the properties of an [redacted] individual is a piece of judicial legislation and therefore ultravires and invalid as it violated the 1963 Constitution. But the Supremacy Decree"[82] following this decision rendered nugatory such holdings of the Supreme Court; thus judicial independence was affected grossly.

The Independence of the judiciary has been affected in some other ways by Military rule. During the various periods of Military rule identified so far in this study; matters which required purely judicial decisions had been transferred to all kinds of tribunals. The tribunals after its 'Kangaroo trials' would not only convict but also impose penalties in form of fines or even death sentences".[83] There was also the tribunals set up under the Robbery and Fire Arms (Special provisions) Decree of 1970 for trying armed Robbers and the

---

81. (Supra).

82. The F.M.G. (Supremacy and Enforcement of powers) Decree No. 28 of 1970.

83. Like the Justice Oksdigbo (retired) Judicial Tribunal on the Zango Kataf Communal Disturbance in Kaduna State of May 17, 1992.

petroleum production and Distribution (anti Sabotage) Decree of 1975 for the trying of offences relating to petroleum production and distribution. There was in addition, the controversial Recovery of public property (Special Military Tribunals) Decree"[84] which provided for the confistication of Assets of any public officer who is alleged to have corruptly enriched himself or another or had in any other way violated the code of conduct for public officers in the 1979 Constitution. Most of these tribunals were headed by Military officers or retired judges with military members to assist them. However, all their decisions are subject to the highest Military authority such as the Supreme Military Council under the Buhari regime or the Armed forces Ruling Council under the Babangida regime or the Provisional Ruling Council of the Abacha regime respectively. No doubt, the independenceof the judiciary was affected in this respect.

Although, Andrew Obaseki (J.S.C.) (as he then was) asserted that :

> "... there is absolutely no interference in the operation or decision making process of the judiciary"...[85]

---

84. NO.3 of 1984.

85. See his lecture; "The relevance of law as an effective instrument of social engineering in contemporary Nigeria". Delivered at the University of Lagos. See also Nigerian Tribune of Friday April 26, 1985, page 9.

he went on to say that the fact that certain functions were taken from the jurisdiction of Law Courts did not detract from the independence of the judiciary.

Most respectfully, it is difficult to go along with these assertions. For whatever reasons, the mere fact that it was found necessary to take some functions which were purely judicial from the ordinary courts and given to other bodies, discounts the competence of and the confidence in the ordinary courts and to that extent vitiates the independence of the ordinary courts.

The need to 'inject' Military officers into institutions that purport to perform judicial functions by trying cases and imposing punishments like the ordinary courts can only be seen as interfering with the independence of the courts.

It can also be argued that specific provisions in certain decrees which particularly exclude or purport to exclude the jurisdiction of the ordinary courts to their traditional and constitutional functions affect the independence of the judiciary.

Every constitutional decree specifically provided that no question as to the validity of this or any other Decree

that deals with specific matters"[86] Shall be questioned by any court of law.

The most draconian of all was the federal Military Government (Supremacy and Enforcement of powers) Decree No.13 of 1984 which bars any civil proceedings in any court for or on account of, or in respect of any act, matter or things done or purported to be done under or in pursuance to any Decree or Edict.

All these can certainly not be said to be in aid of independence of the judiciary in the performance of their functions. They are legislative 'castration' of the judiciary.

The mechanism and manner of appointment and removal of judges could affect the degree of independence of the judiciary as discussed above.

Under the 1979 constitution in the federal System of government, appointment and removal of judges, the Grand Kadis, Kadis of Sharia Court of Appeals of the States and the President and other judges of the Customary Court of Appeal of the States,

---

86. E.g. The Recovery of public property (Special Military Tribunals) Decree No.3 of 1984.

except the Federal High Courts, the Court of Appeal and Supreme Court, were done on Federal and State basis respectively."[87]

However, the military administration, in line with its unifying tendency has centralized both the system of appointment and removal of judges and justices in the whole country. They are appointed and removed from office by the Supreme Military Council, or Armed Forces Ruling Council or the present Provisional Ruling Council of the Abacha regime, as the case may be, acting on the advice of the Advisory Judicial Committee".[88]

This national body comprises; the Chief Justice of Nigeria as Chairman, the Attorney General and Minister of Justice, the president of the Court of Appeal, the Chief Judge of the Federal High Court, the Chief Judges of the States and the Federal Capital Territory, Abuja, one Grand Kadi of the Sharia Court of Appeal appointed annually on rotation by the Supreme Military Council, Armed Forces Ruling Council or the present provisional Ruling Council (as it applies) from the States having a Sharia Court of Appeal. And finally, the president of the Customary Court of Appeal".[89]

---

87. See Section 210, 211, 218, 235 & 241 of 1979 Constitution.

88. See Section 14(3) of the Constitution (Suspension and Modification) Decree No.1 of 1984. See also section 212, 213, 218-235 of No. 107 of 1993.

89. (Ibid) S.14(1) of the Decree. See generally Chapter 2,4,2.

The retention of a body like the erst while judicial Service Commission is commendable. The present arrangement has great virtue of promoting uniformity of standards by affording opportunities to make comparisms. It can also be said to insulate to a degree, the judiciary, from undue local and state pressures. Civilians may not likely accept this arrangement as politicians will insist on the federal character principles. This however, means that the military are shielded from 'Soldier politiking' particularly in matters of appointment, tenure and removal of judicial officers since they have the final say.

It may be said that in the actual operation of decision-making process of the judiciary, there is no direct interference. The matter is then reduced to the courage of the judges themselves.

For instance, in the case of MINERE AMAKIRI V.R.M. INOWAN;"[90] a newspaper correspondent was forcibly shaved, given 24 strokes of the cane and subjected to in human degrading treatment. He was also detained for well over 24 hours. His offence was that he published an unpalatable and distasteful article in the Nigerian observer on the birthday of the state Governor. The plaintiff instituted a civil action for false imprisonment, assault and battery against the Aid decamp (A.D.C.) of the Governor claiming ₦10,000 damages. The acting Chief judge of

---

90. Unreported, Suit No. PHC/232/73, of March 22, 1973.

Rivers State gave judgement in favour of the plaintiff.

This case illustrates one of the few instances in which the judiciary gave judgement in favour of individuals rather than the Military Government as earlier discussed in the Middle of this Chapter".[91]

In a recent case of note is CHIEF V.O. ONABANJO V. THE SPECIAL MILITARY TRIBUNAL, LAGOS ZONE AREA".[92] in which the jurisdiction of the Tribunal in trying the plaintiff was challenged in the High Court. Just about the time the case was being heard before Honourable Justice Omotosho, the Federal Military Government promulgated the Federal Military Government (Supremacy and Enforcement of powers) Decree".[93] which purportedly ousted the jurisdiction of the court in challenging the jurisdiction of the Military Tribunal. Inspite of this, the learned justice went on to decide whether or not she had jurisdiction and commented in the course of her ruling that;

> "... it is very doubtful whether the draftsman however ingenious, can effectively and completely oust the jurisdiction of the courts ..."[94]

---

91. See Sub-heading 2:3:1 and 2:3:2.

92. (Unreported) Suit No. M/106/84 delivered on 28 May 1984.

93. No.13 of 1984.

94. (Supra).

This case also buttress the analysis earlier made that the judiciary in the second Republic and thereafter gave more favourable decisions in favour of individuals than the Federal Military Government in power unlike the Courts before and after the First Republic".[95]

The Nigerian judiciary witnessed one of its most serious crises at the tail end of the Babangida regime. The Shonekan regime created by the Babangida regime under the interim National Government did not also last long as it was 'technically' ousted from power by the Abacha regime. We shall examine these judicial crises following the annulment of June 12, 1993 election in the following topic.

2.4.1 INDEPENDENCE OF THE JUDICIARY UNDER THE INTERIM NATIONAL GOVERNMENT AND THE ABACHA REGIME.

Like any other Military regime that ever ruled Nigeria, the judiciary under the interim National Government of Ernest Shonekan and the Abacha regime remained almost the same in terms of structure and forms but with some basic modifications made by the constitution (Suspension and Modification) Decree No.107 of 1993 under the Abacha regime. In terms of judicial Independence, there had been a remarkable interference in the

---

95. See sub-heading 5:2:1 and 5:2:2. Particularly footnotes No.14, & 19,43 and 45, 46, 48, 49 and 50 above.

workings of the judiciary by the demised Babangida regime following the June 12, 1993 political impasse. The political impasse culminated into serious litigations in the various superior Courts in the land. The decisions of these courts raised fundamental constitutional issues that even threatened the existence of the Country, Nigeria.

Under this heading, we shall examine briefly, the events that led to the political impasse and the consequent effects on the judiciary. We shall also examine the role played by interest groups, and the rulings of Abuja and Lagos High Courts as well as the Supreme Court respectively.

When General Ibrahim Badamasi Babangida (I.B.B.) took over power from the Buhari/Idiagbon regime on 27th August, 1985, he promised to hand over power to the Civilians 'as soon as possible'. He pursued a political programme or what came to be known as the transition to civil rule programme. He raised the hopes of the politicians very much. But as things turned out to be, there was nothing like transition to civil rule as all the political plans were 'technically' foisted and completely aborted at the last minute when such political programmes were about to yield their fruits. This was evident when he called on the politicians to form their political parties, which they did. He selected six out of the thirteen political parties that emerged. But even the six political parties did not see the light of day as they were cancelled completely, giving

one reason of the other for the cancellation. The next thing he did was to create two new political parties; the Social Democratic party (S.D.P) and the National Republican Convention (N.R.C.) which are all state parties funded by the Military Government. Nigerians were eligible to belong to either of the two parties by registration, not both.

For several times, party heads from both the S.D.P. and N.R.C. emerged through the primary elections, but the final election that would have determined the political head was cancelled. The Babangida Government would advance a doubtful reason as the cause for the cancellation. In most instance, it was blamed on election malpractices. This made some people to start believing that he (I.B.B.) had a 'hidden agenda'. That hidden agenda was accorded different meanings. A lot of people believed that the hidden agenda was indeed not to hand over power to the Civilians. This was proved so when another election was conducted. The various state Governors were elected and sworn into office as well as the state houses of assemblies and the National Assembly. But as the final phase of the political transition was reached; two business men emerged as the party heads. They were M.K.O. Abiola under the S.D.P. and Bashir Tofa under the N.R.C. as presidential candidates;

Chief Moshood Abiola was alleged to have won the June 12, 1993 election under S.D.P. ticket. There was world wide attestation that the election was indeed free and fair. There

were foreign observers who actually verified this fact.

But to the utmost surprise of Nigerians and the world, Babangida 'summarily' annulled the june 12, 1993 elections and gave a flimsy excuse that there were some election malpractices. Most Nigerians went wild. It nearly drove the whole country into an unprecendented chaos and anarchy. These circumstances led to the post june 12, 1993 political impasse, wherein Nigerian Courts were found passing series of injunctions and counter injuctions that raised serious constitutional problems.

Nigerians came to believe that the Babangida regime intended to stay longer in power than necessary. Thus, in all his Eight years in office, he created problems upon problems that would make him stay longer in office, apart from cancelling elections and shifting the handover dates for several times. Indeed, the 'hidden agenda' was not to hand over power to the civilians at all.

But the annullment of the june 12, 1993 election was the last straw and Babangida was forced to handover to the shortlived Shonekan regime through the acts of the agrieved politicians at home and abroad, particularly, the alleged winner of the June 12, 1993 election, Bashorun Abiola and the international community.

The Shonekan regime which was clearly the upshot of the Babangida regime was 'technically' sentout of office by the

Abacha regime for no other reasons than the problems created by the Babangida regime.

We shall now look at the role played by the 'interest groups' such as the 'Association for better Nigeria' (A.B.N.), the presidential Candidates and the Courts following the June 12 political impasse.

'Interest groups' or what we can refer to as 'pressure groups' played an important role in the June 12, 1993 political impasse. Most notable among them were the Association of Better Nigeria (A.B.N.) under the auspices of Chief Arthur Nzeribe, a wealthy but crude businessman; and campaign for democracy (C.D.) which has human right activists such as Tony Falana, Beko Ransome Kuti and Gani Fawehinmi e.t.c. as its leading members. While A.B.N. was campaigning for the continued stay of the Military regime of General Babangida, the C.D. were struggling to see that the Military regime, not necessarily the Babangida regime is done away with, so as to give way for the practice of democracy in Nigeria.

For instance, the A.B.N., even though it was an unregistered association, applied for an order before the Lagos High Court asking for the continued stay of the Babangida regime up to 1997 and it was granted."[96]

---

96. See 'The African Guardian', of June 21, 1993, pp.11-13.

It was widely believed that the Babangida Government had a hand in the campaign for his stay. The A.B.N. under Arthur Nzeribe was used as a front to disguise the real intention of General Babangida's 'hidden agenda'. This is because the activities of A.B.N. went contrary to the Transition to Civil Rule (Political programme), Decree No.19 of 1987. By this Decree Chief Arthur Nzeribe and the rest of his cohorts ought to have been arrested but they were not. Instead they went about displaying post cards eulogising Babangida and his regime to stay without any molestation from the security officers. What is more, they were not a registered association. In addition, the A.B.N. were allowed to campaign in Abuja even on election day by the Deputy police Commissioner of Abuja (F.C.T.) and indeed held a rally to that effect on the Abuja parade ground".[97] This is most unusual and unbecoming of a Military regime that 'Promised' to hand over power to the Civilians on August 27, 1993.

Meanwhile, the C.D. also engaged in campaign of Columny in some notable Newspapers and Magazines such as the National Concord, Tribune, punch, The Guardian, African Concord, Newswatch Magazine and The African Guardian e.t.c. demanding that General Babangida and the entire Military regime should abdicate the seat of political power and hand it over to the civilians".[98] They also held series of rallies in different

---

97. See The African Guardian of June 21, 1993 p.12. See also fotnote No.94.

98. See Generally their June and July 1993 publications.

parts of the country on the same issue. However, the activities did not go scot free as that of A.N.N. The leaders of C.D. sufferred serious harrassment, victimisation and indictment from the security officers, police and even the Law Courts. On a number of occassions, the C.D. Leaders, Ransome Kuti, Falana, Gani e.t.c. were goalded,

This buttress tacitly, the ever vexing argument on whether or not General Babangida did wanted to hand over power to the Civilians, as his hidden Agenda. By these acts, Babangida indeed did not want to hand over power.

Even though another Lagos High Court issued an injunction against A.B.N. from further campaigning for the continued stay of the military, A.B.N. flouted the order by further moving a motion before an Abuja High Court praying the Court to stop or restrained the National Electoral Commission (N.E.C.) from holding the June 12, 1993 elections.[99] Surprisingly enough, Justice Bassey Ikpeme (rtd) who was just two months old on the Bench granted the injunction. By this ruling, she jettisoned the presidential Election (Basic Constitutional provision) Decree no. 13 of 1993. The ruling also dealt a total blow to the transition programme. It was not only a shame on the Nigerian judiciary, but it created confusion and it marked

---

99. See. The African Guardian of June 12, 1993, pp.11-13.

the first serious trouble that culminated to the june 12, political impasse.

S.19 of Decree No.13 of 1993 states that;

> "Notwithstanding the provisions of 1979 Constitution of the federal Republic of Nigeria (as amended) or any other law, no interim or interlocutory order or ruling, judgment or decision made by any court or tribunal before or after the commencement of this decree in respect of any intraparty or interparty dispute... shall affect the date or time of holding of the election or performance by the commission of any of its functions under this decree ..."100

the Supremacy of military decrees over any other Law, order and injunction e.t.c. has always been provided by most military regimes. Babangida's regime inclusive".[101]

but it was surprising to find a high court judge granting an injunction without any regards to a decree that forbid such orders, with the government giving full support to this heinous decision.

When N.E.C. refused to abide to the 'obnoxious' ruling and went on to carry on the june 12 elections, the Chief judge

---

100. Presidential Election (Basic Constitutional and Transition provision).

101. See S.1(1) Decree No. 61 I.N.C. (Basic Constitutional provision), 1993.

of the same Abuja High Court, Dahiru Saleh, further issued another injunction restraining N.E.C. from further announcing the June 12 election result that was successfully conducted pending the hearing of the A.B.N. substaintive suit at the other Abuja High Court. The Babangida government through its security agents moved swiftly to effect this order even though wrongly given. The Chief Judge really erred in law to have given this order. He even threatened to commence contempt charges against N.E.C. The then N.E.C. Chairman, Humphrey Nwosu at last abided by the said order under much pressure from the top".[102] These decisions formed part of the confusion that came to be known as the June 12 political impasse.

Abuja High Court was not alone in the passing of injunctions and counter injunctions and or orders. A Lagos High Court presided over by justice Olugbani, made an order given N.E.C. twenty four hours (24hrs) to release the June 12 election result which it had earlier on started to release citing Decree No.13 of 1993 as authority".[103]

All these series of court injunctions made a mockery of our judicial system. However, it should be noted that all

---

102. See. The African Guardian of June 12, 1993 p.8.

103. See. The African Guardian of June 28, 1993 p.23. See also Footnote No.98.

along, it is the Military that have been interfering seriously with the workings of the judiciary as we have seen so far.

There is no doubt that the election was the freest and fairest in Nigerian history and it was indeed acclaimed so world wide. But the disgruntle military junta under General Babangida annulled it giving the usual flimsy excuses viz. election malpractices, rigging e.t.c. which was not so.

The United States information service (U.SIS) on getting wind of a likely cancellation of the election wrote a memorandum to the Nigerian internal affairs ministry thus;

> "We are awaiting the Federal Military Government reaction to this Court (ie. Abuja High Court) decisions. However, any postponement of the elections would be unacceptable (and cause grave concern) to the United State Government."104

The then 'foolish' military regime of Babangida saw this act of the USIS as meddling with its internal affairs and engaged in 'diplomatic arm twisting' between Nigeria and U.S. It ended up with Babangida regime 'stepping aside', but the U.S. Political and economic embargo still remains against Nigeria up to the time of this writing".[105]

---

104. Ibid.

105. Ibid.

When General Babangida's regime was systematically forced to relinquish power to the allegedly elected Civilian president, M.K.O. Abiola, by internal and external pressure, he instead created an Interim National Government (I.N.G.) under Chief Ernest Shonekan. The I.N.G. was to operate under a given constitution promulgated by the Babangida regime.[106] The handover ceremony took place at Abuja. This historic event came to be known as the infamous retirement of General Ibrahim Badamasi Babangida from power.[107]

However, this handing over of power to the I.N.G. by Babangida did not help matters at all. Some pressure groups such as the campaign for Democracy (C.D.) e.t.c.; challenged Babangida's act as unconstitutional, null and void. We share the view that Babangida's action was truly undemocratic. The alleged winner of the June 12, 1993 election; (Abiola) should have been sworn-in as president.

The alleged president elect, Chief M.K.O Abiola and his running mate Babagana Kingibe took the matter before a Lagos High Court presided over by Justice Dolapo Funlola Akinsanya

---

106. See the Interim Government (Basic Constitutional provisions) Decree No.61 of 1993.

107. See 'New Nigeria' of 28 and 29 August, 1993.

to declare the I.N.C. illegal. The Attorney General of the Federation and N.E.C. were made the defendants in the Suit.[108] The Plaintiffs (Abiola and Kingibe) were seeking the Court to decide inter alia.

a. That the I.N.C. and Decree No.61, 1993 which established the I.N.C. were null and void.

b. That General Babangida's power of making Decrees has been taken away by the Constitution (suspension and Modification) (Repeal) Decree no.59 of 1993. This decree suspended the amended constitution (suspension and modification) Decree No.1 of 1984 which gave General Babangida's regime all its Powers and functions).

c. That Ernest Shonekan's Cabinet is illegal and all the ministers should be restrained from acting as the cabinet secretaries or Ministers.

The learned trial judge granted all these prayers, her lordship even quoted an impressive Latin Maxim in her judgment thus,

---

108. See The African Guardian of Nov; 22, 1993 pp.17-21. Suit No, LD/2056/93.

"Fiat justitia, aunt Coelum". Meaning, (let justice be done, even though the heavens fall)".[109] Earlier on, before the judgment, the learned trial Judge received several phone calls from the 'Tepmen' in Abuja and the Country at large reminding her of her 'duty' to respect and honour the desires and wishes of the Babangida regime towards the INC. Indeed Justice Funlola Akin Sanya's act is bold and correct in the eye of the Law and every Judge in Nigeria should emulate this act.

Despite the ruling of the above named Court and Public opinion against the INC., the people in authority refused or failed to effect the desired wishes of majority of Nigerians and the rule of Law.

This made the 14 S.D.P. States to sue the Federal Government all the N.R.C. States and N.E.C. before the Supreme Court of the Land".[110] The plaintiffs were challenging the Constitutionality of the I.N.C. including the validity of the Decree No.61 of 1993 which established the INC.

---

109. I C C Cit. (The African Guardian) Suit No.LD/2046/93.

110. See the National Concord of 15 July, 1993 and that of Thursday 22, 1993 pp. 1-2.

Although, at the time of this writing, the full text of the judgment was not at hand, but the important ruling of the Supreme Court Presided by the Chief Justice of the Federation, Mohammed Bello was to the effect that the Supreme court has no jurisdiction to hear/ or determine the constitutionality of the Military decrees or the ING..."[111] This indeed is very absurd and least expected of the highest Court of the Land.

The ruling of the Nigerian Supreme Court had a very devastating effect on the whole system of judiciary in Nigeria to date. It clearly showed that even our most learned justices at the highest court of the land have subjected themselves not only to national and international ridicule, but also it shows that they have subjected themselves to the whims and caprices of the Military in power. One may even begin to ask which authority in an independent country has the power or authority to determine the legality or illegality of any law, order rule, decree or edict? "Is it not the Supreme Court? Yes, it is, of course. Whiter Nigerian Judiciary?

---

111. Before this ruling, the Fed. Mil. Govt. passed the Presidential Election (Invalidation of Court orders) Decree No.41 of 1993 to the effects that no court, even the S.C. shall not entertain such issues as one brought before it.

Since even the Supreme Court could not save the country from the Shackles of Military regime, it was not Surprising that the I.N.G. fell barely two months after it assumed power from the Babangida regime. Ofcourse, it was another Military regime that took over power from the I.N.G. technically and systematically. This was done under the leadership of General Sani Abacha who was a prominent figure under the Babangida regime.

This was the nature of independence of the judiciary under the I.N.G. The judiciary under the Abacha regime has already been discussed atleast under the constitution (Suspension and modification) Decree of the Abacha regime".[112]

At the time of this writeup, the June 12 Political impasse was yet over. What the Abacha regime is doing at this point in time is the setting up of commissions and tribunals of enquiry to investigate the affairs of the various federal and state parastatals including the judiciary. What is more, he has set up a mechanism for an election to the national constitutional conference to be held soon. However, the Nigerian judiciary seems not to have woken up to its task of judicial review Power, and the application of the rule of Law and separation of powers doctrines. There is now a test case for the Nigerian Judiciary. This is because, the alleged winner of the June 12, 1993

---

112. No. 107 of 1993.

presidential election, Chief M.K.O. Abiola had declared himself president on Saturday 12th June, 1994 at Evans S quare, Victoria Island Lagos".[113]

He has however been arrested, detained and brought to trial before the federal High Court Abuja. He is charged with the offence of Treasonable Felony for allegedly trying to cause public disorder and overthrow the government".[114] At the time of writing, the matter is still in court, hence subjudice. It cannot be discussed at length because the case is not decided.

However, the circumstances that led to the episode is not unconnected with the annullment of june 12, 1993 elections which consequently led to the political impasses as earlier discussed.

Chief M.K.O. Abiola was said to have 'Supported' the takeover of power of the I.N.C. of Ernest Shonekan by the Abacha military junta. It is not clear what was Abiola's real intention. Probably, he thought that by 'supporting' General Abacha, the General may later on declare him winner of the June 12 elections and swear him in as president of Nigeria officially.

---

113. See "Vanguard" of june 14, 1994 pp.1-2. See also the 'NewNigerian' of june 14, 1994.

But it dawned on him that he will not be sworn-in as president by the Abacha regime. He therefore started agitating to be recognised as the president elect. His utterances and campaign on the June 12 election brought him at loggerhead with the Abacha regime; just as it was the case under the Babangida and I.N.C. administrations.

The political crisis reached its climax when Chief M.K.O Abiola declared himself winner of the June 12 election of 1993 at Evans Square, Victoria Island Lagos".[115] This led to his subsequent arrest and detention. Earlier on, there were series of Court Orders, especially from the Lagos High Courts asking the government to produce Abiola for trial.

This was done eight days later".[116] He was charged with treasonable felony before the federal High Court Abuja as stated earlier. It appears that the 'Political impasse' as discussed earlier on is far from being over.

It is difficult, as we can see, to assert the independence of the judiciary under a Military regime. As such, all hands must be on deck to stamp out the uncanny influence of the Military in all spheres of political and judicial administration in Nigeria.

---

115. Ibid.

116. See 'Vanguard' of July 4th, 1994 at pages 1 & 2.

In chapter five, the final cahpter, we shall draw conclusions and make suggestions that might help the Nigerian judiciary in its struggle for upholding the principles of rule of law and separation of powers as is contained in the Constitution of 1979, so that no any military regime can limit the powers and functions of Nigerian judiciary.

C H A P T E R T H R E E

THE JUDICIARY AND THE MILITARY GOVERNMENT

3.1 INTRODUCTION

The judiciary and the military always play an important role in any government, be it in the advanced 'Western democracy' or the 'third world'.

In advanced Countries such as the United State of America, the United Kingdom (Britain), France and Germany e.t.c. the role and powers of the judiciary are separated from the executive and legislative organs of Government based on the principles of Separation of powers and the rule of law. These principles are contained in a codified body of laws or document known as the constitution.

However, the military in the 'advanced Western World' do not always 'intervene' in the political administration of their respective countries as does the military in the developing or third world countries like Nigeria, Ghana, India, Pakistan, Chile, Columbia, Afghanistan and Bolivia e.t.c.

Although, developing Countries also have similar judicial arrangement as the western Countries; but one should not be unmindful of the fact that the level of 'Military intervention' in the third world's (i.e. developing Countries)

political System is higher than that in the advanced Western world.

In the developing world, the military frequently disrupt a legally constituted political authority through Coup d'etats. but in the advanced Countries, the military only act when it it is mandated to do so by a legally constituted authority such as can be seen under the American political system.

Thus, the United States Army fought the Gulf War (i.e. operation desert storm) after the united states congress sanctioned it. They were also in Somalia in the 'Operation Restore hope' to save the Somalia people from serious political anarchy only after it was sanctioned by the U.S. Congress.

Similarly, Countries in Europe, America (North and South), Africa, Middle and the Far East and the world in general jointly fought the second world war (1938-1945) to destroy the Nazi regime of Germany and the Fascist-Italy and Japan after receiving the mandate of their respective governments.

However, this is not to say that there are no serious military intervention in some advanced countries that has similar consequences as is obtainable in the third world. Soviet Russia under the Communist system is a good example. It happened when a group of top Russia military officers

arrested and detained the then president of Russia, Gorbachev and asked him to relinguish his powers to them. It was an abortive Coup because he refused and it was generally not accepted not only in Russia but to the 'Capitalist' West.

Although it may be argued that Soviet Russia was a 'Communist political System' that has of recent disintergrated into smaller Republics; but the fact remains clear that military intervention is more common in Africa, the Middle East and Latin America than in Western Europe and North America.

Inspite of the provisions relating to the principles of separation of powers and rule of Law in the various constitutions of the third world, the military seems to dominate the political system in its entirety. Nigeria, Columbia, Ghana, Afghainstan and Columbia are good examples. The effect is that the judiciary is not allowed to function properly,. Under this topic, we shall examine the rationale for the legal and political justification (if any), of military intervention in the politics of the third world, especially, Nigeria.

3.1.1 NATURE OF MILITARY REGIME.

WHAT IS MILITARY REGIME?

It is the headship or leadership of a political system by a group of armed soldiers. In most instances, it is spear headed by a Senior military Officer. It is the control of the government by armed military men either through a bloody military putsch or 'palace putsch' which may or may not be bloody. By bloody military putsch we mean such military 'Revolution' 'Coup d'etat' or takeover of the political administration from a legally constituted authority by a military junta. An example of this is the 1984 Buhari/Idiagbon military regime which ousted the Civilian regime of Shagari. There was also the palace coup that unseated Buhari regime and usherred in the Babangida regime.

Thus, it is a palace Coup or putsch when members or leaders or politicians within the same political hierarchy (Military or Civilian) conspire to topple the existing legal order and replace it with a new one in which they often become members in the new regime. The Babangida regime mentioned above is one good example of such a regime. It does not matter whether or not they were in the toppled regime.

In the Case where a Civilian government was toppled, the executive and legislative arms of government are replaced by

military personnel. Where it was a military government that was toppled, it is a mere 'change of guards'.

A Military putsch usually effects some 'Cosmetic political changes' and sometimes undertake a radical overhaul of the whole political system. The legal constitutional government is suspended. The judicial organ is more often left intact in terms of its personnel; but the post of the Federal Attorney General and Chief Justice are usually appointees of the Federal Military Government.

In a Military regime; the Constitution is suspended or modified to suit the new regime".[1] And those parts of the Constitution not suspended are allowed to function subject to the Decrees and Edicts".[2]

Some other examples of military coups in Nigeria are that of 1966 which toppled the Civilian regime of Balewa and unsherred in the Aronsi regime. This was followed by

---

1. See the Constitution (Suspension and Modification) Decree No.1 of 1966 and its equivalent under the Constitution (Suspension and Modification) Decree No.1 of 1984.

2. See The Federal Military Government (Supremacy and Enforcement of powers) Decree No. 28 of 1970 and its equivalent under Decree No.13 of 1984 i.e. The Federal Military Government (Supremacy and Enforcement of Powers).

the july Coup of the same year which brought in the Gowon regime. There were the Murtala Coup of 1975; the foiled Coup of Dimka in 1976, the Buhari Coup of 1984, and the Babangida Coup of 1985.

The takeover of political administration from a legally constituted authority by unlawful means, notwithstanding that it was successful is illegal. This is because, the seizure of political power was done without the legal Mandate or authority of the Constitution or the people. It is the rule by force or Coercion which involves the use of force of arms like the Gun and other military apparatus.

Military regimes are usually authoritarian and autocratic. It is totalitarian in nature. They are not bound by any supreme law such as the constitution to which all persons and authorities are subject. Military regimes assume power, authority and legality through the use of forces and named Coercion.

It is not only in Nigeria that there are military putsch. There was the Afrifa Coup in Ghana in the 1970 and J.J. Rawlings' in 1979 also in Ghana. There was the Coup of Thomas Sankara of Burkina Fasso in 1984. We also had the Penochet Coup in Chile (Latin America). There was also the foiled Coup in Russia in 1992/1993.

It has always been argued in Nigeria as to whether an Army takeover is a military coup d'etat, a mutiny or a revolution? [3] This will be discussed subsequently. Mention must however be made that the military regimes do not command the general will or represent the interest, wishes and aspirations of the people in the political system even though their assumption to power is 'somehow welcomed'. They are an undemocratic government that assumed leadership through the 'barrel of the Gun'.

Military regimes claimed to have taken over power from the civilians 'to save the country from collapse', based on the Kelsen's theory of necessity. They also claim to save Nigeria from 'Economic doldrums' and to stop the hospitals becoming 'mere consulting clinics' and 'total collapse'. There are many reasons given for their taking over political administration. But it appears that even today the problems which they allegedly came to solve are still with us.

The impact of the military takeover of the Nigerian political apparatus as it relates to specific provisions of the 1979 Constitution was provided under section 1(2) of the constitution which reads;

3(a) See Lakanmi and Kikelomo V. A.G. W/States and other (1971)1 U.I.L.R. 218.

> "The Federal Republic of Nigeria shall not be governed nor shall any person or group of persons take control of the Government of Nigeria or any part thereof except in accordance with the provisions of the constitutions..."3(b)

It is clear from the proceedings of the Constituent Assembly that Section 1(2) was written into the constitution because of the nation's past experiences of military rule. But the question arises whether the subsection was really necessary. By the subsection, a Coup d'etat or revolution is not the legal or legitimate way of taking over or taking control of the government because it is not "in accordance with the provisions of the constitution". The subsection provides against a military government by declaring it illegal. It also anticipates a government taken over as a result of Civil strife or disorder. e.g. revolution. S.1(2) understandably did not provide any punishment for breach of the subsection. It is both a question of Law and fact that participants in a successful coup d(etat or revolution cannot be punished because the ousted government is no more in power to enforce any Sanction. It is only when a coup d'etat or revolution is unsuccessful that the participants face the offences of treason or treasonable felony depending on the gravity of the overt acts.

3(b) Ibid the 1979 Constitution.

The point must be made that the criminal laws of the country made sufficient Penal provisions for the punishment of participants in an unsuccessful Coup d'etat or revolution[4] and there was really no need for the fairly curious and novel provision of S.1(2) in the 1979 constitution".[5]

[illegible] LEGAL AND POLITICAL JUSTIFICATIONS OF MILITARY INTERVENTION IN NIGERIA'S CONSTITUTIONAL DEVELOPMENT.

There is always the general impression that military governments are unconstitutional and illegal. This impression is generally borne out of the fact that military revolutions are an illegal means of overtaking a legitimate government. While the point is conceded that military revolutions are per se illegal but customary international law and jurisprudence tend to recognise successful revolutions as a proper and effective means of changing a legitimate government that failed to meet the expectation of the society it governs. But certain basic requirements have to be fulfilled viz;

a. There must have been an abrupt political change, that is, a coup d'etat, revolution or in surrection;

---

4. See Penal Code (N/Region) Federal Provisions Act 1960 (L.N. No.25 of 1960) and the Criminal Code (S/Nigeria) 1958/59.

5. See Niki Tobi, "Some Innovations in the Constitution of the Federal Republic of Nigeria (1981)2 Solicitor and Advocate, pp. 16-24.

b. The change must not have been within the contemplation of an existing constitution;

c. The change must destroy the entire legal order except what is preserved and;

d. The new constitution and government must be effective."[6]

Hans Kelsen, an Austrian Legal Scholar and the protagonist of Vienna School of the pure theory of Law wrote recognising revolution as a legitimate way of overtaking a government if it is successful and the new order is in effective control of the government. Thus the old order cannot obtain the force of Law".[7]

Also a proponent of Scandinavian Realist School of Legal thoughts, Olive Crono was in favour of Kelsen's view by saying that there is no reason for any explanation on how a successful revolution acquires its binding force in the face of glaring illegality. The revolutionaries, he said, are only bound to control the machineries capable of exerting the needed psychological pressure. He said the needed,

---

6. See the cases of Madzimba Muto V. Lardner Burke & Ors (1968)3 W.L.R. 1129, the State v. Dosso & Anor, (1988)2 Pak. Sup. cit. Report 180; Uganda v. Commissioner of prisons, Ex. porte Matora (1966) E.A. 514.

7. See 'Pure theory of Law; L.G.R. Vols. 50 & 51.

1. Force to oust the existing order and suppress its supporters;

2. propaganda to facilitate the creation of the new psychological order or association".[8]

We shall now examine the issue of the legality of military regime in detail by analysing and making reference to the American Constitution as well as the pakistani, Ugandan and Cyprus, situations and ending it up with the Nigerian military interventionism in the political arena.

The legal consequence of Supremacy of the Constitution is that it binds the authorities that constituted the constitution itself. That is, the congress or Houses of legislation; including the people as well. Likewise in a Federating unit, all units or states that form the union or federation are bound into indissoluble union. None can freely seced or withdraw from the union. This was the view of the United States Supreme Court in the case of TEXAS v. WHITE".[9]

In Nigeria also, the Eastern region attempted to secede, but the federal government aborted it through a protrated civil War from 1966 to 1970.

---

8. See; Law as facts' (1939).

9. (1965) U.S. S.C. p.365.

Section 2 of 1979 Constitution provided that Nigeria is and indivisible and indissoluable Sovereign State consisting of the States and the Capital Territory, Abuja.

Section 8 of the same constitution gave room for creation of other states by amendment. Section 9 made secession of any state illegal and unconstitutional per se.

Thus, a constitution that protects minority rights should continue to be supreme. But where minority rights are trampled upon by the majority, the minority are not free to secede. This was the view held by the one time president of America, Abraham Lincoln when he was addressing the few seceding states of United States.

It follows that where the minorities cannot alter the constitution through their representatives in congress (National Assembly) or Parliament, and there is no hope of setting a constitutional amendment to protect their interest, they may find rebellion as the only way out. Morally, the rebellion may be right but legally, it is not permissable.

Sometimes, situations may arise whereby the constitutional Provisions may not be adequate enough to deal with the particular event and if the state authorities do not do something about it the constitution and the government may be in danger. In such circumstances, the government may act

act outside the constitution to save the Constitution and the state from total collapse. This can be done in the following ways:-

1. By taking such extra - Constitutional Steps as may be necessary to deal with the emergency situation not contemplated by the constitution.

2. Suspends or abrogate the constitution in extreme cases where, but for such steps, it is difficult to maintain the security of the state of Federation or union of the states. Such step might be taken by any of the government authority or by a group of people who might be dissatisfied with the manner in which the Constitution of Government is being run or the frequency with which the Constitution is flouted by the government.

This was applied by president Abraham Lincoln of United states during the American Civil War. He suspended the writ of Habeas Corpus against the enemies of the Union, which Constitutes a breach of a part of the United states Constitution. When asked why; he argued that he did so to save the constitution and the Union from total collapse and had he not suspended the writ of Habeas Corpus, the Union could have been overthrown by the dissidents. Hence he was

the union and the Constitution from Collapse.

The change of government by extra Constitutional means has become a matter of great concern in the developing States. The Colonial powers enacted the Constitutions to guide the newly independent developing states when they did not have adequate experience of the working of democratic institution or as to constitutionalism.

Modern constitutions do contemplate certain emergency powers of extra-ordinary nature by vesting them generally in the Chief executive, subject of course to the legislative checks and balances.

Section 265 of 1979 Constitution for instance, gave the president power to proclaim a state of emergency. Section 11(3) of the Same Constitution also gave the National Assembly powers to make laws on any subject including the state subjects as may appear to it to be necessary and expedient for the defence of the federation in emergencies such as war. It can also make laws for the state when the state assembly cannot convene due to internal squabbles or Civil Strife until when such state assembly is able to perform its functions.

The emergency powers in the 1979 constitution is seriously restricted in view of the experience of the wider-emergency

powers under the 1960 Constitution. It was 'alleged' to have been abused by the federal government in respect of the disturbances in 1962 in the western Region. Under the emergency powers provision in the 1979 constitution, unlike the 1960 Constitution, the president may declared a State of emergency in a state, but the power does not include the power to suspend or take over the government of the particular state.

But it may be argued that, since the president has taken the oath of allegiance to do everything necessary to preserve, protect and defend the constitution, hence he can even go beyond the provisions of the constitution to do so.

The measures taken by the president are to be temporary and should be necessary to protect, preserve and defend the constitution. And when normalcy is restored such extra-constitutional power stands exhausted. The president is bound to restore the constitutional government in strict accordance with the constitution. This is known as the doctrine of necessity.

The rationale of the doctrine is that in an emergency endangering public order or safety, the safety, the safety of the people and the state is the Supreme law of necessity. By this Supreme law of necessity, the organs of the state are

are entitled to take all appropriate action even in deviation from the express provisions of the constitution in order to safeguard law and order and preserve the state of society. This doctrine is subject to the following conditions.

1. There must be imperative necessity arising from an immediate and imminent-danger and it is inevitable to take action to meet such an exigencey.

2. The action taken must be proportionate to the necessity i.e. it must be reasonably warranted by the danger it was intended to avoid.

3. It must be of temporary nature limited to the direction of the exceptional circumstances after which normal authority should be allowed to resume its lawful functions.

This situation arose in Cyprus whereby there was a deadlock when the Turkish Cypriots broke away from the Federation. Consequently, the Supreme Court and High Courts could not function because the constitution provided that for any of the courts to function, it must have certain numbers of Greek and Turkish Cypriots to Constitute the bench. A law was made to the effect that the courts would be deemed constituted if it has 3 Cypriots on the bench. This Law was

challenged on the grounds that the legislature as well as the executive was not properly constituted. Since certain number of Turkish Cypriots were not present to enact the law and the Vice president - Turkish Cypriot was not the Signatory to the law as the Constitution requires. But it was held that the doctrine of necessity applies to save the Constitution and the federation from imminent danger of collapse. This was decided in the Cypriot case of A.G. THE REPUBLIC V. MUSTAPHA IBRAHIM".[10]

The doctrine of necessity was also applied in Nigeria in LAKANMI KIKELOMA & ORS. V. A.G. W/NIGERIA".[11]

In this case, there was insurrection in both Northern and Southern Nigeria in which prominent Ministers including the Prime Minister were kidnapped and assassinated. The President was out of the country and the Acting President with some few Ministers met in secret with some groups of armed forces and handed over power to the military. Nobody knows what transpired between them except what came out from the speech of the General Officer Commanding the armedforces of Nigeria. He said that the Civilian had met and decided to hand over power to the military for the sake of maintaining Law and order and good governances of the federation until everything is safe. In other words, he was saying that the Military had assumed leadership out of necessity.

10. (1964) Cyprus Law Report pp.116-195.
11. (1971) U.I.L.R. 201.

Consequently, the Federal Military Government Constitution (Suspension and Modification) Decree No.1 of 1966 was enacted. This decree affected the Supremacy of the 1963 Constitution. Section 6 of the Decree forbids any court from questioning the validity or legality of the military regime. Lakanmi and his daughter instituted this case challenging the validity of the military Edicts which order the confiscation of their assets as it is ultra vires to the 1963 Constitution. The Supreme court held that Decree No.1 of 1966 ousted the court's jurisdiction to hear and determine the case before it.

However, in the case of ADAMOLEKUN V. THE COUNCIL OF UNIVERSITY OF IBADAN[12] the court interpreted this section of the Decree No.1 of 1966 to mean that the court is not precluded from challenging the validity of the military Edict if it contravenes the military decree or unsuspended part of the 1963 Constitution.

In Lakanmi's case however, the Federal Military government promulgated the Forfeiture of Assets e.t.c. (validation) Decree No.45 of 1968 confiscating Lakanmi's Assets and his daughter's until the final determination by the military Tribunal investigating the Public officers Assets. Lakanmi challenged the validity of the decree as it is ultra vires to the 1963

---

12. (1968) N.M.L.R. 60-253.

constitution as it amounted to an Act of Attainder.

The government's contention was that the events of 15th January, 1966 and the enactment of Decree No.1 of 1966 should be construed as a revolution by a replacement of one legal order by another. And therefore, the validity of the laws and Acts of the new order cannot be judged or determined by reference to the old legal order. The surviving part of the constitution derived their own force of authority from Decree N.1 of 1966. This is not to say that their validity rested solely on Decree No.1 of 1966. That is to say, the new order (the military regime) could apply the provisions of Decree No.1 of 1966 as well as the unsuspended part of the 1963 constitution notwithstanding that part of it was either abrogated or suspended by the said decree.

The Supreme court was inclined to accept that the events of January, 1966 read with the announcement of the G.O.C. of Nigerian Army amounted to an emergency out of necessity and it was clearly stated that the Government established was an interim government formed for the purpose of maintaining law and order and essential services for the time being before the situation returns to normalcy.

In arriving at such conclusion the Supreme Court distinguished the Ugandan case of UGANDA v. COMMISSIONER OF

PRISONS".[13] and the Pakistani case of THE STATE v. DOSSO".[14]

The Court pointed out that in the Uganda case, the Pakistani case was referred to in the following terms.

> "... that the President's Proclamation of October 1958 by which the constitution of 1956 was annulled and martinal law proclaimed thereby constituted an abrupt political change not within the contemplation of the said constitution. That is, it was a revolution. A victorious revolution is an internationally recognised legal method of changing a constitution. Such a revolution constitutes a new law creating fact. Laws which derived from the 'old order' may remain valid under the 'new order' only because validity has expressly or tacitly been vested in the same, not the reason of validity. Further, no jurist would maintain that even after a successful revolution, the old constitution and the law based thereupon remain in force, on the ground that they have not been nullified by the old order itself,"15 (sic)

What actually happened in THE STATE v. DOSSO[16] was that in Pakistan, the President had issued a Proclamation annulling

---

13. (1966) (1966) E.A.L.R. pg. 514.

14. P.L.D. (1958) S.C. Pakistan 533.

15. D.O. Alhe and P.A. Oluyede See Cases and materials on Constitutional Law in Nigeria." Published by University Press Ltd. Ibadan (1987) pg. 44 - 55 particularly at p.56.

16. (Supra).

the existing constitution. There was a disruption of the Constitution and the national legal order by an abrupt political change not contemplated by the constitution. The action of the President was challenged as being unconstitutional. But it was held by the Supreme Court that there is a successful revolution; the 'old order' having been replaced by the 'new established order'. Nelson's theory of necessity was upheld.

Also the facts in the case of UGANDA v. COMMISSIONER OF PRISONS".[17] was that the President abolished the constitution of the country in the National Assembly and Substituted a new one, which installed him as Executive President with Power to appoint a Vice President contrary to the Constitution of the country - actions which could only appropriately be described in Law as a revolution.

But in the Southern Rhodesian case of MADZIMBA MUTO v. LARDNER BURKE".[18] There was a unilateral declaration of Independence (U.D.I.) from the British Colonial Power by the Rhodesians and the new goveernment made Laws to govern Southern Rhodesia. The High Court of Southern Rhodesia held that the laws were valid as it was necessary to maintain Law

---

17. (supra).

18. (1969)1. A.C. 645 at p.710. See also Cases and materials on Constitutional Law in Nigeria, D.O. Aihe & P.A. O Luyede pp.58.

and order, but the government was declared illegal. At the Privy Council in Britain, it was held that both the laws and the Government were illegal, unconstitutional, null and void. The reasons being that there is still the imperial legislature and the government functioning. The ruling in the Pakistani case of STATE v. DOSSO[19] was rejected on the ground that it is not applicable to Rhodesia as the facts are different and there was no authority under the old order trying to restore the old one that was completely replaced by the new one. Hence, the British Government still claimed sovereignty over Southern Rhodesia and was taking steps to regain control of the territory. Therefore, in Law, the British Courts held the new Southern Rhodesian Government illegal, but in fact and in Law, the new order in Southern Rhodesia was a successful revolution. At page 740 of the Law Report, Lord Pearce, on the doctrine of necessity said;

> "The Principle of necessity or implied mandate is for the preservation of the citizen, for keeping law and order, rebus sic stantibus, regardless of those fault it is that the crisis has been created or persists"... (sic) 20'a'

In yet another Pakistani case of JILANI v. GOVERNMENT OF PUNJAB[20 'b)] East Pakistan had seceded and declared their in dependence from Pakistan to be known as Bangladesh Republic. The Parliament of the seceding territory made laws for the new

---

20(a) (1972) Pakistan L.R. 6.

20(b) (Supra).

Republic. The idea of successful revolution and international recognition was advanced based on Kelsen's theory of Grundnorm. The old order having been replaced by a new one. The doctrine of necessity was applied. But the Pakistani Supreme Court rejected this contention and over ruled its earlier decision in STATE v. DOSSO[21] and held that the new independent government is unconstitutional since there is still the existing old order i.e, the Pakistani constitution. It was further held by the Supreme Court that the legality of the new government has to be judged with reference to the domestic laws of Pakistan by which the court is bound and not with the rule of international law i.e. international recognition. Hence, the new Bangladesh government is illegal Perse. The court also rejected the idea of a successful revolution by stating that an act which is void and illegal abinition cannot be said to be legal on the grounds of its effectiveness. The court said that effectiveness may have been established by force; silencing or coercing the people into submission to the new government.

The facts of the case are different in the sense that the new government was established by sucession of a territory and that the court was functioning still under the old order as the new order did not affect it in any way.

---

21. (Supra).

Considering the privy council's views in MADZIMBA MUTO's Case;[22] it could not be said that the new order was functioning under the constitution (i.e. the old order). Thus, it cannot be expected to determine the validity of an action in accordance with the constitution of the country and not a rule of international law. This is a limitation to Kelsen's theory of necessity.

In the Southern Rhodesia, not withstanding the decision in Madzimba Muto's Case[23], the high court of Southern Rhodesia after sometime found that the new order had been fully established and there was no immediate possibility of it being replaced, applied the doctrine of necessity and successful revolution. Thus, it accepted the new order as legitimate and all its laws and actions were valid with reference not to the old order, but the new constitution.

From these cases, it is evident that, whether a given case is that of necessity or of successful revolution, depends upon the facts of the case. The following must be taken into consideration;

1. whether the new order has been fully established.
2. whether there is any possibility; factual or legal for the resumption of the old order and;

---

22. (Supra).

23. (Supra).

3. The position of the courts which are to decide the case in the matter and also;

4. Whether any question of international or municipal Law is involved.

The Nigerian case as was canvassed in Lakanmi's case[24] provided a typical application of Kelsen's theory of Grundnorm; the doctrine of necessity and successful revolution by the new order. But in this case, the military said they took over power temporary to restore law and order. Yet they continued to rule longer than necessary without restoring the old constitution and Government".[25] What is more, Decree No.1 of 1966; Particularly section 6 restricted the courts from questioning the validity or legality of both the military decrees and the government itself, and does not specify the time limit by which the government is to maintain the said law and order before it can give back power to the order. It rather declared its supremacy by issuing the Federal Military Government (Supremacy and enforcement of Powers) Decree No.28 of 1970 which further consolidated the

---

24. (Supra).

25. When the Military took over power from the Civilian in Nigeria in January, 15th 1966, they did not relinquish the power to the civilians until 1st October 1979 with a new constitution. There were several Military regimes from 1966 - 1979.

and military in power.

The decisions of the courts in State v. Dosso;[26] Mazimba Mute case";[27] Federation v. Shah";[28] Uganda v. Commissioner of Prisons[29] and Lakanmi cases[30] in upholding the validity of the new law and order based on the doctrine of necessity or successful revolution does not actually uphold the laws and orders valid per se. But that they are only valid because they are necessary for regulating the affairs of the society when there is no government to control the society and the country as was decided by the United States Supreme Court in TEXAS v. WHITE".[31]

The Military Coup d'etat of 1983 in Nigeria that brought General Buhari into power did not waste time in stating that it was a revolution and attested various reasons that necessitated their action and to stay for an indefinate period in power

In the Coup d'etat of 1966, 1983 and 1985, various decrees were enacted which suspended some provisions of

---

26. (Supra).
27. (Supra).
28. (Supra).
29. (Supra).
30. (Supra).
31. (1869) U.S. S.C. p.603.

pre-existing constitution; modified some of the provision and made the Military Decrees Supreme law as against the constitution. Infact, the existing constitution were to derive their power or validity from the Military Decrees".[32] That is to say that the suspended constitutions are subject to the Federal Military Government Decrees and no court is allowed to question the legality or validity of such decrees except the Edicts".[33] But they are allowed to interprete all the laws or Decrees e.t.c. of the military government. These military decrees, like the Federal Military Government (Supremacy and Enforcement of Powers) Decrees No.28 of 1970 and No.13 of 1984, completely allowed and guaranteed the military Executive to do whatever they liked. This constitutes a serious infringement of separation of powers and the rule of law in the country.

Though, it may be argued that one cannot challenge the Decrees made by the Federal Military Government but any person is at liberty to challenge state Governors Edicts that go against the existing or unsuspended part of theold constitution or the Federal Decrees".[34] So one can say there is a limited

---

32. See Decree No.1 of 1966 Constitution (Suspension and Modification), The F.M.G. (Supremacy and Enforcement of Powers). Decree, NO.13 of 1984.

33. See Dokun Ajayi v. Alh. Mustapha & ors: (1992)8 N.W.L.R. 139 at 150.

34. (ibid).

application of the rule of law at the lower level.

But the rule of Law ought to be completely adhered to if justice is to be administered.

For instance, nobody can pretend to be unaware of the infamous State Security (Detention of Persons) Decree No.2 of 1984 of the Babangida regime. This decree completely usurped or rather affected the provision of section 42 of the 1979 constitution dealing with Fundamental Human rights in various situations.

The 1979 constitution was drafted by the Constituent Assembly. Its members were elected by the Local Government Councils under the enabling Decrees of the Military Government. The Constitution came into force not by virtue of the fact of its enactment by the constituent Assembly, but they have been brought into legal existence by virtue of special military Decree enacted by the Federal Military Government".[35]

These 'enactment Decrees' did not swing into force simpliciter, rather, the federal military government made

---

35. See. The Constitution of the Federal Republic of Nigeria (Enactment) Decree No. 25 of 1978.

certain modifications and changes".[36] As such, one can argue that the 1979 constitution derived their legality and authority from the federal military government and not from the free will or mandate of the people. Though the preamble to the 1979 constitution boldly proclaimed;

> "We the people of Nigeria do hereby make, enact and give to our selves thefollowing constitution..."[37]

One begins to wonder whether these words should accomplish what they present of mean on their face value, or to accept them as a background to the enactment of this constitution. The enacting Decree however specified that they are not to be read alongwith the constitutional provisions.

It is worthy to note that it is difficult to accept this idea of shifting the Grundnorm within the same legal order, be it in the Civilian or a Military administration. This is because each organ of government has its functions to perform under the constitution. Judicial decisions, even of the supreme court are mere norms in the hierarchy of norms.

---

36. The Supreme Military Council amended sections 33,46, 60, 86, 104, 126 and 274 of the Draft 1979 constitution.

37. See the 1979 Constitution.

This was rightly pointed out by the learned jus tice Kayode Eso (as he then was):[38] That:

> "The original norm must be all important. That the original norm, the highest factor in a hierarchy or norms, the mathematician's 'H.C.F, is the Grundnorm'. The Grundnorm therefore, must have no rule behind it. It is the fons et Origo - the final norm, one which Salmond regarded so fundamental as to be termed the legal sources".[39] Beyond it, there must no longer be a further enquiry. It is the 'alpha and Omega'."

The learned justice opined that the search for the Grundnorm in Nigerian jurisprudence is not an easy one".[40] He refused to take the simplistic views of the learned author on constitutional law, Professor Abiola Ojo, who said with finality:

> "Any search for a grundnorm away from the Supreme Military Council (Armed Forces Ruling Council or Provision Ruling Council) or

---

38. See Hon. Justice Kayode Eso in his Lecturer: 'Is there a Nigerian Grundnorm?' delivered at the Convocation Creremony of University of Benin January 31 1985. See also Justice Idigbe (as he then was) memorial lectures at the same occassion.

39. See Salmondon Jurisprodence p.47 - 50.

40. See the article, The Nigerian Grundnorm - A critical Appreisal written by Hon. Justice Kayode Eso In "Justice" - A journal of Contemporary legal problems Vol. 1., No.2, June 1990 p.40-42.

> the expression of its powers as declared in Decree is a futile judicial and academic exercise".41

He however took the optimistic views of Adenekan Ademola, justice of the Court of Appeal who in a paper titled; The Role of the Judiciary in a Military nonconstitutional situation" delivered in Harare Zimbabwe, while commenting on Decree No.2 State Security (Detention of persons) Decree, 1984";[42] hoped that the judiciary would accept its hazardous but noble role in taking a strong stand within its interpretative jurisdiction. The interpretative jurisdiction of the court must feature largely in any search for the Grundnorm, especially in a society like ours, which was unknown to Hans Kelsen, the protagonist of the Grundnorm theory when he revelled in his analytical positivism.

It can be said from the foregoing discussion that a Military Coup d'etat or revolution is a violent or unlawful and unconstitutional change of Government. The coup or revolution gradually becomes legal and acceptable when it is successful. The old order having been replaced by a new order which becomes the Grundnorm, as it has no other power or authority contesting its legality. A coup therefore, is the

---

41. Ibid. 'The Justice' See Also Abiola Ojo; "Constitutional Law and Military Rule in Nigeria..." (1978).

42. See "The Nigerian Grundnorm - A Critical Appraisal" written by Hon. Justice Kayode Eso in the January of contemporary legal problem; Vol.1 No.2 (June, 1990). p.42-43.

antithesis of a constitutional change of Government accepted and recognised internationally, even though it was illegally achieved.

Coups are now common phenomena in the developing states of Africa, Middle East and Latin America. In Nigeria it even assumed a 'bush fire effect'.

In a nutshell, the above discussion on the legality of military intervension shows that;

a. The 15th January, 1966 revolution that brought Major General Aguiyi Ironsi to power;

b. The 25th July, 1966 revolution which brought General Yakubu Gowon to power;

c. The 25th July, 1975 Coup that brought General Murtala Mohammed to power;

d. The 31st December, 1983 Coup that brought General Mohammed Buhari to power and;

e. The August 27 1984 Coup that brought General Ibrahim Babangida into power are all legal in the strict sense of the word. This is so because, they satisfied both the jurisprudential and the customary rules of international law tests of what constitutes legal government. In addition, they were in effective control of the country at different

points in time.

Whereas, the secession of the Eastern region (Biafra) which lasted from 1966-1970; Dimka's foiled coup of 13th February, 1976; Major General Mamman Vatsa's Coup plot of 1985 as well as the abortive coup of Gideon Orkar of 1990 were regarded as illegal because they did not succeed in their attempt to change the existing Grundnorm. This thus, made the acts not only illegal and unconstitutional, but criminal and punishable.

It is also correct to argued that the shortlived Chief Ernest Shonekan regime in 1993 was a legal one since it derived its power, authority and legitimacy from the Babangida regime".[43]

Likewise, the General Abacha regime that succeeded the Shortlived Chief Ernest Shonekan regime is another example of a change of the Grundnorm as discussed earlier under the doctrine of necessity. In this case, the General Babangida regime promised to handover political power to the civilian by organising a nationwide election. This election that is, the 12 June, 1993 election was subsequently annulled by the same regime. It led to a serious 'Political Impasse' that threatened the existence of the country. The 'Military President' (i.e. General Babangida) created the Ernest Shonekan civilian regime and 'Stepped aside'.

---

43. The Interim Government (Basic Constitutional Provisions) Decree No.61 of 1993.

The political tension was exacerbated as the Shonekan regime planned for another election. General Abacha 'technically' took over power from the Shonekan regime based on the doctrine of necessity. In this case the old order was the Shonekan regime which was changed by the new order, that is, the General Abacha's regime and his provisional Ruling Council. Their main reason for taking over power was to save the country, Nigeria from possible anarchy following the 12th June, 1993 political impasse.

3.3 THE MODUS OPERANDI OF MILITARY REGIMES, IN THE EXERCISE OF LEGISLATIVE POWER IN NIGERIA.

By modus operandi of the Military, we mean the ways and methods in which the Military operate after taking over power from the Civilians. This includes inter alia, its mode of operation, organisation, policy and the actual administration of the country. It is often said that that military on seizing power from the incumbent civilian government come with or without any programme of action.

What the military usually does is to issue or promulgate high sounding 'Obnoxious' decrees and Edicts. These decrees and edicts usually contain some 'ouster clauses' that denied the law courts from determining the legality or unconstitutionality

of these decrees and edicts. In most instances, the decrees often suspend, amend, modify or even abrogate some part of the constitution".[44] In addition, it enacts enabling degrees that would make them exercise both executive and legislative functions without anyhindrance from any organ of Government. For instance S.1 of Decree No.13 of 1984",[45] ousted the court's power to question the legality or constitutionality of Military decrees. We shall now analyse some of these decrees and edicts as well as their effects under the various Military regimes in Nigeria.

Since January, 1966, there have been series of Coups and counter coups in Nigeria to date".[46] From jurisprudential analysis, the first coup was a revolution by which there was a violent change of Government. Many other coups followed as already discussed and they are all considered to be a revolution.

---

44. See Decree No.1 (Suspension and Modification) 1966, and Decree No.1 of 1984 of same title.

45. (Supremacy and Enforcement of Powers). See also S.1 of (Supremacy and Enforcement of Powers) Decree No.28 of 1970.

46. E.g. the Enzeogu's Coup of 1966, the Gowon's Coup of same year, the Murtala Coup (1975), Dimka's coup of same year; of recent are the Buhari's coup of 1983/84 Babangidas coup of 1985 and Abacha's coup of 1993.

These military regimes always promulgate a working constitution known as decrees and edicts to guide them in the administration of the country. However, they make sure that the original constitutions were not abolished entirely. Both the Ironsi and the Gowon Military regimes operated under a substantially similar Military decrees and constitution. The basic of which was the Federal Military Government Constitution (Suspension and Modification Decree No.1 of 1966. The Murtala Obasanjo regime operated under the Federal Military Government Constitution (Basic Provisions) Decrees No.32 of 1975.

The provisions of these Decrees are almost the same word to word as the Federal Military Government (F.M.G.) Constitution (Suspension and Modification) Decree No.1 of 1084 of the Buhari/Idiagbon regime. There was also the Constitution of the Federal Republic of Nigeria (Suspension) Decree No.58 and No. 59 of 1993 under the Babangida regime which suspended the 1979 Federal Constitution entirely.

Decree No.1 of 1966, was the first expression of a Military Constitution in Nigeria's Constitutional history.

In contrast to the former Civilian constitution of 1963, it had characteristic features which stood out in

sharp comparism with its predecessor. The constitution (Basic Provisions) Decree No.32, of 1975 and the constitution (Suspension and modification) Decree No.1 of 1984 are substantially the same in content and style.

Most of these Decrees have almost a common purpose. It is, for example, stated in some of their explanatory notes that the decree sets out the basic framework for the Government of the Federal Republic of Nigeria and its component states under the Federal Military Government. It also specifies the principal organs of Government, its powers and function".[47]

These Decrees also provide for the suspension and modification of provisions of the previous constitutions especially those aspects that are incompatible with the stance and operation of the new Government.

Decree No.1 of 1966 set up two major Federal institutions of Governmentnamely; the Supreme Military Council (S.M.C.) and the Federal Executive Council (F.E.C.). But under the constitution (Basic Provisions) Decree No.32 of 1975[49] and

---

47. See Particularly the explanatory notes to Decree No.32 of 1975 and D. No.1 of 1984.

48. See the Constitution (Suspension and Modification) Decree No. 107 of 1993.

49. Section 6.

constitution (Suspension and modification Decree No.1 of 1984.[50] a third one was added and designated as the National Council of States (N.C.S.). These latter decrees clearly stated the various functions of the different arms of Government. The Decree No.1 of 1966 actually glorified the office of the head of state and that of the Military Governors. The three organs of government under the decrees are to exercise their powers with checks and balances".[51] It was meant to avoid a repeat of the reckless and unruly behaviour of top government functionaries under the Gowon administration of 1975.

Some of these decrees not only abrogated or suspended some parts of the constitution but even set up a new constitution and Government. A good example of this was the Federal Military Government Constitution of the Federal Republic of Nigeria (Suspension) Decree No.58 and 59 under the Babangida regime".[52] They suspended the 1979 constitution, while the Interim National Government (Basic Constitutional Provisions) Decree No.61, 1993 set up a new constitution and the short-lived Ernest Shonekan's Interim National Government that was

---

51. See the Nigerian Tribune of Nov. 20 1975.

52. Decree Nos 58 and 59 of 1993 suspended and repealed the the constitution (Suspension and Modification) Decree of 1984.

overthrown by the Abacha regime in 1993.

The most outstanding deed of the Abacha regime was the promulgation of the consitution (suspension and modification) Decree No. 107 of 1993 which not only suspended and repealed Decree Nos. 58 and 59 of 1993 but also repealed Decree No.61 of 1993 which set up the Interim National Covernment and Reactivated the 1979 Constitution".[53] Section 3(1) to (3) of the Decree"[54] specified the legialative powers of the Federal Military Covernment and its agencies. Section 6 of Decree bestowed executive power on the head of State and Commander in-chief of the armed forces of Nigeria acting in consultation with the Provisional Ruling Council. The courts were left with their judicial function of interpretation and adjudiration of Civil and Criminal Matters. However Section 5 of the Decree forbid any court from queationing the validity of Federal Decrees and State Edicts.

---

53. Decree No. 107 of 1990 also amended and modified some part of the 1979 Constitution see Sections 15, 212, 213 215 - 217 etc. of the said Decree.

54. Const. (Suspension & Modification) Decree No. 107 of 1993.

CHAPTER FOUR

LIMITATIONS OF THE JUDICIARY IN A MILITARY REGIME.

4.1 INTRODUCTION:

Under a military regime, the limitation of the judiciary is taken to mean the effects of military legislations such as the 'Decrees' and 'Edicts' on the Constitution and in particular, the judiciary. Such legislations usually weaken the judicial powers and functions of the judiciary as guaranteed by the constitution. They also suspend, amend, modify or abrogate some parts of the constitution in a democratic system of Government. The jurisdiction of the Courts is ousted so as not to entertain any matter that might adversely affect the military administration".[1]

These military Decrees and Edicts affect the working of the judiciary in terms of its jurisdictional power to interprete the consti tution and other statutes either between individuals against the military Government or group of persons, society or authority against the military administration in several ways.

This may be inform of 'ouster clause' Decrees and Edicts",[2] establishment of Military Tribunals apart from regular courts, the

---

1. See the F.M.G. Constitution (Suspension and Modification) Decree No.1 of 1966 and it equivalent under D. No.1 of 1984, D. No.107 of 1993 of the same title. See also the F.M.G. (Supremacy & Enforcement of Powers) Decree No.28 of 1970 & D. No.13 of 1984 respectively.
2. See S.6 of Constitution (Suspension and Modification) Decree No.1 of 1966. See also S. 5 of Decree No.107 of 1993.

nature of appointment and removal of judicial personnel e.t.c. All this will be examined below.

However, this is not to say that there are no limitations of the judiciary in a constitutional Government. For example, section 6(1-6)[3] enumerates the powers of the Nigerian Judiciary, also termed the judicial Review Power. This provision demarcate the actual area or scope within which the constitution permits the judiciary to function. It cannot function outside or above the specified power given to it by the constitution. If it does, such action will be declared ultravires, null and void up to the extend of the inconsistency by the Supreme Court of the Land. The National and State Houses of assembly may also increase or decrease such judicial powers of the Courts in a democratic system of government under the Constitution".[4] The executive and legislative organs of Government also have some sort of control over the judiciary especially in areas of appointment, tenure and removal of ju dicial personnel".[5] But we don't see that as a serious limitation of the judiciary under a Constitutional Government. What we are actually concerned here is the limitations of the judiciary under a Military regime.

---

3. See The 1979 Constitution especially - S.6(6) a-d.

4. But See. S.4(e) of the 1979 Constitution.

5. See Sections 211, 218, 229, 235, 241, 246 and 252 of the 1979 Constitution.

4.2 THE EFFECTS OF OUSTER CLAUSES ON JUDICIAL POWERS.

In chapters two and three, we examined the independence of the judiciary and change of Government by extra constitutional means. In these chapters, we saw some aspects of the limitations of the judiciary as it affects the independence of the judiciary whenever there is a coup d'etat. Under this topic, we shall examine the actual effects of ouster clauses in the Military Decrees and Edicts as one of the important limitations of the judiciary under Military regime.

An Ouster Clause, be it under a constitutional or Military regime has the effect of limiting the judicial review power and other jurisdiction of the courts. For instance, it stops the courts either from questioning or not to question the validity or invalidity of any law, Decree Edict or the status of the Military Government in Power".[6]

The Constitution is said to be supreme and its provisions are declared to have binding force on all authorities and persons throughout the Federal Republic of Nigeria."[7] It is further provided that no person or group of persons shall take

---

6. See Sections 4 & 6(6) contrasted with Sections 13-22 of the 1979 Constitution. See also S.6 of D. No.1 of 1966 and S.5, D.No. 107 of 1993 respectively.

7. See S.1(1) of 1979 Constitution. See also the 1960 and 1963 Constitutions.

control of the Government of Nigeria, except in accordance with the provisions of the Constitution".[8] And that if any law is inconsistent with the provisions of the constitution it shall be null and void up to the extent of the inconsistency".[9]

These are some of the important provisions in any constitution in democratic system of Government. In Nigeria however, as soon as there is a change of Government through extra constitution means (e.g. Military Putsch), the constitution is suspended, while some parts are either amended or abrogated by Military Decrees and Edict".[10]

The effect of these Decrees and Edicts is that they oust the supremacy of the constitution and replace it with the Military constitution which is now regarded as the Supreme Law. Whatever may be the reason of the Military putsch; based on Hans Kelsen theory of 'Grundnorm;' the Old/Order has been legal effectively replaced by a new legal order i.e the Military rule".[11] Thus, the theory of supreme law of necessity applies

---

8. Sub-section 2 of Section of 1979 Constitution.

9. S.1(3) of 1979 Constitution.

10. See F.M.G. Constitution (Suspension and Modification) Decrees No.1 of 1966; D.No.1 of 1984, D. No.107 of 1993 respectively.

11. See the Cases of A.G. of the Republic V. Mustapha Ibrahim (Supra); Uganda v. Commissioner of Prisons (Supra); Jelni v. Government of Punjab (Supra); The State v. Dosso (Supra), Mazimba Muto's Case (Supra) Lakanmi v. A.G. of W/State (Supra) & Adamule Kun's Case (Supra). See generally Chapter three above.

as discussed in chapter three above.

From 1966 to date, Nigeria has experienced a good number of these types of "Ouster Clauses" Decrees and Edicts, some of which are as follows:

a. The Federal Military Government (F.M.G.) Constitution (Suspension and Modification) Decree No.1 of 1966 of the Gowon regime which Ousted the 1963 Constitution.

b. The F.M.G. Constitution (Basic Provisions) Decree No. 32 of 1975 of the Murtala/Obasanjo regime.

c. The F.M.G. Constitution (Suspension and Modification) Decree No.I of 1984 of the Buhari/Idiagbon regime.

d. The F.M.G. Constitution (suspension and Modification) Decrees No.58 and 59 of 1993 of the Babangida regime.

e. The Interim National Government (I.N.G) (Basic Constitutional Provision) Decree. No.61 of 1993 of the Ernest Shonekan regime. and;

f. The F.M.G. Constitution (Suspension and Modification) Decree No. 107 of 1993 of the Abacha regime.

All the aforementioned Military Constitutions have the effect of ousting one constitution or the other in order for the new government to establish its legitimacy effectively.

From the above also, we can imagine the effects of these Decrees as it affects the judiciary. The judiciary, especially under sections 4(8) and 6[12] is saddled with the functions of interpretation of all laws in the country as well as the adjudication of law and justice between any person(s), body or authority in Nigeria under its judicial Review Power. Doubtlessly therefore, it is this judicial organ that has the power to determine the validity or invalidity or inconsistency of both the new Military regime and their Decrees.

The response of the Nigerian judiciary is in most instances not clear and direct with regard to their interpretation of the status of the new Military regime and the ouster clauses in the decrees. The first test case in Nigeria was the case of E.O. LAKANMI & OR v. ATTORNEY GENERAL (WESTERN-TATE) & ORS".[13]

This was an appeal from Western State Court of Appeal which heard and dismissed the appeal of the appellants from

---

12. See the 1979 Constitution.

13. (1971)I U.T.L.R. 201.

the judgment of the High Court of the Western State at Ibadan.

The application before the High Court was for an order of certiorari to remove an order stated 31 August 1967, made by the Chairman of the Tribunal of Inquiry into the assets of public officers of the Western State, into Court for the purpose of being quashed. The learned trial judge of the High Court on 21 December, 1967 dismissed the application, holding that the order was not ultra vires to the 1963 Constitution and that Edict No.5 of 1967 was validly made since according to him the Federal Military Government Decree No.51 of 1966 was not in operation in the Western State of Nigeria when the Edict was made. He further stated that the validity or otherwise of the order made by the Chairman of the Tribunal could not be challenged since section 21 of the Edict No.5 of 1967 Ousted the jurisdiction of any court to hear or determine it. The appellants appealed to the Western State Court of Appeal. While the appeal was pending, the Federal Military Government passed 'the forfeiture of Assets e.t.c. (Validation) Decree No.45 of 1968' This decree validated the order or decision of the High Court. It also ousted the jurisdiction of the court to entertain any suit in relation to the subject matter or any Military Decree or Edict. The Western Court of appeal ruled that Decree No.45 of 1965 was valid. The appellants appealed to the Supreme Court against this judgment.

such as the 1979 Constitution. For instance, the provisions with respect to the fundamental objectives and directive principles of state policy, directives to the police by the Chief executive of the Federal and State Governments and impeachment proceedings".[20] contain Ouster Clauses against the Courts, but it does not take any standard form. Suffice to say that this does not fall withing the the ambit of this study.

One interesting thing to note about the Military Decrees and Edicts is that they do not only oust the jurisdictional powers of the Courts, they also go further to establish Military Tribunals to try cases that could no doubt conveniently be tried in the regular Courts. This takes us to the following topic.

4:3 THE JUDICIARY AND MILITARY TRIBUNALS

Another limitation of the judiciary in a Military regime is the establishment of Military Tribunals apart from the regular courts to try specific offences and matters.

In addition to this, Expost facto legislations as well as 'ad hominem' legislations (i.e laws made to apply to certain person; individuals or authority.) were passed.

---

20. See Chapter II section 13-22 of the 1979 Constitution.

They may be used to reverse a Court decision that is unfavourable to government or to take away accrued or vested rights, which may be rights arising under a contract or other transactions or rights arising from public appointment.

These Military legislations are made to try both Civil and Criminal Cases. Special Tribunals established by the Military government to try Criminal Cases fall into three categories:- Military Tribunals, Special Military Tribunals or Non-Military Special Tribunals. The difference between them does not depend on whether the tribunal is chaired by ajudge but rather on whether the trial is by the procedure of a Court-Martial and whether all or a majority of the members are Military or (Police)men. A Tribunal composed entirely of Military or (Police) members and whose procedings are conducted according to the procedure of a Court-Martial is a Military Tribunal where all the members or a majority of them are Military (or Police) men but trial procedure is not that of Court-Martial, it is a special Military Tribunal; otherwise it is a non-military Special Tribunal".[21]

The fact of the chairman being a judge or retired judge has no significance for this purpose, since the

---

21. See. B.O. Nwobueze: Military Rule and Constitutionalism in Nigeria (1992) pages 65-72.

judicial chairman has no greater power, as distinct from influence, in the formation of the tribunal's decision".[22] He cannot override the majority of his colleagues on the tribunal in the event of disagreement, all the members being there in the capacity of 'judges', not as (assessors' to assist the 'judicial chairman'.

One of decrees issued soon after the first Military coup in January, 1966, the suppression of Disorder Decree 6 1966, authorized the Head of the Federal Military Government (F.M.G.) to declare a 'Military area', any part of the country appearing to him to be affected by wides spread public disturbances. The Military Governor of the region in which the area was situa ted was then to constitute for it a Military Tribunal consisting entirely of Military Officers, with power to the exclusion of all other courts in the country to try wide range of listed offences committed and to convict or sentence any person found guilty.

Other decrees that establish Military Tribunals are; the public Security Decree of 1967 to try offences connected with the possession or use of explosives ammunitions firearms e.t.c; the Petroleum production and Distribu tion (Anti-sabotage) Decree of 1975 authorized

---

22. Op. cit p.66.

the trial of both Military personnel and civilians by a Military Tribunal for offences relating to the production and distribution of Petruleum.

There was also the Treason and other offences (Special Tribunal) Decree of 1976 established to try both Civilians and Military men involved in the abortive coup of 1976. This was repeated and re-enacted as a permanent legislation by the Treason and other offences (Special Military Tribunal) Decree of 1986.

Four new Tribunals were created under four decrees in 1984 namely:

1. The Public Officers (Protection Against False accusation) Decree No. 4 of 1984;
2. The Special Tribunal (Miscellaneous Offences Decree No. 20 of 1984;
3. The Political Parties (Dissolution) Decree 1984; and
4. The Recovery of Public Property (Special Military Tribunals) Decree No.3 of 1984.

Perhaps it will not be too much to mention the notorious 'ad hominem' Decree, State Security (Detention of persons) Decree No.2 of 1984 under the Buhari

administration. This decree suspended the provision of section 42 of the 1979 Constitution dealing with fundamental Human Rights in various situations. It gave the Chief of General Staff the power to arrest and detain any person for more than 24 hours without trial.

We shall now examine some cases and see how the Ordinary Courts tried to handle the issue of Military Tribunals.

In JACKSON v. GOWON & ORS",[23] ~~In~~ a provision of the Tribunal and Inquiry Decree",[24] was challenged as being contrary to the 1963 Constitution which provided against the Ouster of jurisdiction of the Courts in certain matters. The learned trial judge while referring to the case of HOHERTY v. BALEWA",[25] held that the jurisdiction of the Court will not be Ousted where they conflicts with the provisions of the 1963 Constitution . That unless it is proved to him that S.22 of 1963 Constitution will be violated by the proceedings of the Lagos Environmental Development Board (LEDB) Tribunal of Inquiry before he will apply judicial review power of the Courts over the Military Decrees.

---

23. (Supra).

24. No.41 of 1966.

25. (1961) ALL N.L.R. 604.

In DOHERTY's Case,[26] the Supreme Court held that the Commissions and Tribunals of Enquiry Act, 1961, was ultra vires to the 1960 Constitution in so far as it purported to give wider powers to a commission than the parliament could grant under the Constitution. The Clause Ousting the Court's jurisdiction over the Tribunal findings was also held to be ultra vires to the 1960 Constitution.

Looking at these two cases, one will prefer the decisions of the Supreme Court in DOHERTY's Case[27] to the ruling in Jackson's Case[28] because the former case represent the correct position in Law, although it may be argued that it was decided when the country was under civilian rule. The later case was decided under Military rule. Hence we can see the extent of the judicial limitation in the exercise of its functions under Military rule.

In relation to the Jackson Case[29] the question may be asked; 'What will happen suppose it is not proved?' The answer will be that he (i.e. the trial judge) will

---

26. Ibid.

27. Ibid.

28. Ibid.

29. (Supra).

not review or question the validity of such Military Decrees. One should have expected that notwithstanding that there is a failure to prove the inconsistency of Military Decree by any person with or without 'locus standi'; the Court should suo motto, question the validity of any Military Decree to test its legality or otherwise in relation to the Constitution.

What is more from the expression in S.17 of the Tribunal of Inquiry Decree No.41 of 1966 excluding the Court's jurisdiction in matters relating to any proceedings, findings, decision or order of the Tribunal, the effect of the above statement of the learned judge is a direct contravention of S.1(2) and Section 6 of Decree No.1 of 1966; which not only placed a Decree above any provision of the Old 1963 Constitution, but also provides that;

> "No question as to the validity of this or any other Decree or Edict shall be entertained by any Court of Law in Nigeria".[30]

Also, in the most recent case of CHIEF V.O.ONABANJO v. THE SPECIAL MILITARY TRIBUNAL, LAGOS ZONE ARRA",[31] the plaintiff challenged the jurisdiction of one of the Special Military Tribunals to try him. Just about the time the

---

30. See S.1(2), Decree No.1 of 1966.

31. Unreported Case, Suit No. M/106/84.

case was being heard in the high Court before Omotosho J; the F.M.G. (Supremacy and Enforcement of Powers) Decree 1984 was promulgated"[32] Part of the provisions of the Decree reads:-

> "No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and if any such proceedings are instituted before, on or after the Commencement of this Decree, the proceedings shall abate, be discharged or made null and void". 33

While the learned justice was not prepared to challenge the legislative suprimacy of the Military administration (which he ought to), the judge insisted that the administration must act according to Law. This goes on to show the naked limitation of the judiciary in a Military regime. The judiciary has been reduced to a mere appendange of the Military regime in power".[34]

In general, the jurisdiction of the Military Tribunals in respect of the specified civil and criminal matters is exclusive of that of the Ordinary Courts and no appeal lies to the latter from their decisions.

---

32. No.13 of 1984.

33. Ibid, See. 1(2)b of the Decree.

34. See also the case of Anisminic Ltd. v. Foreign Compensation Commission (1969)2 A.C. 147.

In the case of non-military special Tribunals such as the Civil Disturbance (Special Tribunal)"[35] and Transition to Civil Rule (Political Programme)"[36(a)] e.t.c.

Each is composed of a serving or a retired Superior Court judge as Chairman and four or more other members, one of who shall be a serving member of the armed forces.

Looking at the Constitution of the Military Tribunals, it is hard to believe that they would be impartial in the administration of jus tice in specific offences referred to them for adjudication. This is because all of the members owe their allegiance to the Military authority that constituted them.

What is more, trials are held in secret and the mode of practice and procedure in these Military Tribunals does not follow the normal type applicable to the Ordinary Law Courts in most instances. Sometimes, litigants are not allowed the services of lawyers or even where they are allowed, the lawyers are more often

---

35. Decree of 1987 reported in the Revised Edition Laws of the Federation of Nigeria Decree No.55 of 1992.

36(a) Decree No.19 of 1987.

than not suffer judicial harrassment".[36(b)] There are also no room for appeal against the Military Tribunals' decisions. In situations where appeal is allowed, it is usually directed to the highest Military authority e.g. the S.M.C. A.F.R.C. or P.R.C. instead of the Supreme Court. This made Lawyers to boycott some of these Military Tribunals. That is to say also that the punishment or sentences to be awarded by the Military Tribunals after conviction for the offences are subject to the confirmation of the Military authority that constituted them as stated above".[36(c)]

This the difference between Military Tribunals and Ordinary or regular Courts lies in the areas of independence and impartiality, which is lacking in Military Tribunals in most instances.

We have so far seen that the independence of the judiciary is very importan in the administration of justice. Likewise the application of the doctrines of separation of Powers and Rule of Law will be more effective where there is the independence of the judiciary.

36(b). See the Article: 'This is my case' in the African Guardian, January 25 1993.

36(c). See S. 9(2) of Special Tribunal (Miscellaneous Offences) Decree No.3, of 1993.

We shall further examine the manner of appointment and removal of judicial personnel critically to find out the areas and situations where the judiciary can be limited in terms of its powers and functions under a Military regime.

4.4 PERSONNEL OF THE JUDICIARY

These are the officers that actually work in the judiciary in the dispensation of justice. It includes mostly the justices and judges of the superior and inferior Courts as well as judicial Tribunals working under the judiciary. Both the 1960 and 1963 Constitution provided for the ways and manners by which qualified judicial personnel and appointed or removed from office".[37] Also, sections: 211, 218, 229, 235, 241, 256, and 252 of the 1979 Constitution is to the same effect as stated above.

Under the 1960 Constitution, the appointment of the justices of the supreme Court is done by the Governor. General on the advice of the prime minister and the Federal judicial service commission".[38] At the regional level, the regional high court judges are appointed or removed based on the advice of the premier, or regional

---

37. See sections 57(1), S.106(1-2), SS.116-117 of 1960 Constitution. See also S.112(1) of 1963 Constitution.

38. Ibid the 1960 Constitution.

judicial service commission, by the Governmor of the region".[39] This system was abolished under the 1963 Constitution".[40] Thus, the President and Prime Minister or the regional Governor and Premiers had much power in the appointment and removal of judicial officers. The Federal and State or regional judicial commissions were abolished under the 1963 Constitution.

Under the 1979 Constitution appoinment and removal of judicial officers in the Supreme Court or the State High Courts e.t.c. are done by the president or Governor on the advice of the Federal or State judicial service Commissions (as the case may be)".[41]

The above is the position under a democratic Constitutional Government. It is under the Military Government that we find the functions of the judiciary are hamperred due to the manner or ways the judicial personnel are being appointed and removed. The importance of the independence of the judiciary need not be re-emphasized in this case as already discussed in chapter two. Under Military administration, the appointment and removal of judicial personnel is done by a Military Constituted Advisory Judicial Committee (A.J.C.) to replace the

---

39. Ibid.

40. See the 1963 Constitution.

41. See Sections 211, 218, 229, 235, and 241 of 1979 Constitution.

Federal and State judicial Service Commission. This greatly limits the functions of the judiciary as we shall see in the manner of appointment. and removal of judicial officers under the Military regime. This also brings to mind the type and calibre of judges and members that constitute the Military Tribunals. Can they administer justice impartially in cases involving their 'mentors' i.e (Military authority) and the ordinary individual? Who is the final arbiter? The Supreme Court or the Supreme Military Council, or Armed Forces Ruling Council, or the Armed Forces Ruling Council, or the Provisional Ruling Council (as the case may be)? These Limitations would be examined in the succeeding sub-heading.

4.4.1 APPOINTMENT AND REMOVAL OF JUDICIAL OFFICERS UNDER MILITARY GOVERNMENT.

As discussed earlier on the appointment and removal of judicial personnel is done by the executive on the advice of the Federal or State Judicial Service Commission, in a Constitutional Government.

Likewise under Military administration, appointment and removal of judicial officers are done through a centralized body known as the Advisory Judicial Commission (A.J.C.) who advice the executive i.e. the S.M.C. or the A.F.R.C. or the P.R.C. (as the case may be) on the appointment or removal of

judicial Officers. So, just like under the Constitutional Government, appointment, promotion Tenure or removal of judicial officers are done through a central organ the A.J.C. under a Military regime".[42]

There is no doubt that the Military has left the judiciary untouched in terms of structure and form. Also, Andrew Obaseki (J.S.C.) (as he then was) asserted: that:

> "... there is absolutely no interference in the operation or decision making process of the judiciary..."[43]

He went on to say that the fact that certain functions were taken from the jurisdiction of the Law Courts did not detract from the independence of the judiciary especially in areas of appointment, promotion, tenure or removal of judicial personnel. But a critical look at the manner of appointment and removal of judicial personnel in a Military regime will buttress the fact that there are inherent

---

42. See S.14(3) of the Constitution (Suspension and Modification) Decree No.1 of 1966 and No.1 of 1984. See also sections 212, 213, 218-235 of Decree No.107 of 1993.

43. See his Lecture: "The relevance of Law as an effective instrument of social engineering, in contemporary Nigeria". Delivered in the University of Lagos. See also Nigerian Tribune of Friday, April 26, 1985, p.9.

limitations on the judiciary concerning the exercise of its functions. This is because their appointment and removal is left to the whims and caprices of the incumbent headship of the Federation or State. This may give the executive the power to easily manupulates the Advisory judicial committee - knowing the nature of 'our' Military regimes in Nigeria - to their advantage. It is hard to believe that the judge whose appointment or removal is determined by the executive, notwithstanding A.J.C. advice, can be said to owe no allegiance to the final appointing or removing authority in deciding any matter between any person or authority and the Military administration that appointed him. He will definately think twice before deciding the case taking into consideration the repercussion of deciding the matter in favour or against the Military in power.

This brings to mind the retirement of Chief Justice T.O. Elias soon after the coup that brought General Murtala to power.

In the "cleaning up" exercise initiated by the new Military administration to rid all government functionaries of "dead woods", persons charged with declining productivity, poor health, corruption, inefficiency, abuse of office or of old age were removed".[44] Chief Justice Elias (as he then was)

---

44. See also the Daily Times 18th August, 1975, p.1.

appointed by the S.M.C. or A.F.R.C. or R.M.C. (as the case may be) on the advice of the Advisory Judicial Committee".[46]

The A.J.C. is made up of the Chief Justice of Nigeria as Chairman, the Attorney-General and Minister of Justice, the President of the Court of Appeal, the Chief Judge of the Federal High Court, the Chief Judges of the States and Federal Capital Territory Abuja; one Grand Kadi of the Sharia Court of Appeal appointed annually on rotational basis by the S.M.C. or A.F.R.C. or P.R.C. (as it applies) from the states having a Sharia Court of appeal. And the President of the Customary Court of Appeal appointed also annually on rotational basis as that of the Sharia Court of Appeal.

Under the Constitutional government such as the 1979 Constitution; the appointment and removal of judicial officers as mentioned above were done on Federal and State basis respectively".[47]

---

46. See the F.M.G. Constitution (Basic Provision) Decree No. 32 of 1975.

47. See S.210, 211, 218, 235 & 241 of 1979 Constitution.

From the above, it can be seen that the appointment and removal of judicial officers is very important in the administration of Justice. Thus the independence of the judiciary will be purposeless if the quality of the judicial personnel is brought in question. As Bernard Schwartz stated;

> "Unless those appointed to the Bench are competent and upright and free to judge without fear or favour, a judicial system however sound its structure may be on paper is bound to poorly function in practice. That is why the problem of judicial selection and tenure is the pivotal one in all the discussions of the proper administration of justice".48(a).

In this topic, we have seen how the functions of the judiciary can be limited under a Military regime in terms of appointment and removal of top judicial officers. It is infact very easy to manipulate the judiciary into toeing their line of action to their favour by 'singling' some particular judgeds and 'settling' them in order to perform a judicial function according to their whims and caprices.

48(a). See. 'The American Constitutional Law' by. Bernard Schwartz p. 30.

It is a fact that the Nation's judicial Officers are appointed at the pleasure of the Military government".[48(b)] The effect of this is that most of those appointed into judicial Offices are those seen by the Military government as being unlikely to be engaged in "undue radical" decisions, which accounts for most of the judges being 'hand picked' from the various Ministries of Justice.

For instance, in Lagos State, four of the six judges appointed in 1990 to the state high court were officials of the State Ministry of Justice while the remaining two were senior officials of the judiciary staff".[48(c)] It is therefore understandable why these judges who owe their position to the Military government "benevolence" will find it difficult to give judgements against the government. This may also help to explain why the government is tempted to disobey the adverse orders and decisions of judges most of whom got their positions through government "Magnaninity".

The absolute pre-eminence of the Military over the judiciary has often been graphically demonstrated. In Lagos State, all the High Court were shut for two days in

---

48(b). See Clement Nwankwo, B. Ugochukwu & D. Nbachu, in 'Nigeria, The Limits of Justice' Published by Constitutional Rights Project, (Dec. 1993) p. 53-57.

48(c). Ibid p.55.

1990 so that judges could pay a condolence visit to the Military Governor, who had just lost his wife".[48(d)]

In 1989, while giving ruling in a case challenging the temporary dissolution of the A.F.R.C. by the then president Ibrahim Babangida, judge Ligali Ayorinde, then Acting Chief Judge of Lagos State, in dismissing the action referred to General Babangida as "Kabiyesi" (Meaning "His Majesty") whose action cannot be challenged by the citizen. Ayorinde was later appointed substantive Chief judge, over a more senior judge, Idowu Agoro, who at various times had the police security orderlies attached to him withdrawn apparently on account of rulings made by him which the Military government considered embarrassing".[48(e)]

The Military government has revolved a subtle strategy of rewarding "co-operative" judges and reprimanding (or punishing) the "un-co-operative" ones. The effects of this 'carrot-and-stick' strategy on the quality of justice handed down by the nation's judiciary shows the extent of the limitations of the judiciary under a Military administration in Nigeria.

48(d). Op. cit. 56.

48(e). Op. cit. 57.

Another area of limitation of the judiciary closely related to this is the actual funding of the judiciary. It should be noted however that this problem is encountered not only under the Military regime, but also under a Constitutional Government. This brings us to the next topic.

4.5 FUNDING OF THE JUDICIARY.

In Nigeria, the poor funding and remuneration of the judiciary and its officers both under the Constitutional and Military Government played a great role in the poor administration of justice as a limitation on the judiciary.

Although, it is important that a judge must be a man of conscience; the bench, the judges should know, is definately not the place to make money at all cost. They should not be corrupt. But every person knows that Nigerian judges are poorly paid. Even though the funding of the judiciary is charged upon the Consolidated Revenue Fund of the Federation account, the amount is not sufficient to effectively run the judiciary. It is a common sight that most judges do not have the vehicle to take them to the Court. They always struggle with litigants in boarding vehicles to their place of work (i.e the Court.) Even

before passing judgment, some judges have to borrow the Law Reports from the Lawyers. In most instances, cases are adjourned due to lack of facilities in the Court e.g. fans, air-conditioners or room heaters in periods of hot or cool weather; or lack of stationery e.t.c.

This in adequate funding of the judiciary actually limits and weakens the judiciary in the administration of justice.

As Henry Cecil wrote:

> "Justice is such a precious commodity that every thing reasonable should be done to attain the highest standard. However, if the public does not want to pay for the more expensive article, it can certainly have the cheaper..."49

Likewise Sir Alfred Dening (as he then was) in 1954 commented:

> "Such is the price which England readily pays so as to ensure that the Bench shall commend the finest characters and the best legal brains that we can produce".50

---

49. See his book: The English Judge" at p.13 reported in the 'Justice' Vol.I. No.3 (July 1990. p.22.

50. Ibid. The 'Justice' p.23.

The salary of a British Judge was £24,000 pounds per annum.

In Nigeria, the judges were paid about £2,000 pounds per annum. In 1987, Circuit judges in England were paid £43,500 pounds per annum. The Lord Chancellor is paid £79,400 pounds per annum while the High Court Judges earn £65,000 pounds per annum".[51] Thus in England the High Court Judge earns more than the Prime Minister who earns £58,650 pounds per annum".[52] What is more in England, the salaries and conditions of service of judges are not pegged on the civil service structure; they have a rationale of their own.

In Nigeria, it was reported that the Supreme Cour Justice was earning £17,500 p.a. in 1990. Which under the Second Tier Exchange Market (SFEM) was below £2,000 pounds p.a."[53] Eventhough the salary structure of Nigerian judges has been reviewed upwards efforts ought to be made by any government be it civilian or military - to emulate the British model so as to stamp out corruption in the administration of justice that is said to be the bane of the Nigerian Judiciary.

Therefore, a judiciary that is poorly funded can easily succumb to corrupt practices and undue influence in relation to their decisions in court by either private and wealthy

51. Ibid. 'The Justice' p.23.
52. Ibid.
53. See 'The Justice' A journal of contemporary legal problems, Vol. 1 No.3 of July (1990) p.22.

individuals or an authority or the government itself. Under the Military regime; it is infact very easy to manipulate the judiciary into toeing their line of action to their favour by 'singling' some particular judges and 'settling' them financially or otherwise in other order to perform a judicial function according to their whims and caprices.

Stories had been told or reported that some judges are 'bribed' with money or other material gains in order pass judgment in favour or against a particular individual persons, authority or government and some of the judges were alleged to have ' cooperated' to these demands. But we cannot rely on these in formations because they are mostly rebuttable assertions and allegations reported by some 'rumour mongers' and 'sensational Newspapers'.

What is more, even where these stories appear to be true
time at face value, it is difficult to prove or even belief the stories because most of these 'undue influences' on the judges usually happen behind the scene' and done in absolute secrecy.

To counter this dondy and uncarry rebuttable assertions against the judiciary, the Covernment, be it Civilian or

Military should properly keep the judiciary adequately.

It can further be said that the judiciary is not only limited under Military regime as discussed above, but there could also be limitations of the judiciary under a constitutional government. We can identify the main Ouster Clauses in the constitution as including the provisions with respect to the fundamental objectives and directive principles of state policy; directives by the police by the Chief executives of the Federal and State Government; proceedings against Chief executives and inpeachment proceedings. But, as noted earlier, the limitation do not take any standard forms".[54] The judicial limitations are more prominent under Military regime as discussed above.

---

54. See Sections 13-22 of the 1979 and Cap.II contrasted with Cap.IV of the same constitution.

CHAPTER FIVE

CONCLUSION

5.1 OBSERVATIONS

In Chapter one, we observed the gradual development of the Nigerian Judiciary before the advent of Colonial rule, during Colonial rule and at independence and thereafter to date. However, we noticed the disturbing effects of the unstable political atmosphere soon after Nigeria got her independence in 1960. The politics of regionalism, ethnicism, sectionalism and serious corrupt practices by the Civilian administration led to the political crisis which culminated into the Military takeover and the subsequent Civil War that followed from 1966 to 1970. The impact of Military rule as it affects the judiciary was begun to be felt.

We considered in Chapter two the independence of the judiciary under both the Constitutional and Military Government. Critically with a view to understand the proper level and extent of judicial limitations under a Military administration. It is observed that the frequent meddling of the political system by the Military regime has serious repercussions on the independence of the

judiciary. The judiciary is no longer free to carry out its constitutional functions as it ought to be. This is due to the Military legislation which ousts the Court's judicial review power. The Courts were not allowed to apply the principles of rule of Law and separation of powers which are essential attributes of judicial independence and constitutionalism. It was noticed that under the Military regimes; particularly the Babangida, the Interim National Government of Ernest Shonekan and the Abacha regimes, the judiciary has been so bastardized that even courts orders were not obeyed by the Government and some wealthy individuals with government backing. The Courts were plunged into confussion as various Courts passed series of injunctions and orders e.t.c. which all ended up in futility. It reached a crisis point that even the highest Court of the Land was said to have ruled that it has no jurisdiction to question the validity of Military Decrees".[55]

In Chapter there,, we noticed the disturbing activities of the Military as they constantly take over political power from the civilians through extra-constitutional means. Even though we tried to see whether there is justification fer any takeover of the

---

55. See National Concord of 12 July, 1993. See also the unreported case of A.G. of all S.B.P. States V. A.G. of the Federation & N.R.C. States. Suit No. 90/140/93.

apparatus of government by examing the views of scholars in jurisprudence and case Law in different perspectives; We are left in doubt on the reasons for such coup d'etats.

The Military usually claimed that they took over power from the civilians to save Nigeria from political, economic and socio-cultural stagnation (i.e. the doctrine of necessity). This appears not to be so. The Military had either pushed Nigeria to the brink of civil strife or into serious political chaos. The Military are not bound by the Supreme Law - the Constitution. There is absense of rule of Law and gross disrespect of the judiciary. This is evidence in most of their 'notorious' and 'obnoxious' Decrees and Edicts that tend to Oust the Court's judicial review power over any Military legislative action".[56] This contributes in no small measure to the limitation of the judiciary from functioning very well.

In Chapter four, which formed the basis of the research work; we observed and analysed the serious limitations

---

56. See the Constitution (Suspension and Modification) Decrees Ni.1 of 1966; No. 1 of 1984 No.61 of 1993; No.107 of 1993 respectively. See also the P.M.G. (Supremaly and Enforcement of Powers) Decree No.28 of 1966 and No.13 of 1984 respectively.

of the judiciary under Military rule in Nigeria. It is in this chapter that we discussed the effects of the 'Ouster Clauses' in the Military Decrees and Edicts and how the Courts feel more strongly intimidated and threatened by such Ouster Clauses. We also saw how the Courts made futile attempts to stem the effects of the Military legislations on the judiciary. We observed that poor funding of the judiciary, poor payment of salary to the judicial officers, the establishment of Military Tribunals apart from the regular Courts and the centralization of the organ for the appointment, promotion and removal of judicial Officers (i.e. the A.J.C. instead of the Federal or State Judicial Service Commissions.) are among the major limitations of the judiciary under Military regimes.

Under the 1979 Constitution, the Federal and State Judicial Service Commissions were empowered to recommend to the President of the Federation and the Governor of a State respectively, the disciplins or removal from office of a judicial officer. This power is, however, suspended under the present Military dispensation. Instead the S.M.C. A.F.R.C. or P.R.C. has been given the power to remove a

judge summarily from office. They also appoint and promote judicial officers and to determine the funding for their salaries, benefits, allowances and welfare as well as working conditions.

All said and noted, we can now go ahead to advance some suggestions that may help in solving some of the problems highlighted above.

5.2 SUGGESTIONS AND CONCLUSIONS

On the part of the 'Civilian politicians, we would suggest that they should learn to play 'Clean politics' by not encouraging the politics of ethnicity, tribalism, sectionalism, regionalism and 'religious politics'. This will dissuade and discourage the Military from taking over power from the Civilians by using the above as an excuse to overthrow and democratic government. The civilian politicians should not engage in corrupt practices, mismanagement and embezzlement of public funds. This is because the Military uses these political vices as an excuse to takeover political power through extra-constitutional means. The civilian politicians should display political maturity by proper and careful accountability to their electorates. They should strictly abide by the code of conduct of the public civil service. This will indeed insulate them from political economic and socio-cultural blames from any angle and stop the frequent military intervention in the political system. This will guarantee a sound democratic system that will ensure the practice of constitutionalism, separation of powers, rule of Law and independence of the judiciary. The limitations of the judiciary will be reduced to the bearest Minimum. The re-establishment of War against indiscipline and corruption (WAIC) by the Abacha regime is a laudable step towards the right direction.

For the Military, we will suggest that they should try as much as possible to avoid the struggle to share political power with their civilian counterparts. They should know their role is to defend the nation from internal or external aggression and to check any plotting within the political entity. They can do this effectively by not necessarilly taking over political power by extra-constitutional means. Where they deemed it necessary to take over power (e.g. in situations where there is emergencies such as political turmoil that calls for necessary and instant action to safe the nation from disintergration); they should take necessary steps to safe the country and the constitution from collapse. Their action should be for a limited period and should abate immediately after the situation returns to normality and give back political power to the civilians. They should indeed learn to stay in their barracks and protect the nation when situation calls for it. The Military are not suppose to rule the country.

In addition to the above, where the Military 'happen' to be in power for the 'limited time', they should try as much as possible to guarantee judicial independence. In particular, they should try to do away with 'Ouster Clauses' in the Decrees and Edicts. The Attorneys-General serving

under Military regime should make it a point of duty to inform the Military that ordinary or regular Courts are, better than Military Tribunal if properly equipped and funded";

On the part of the judiciary it should learn to affirmly assert their independence by applying their judicial review powers as guaranteed by the constitution. They should learn not to succumb to the intimidation not only from the civilian regime but also from the Military regime. The judiciary should learn to confront and challenge the Military legislations e.g. the Decrees and Edicts. The judiciary should scorn the uncanny influence of Military Tribunals since it affects their power and performance in several ways as discussed earlier on. The precedent has already been set by the Supreme Court in LAKANMI's Case".[57] Also the decision of the Court in Chief V.O. ONABANJO's Case"[58] is worthy of emulation by all Nigerian judges and courts. While commenting on the Ouster of the Court's jurisdiction by the F.M.G. (Supremacy and

---

57. (Supra) See Cap.I & II Respectively.

58. Unreported Case Suit No. M/166/84 delivered on 28 May, 1994.

Enforcement of Powers) Decree No.13 of 1984, the judge sarcasticallay said that:

> "... it is very doubtful whether the draftsman however ingenious, can effectively and completely Oust the jurisdiction of the Courts..."[59]

The plaintiff in the Case was contesting his trial by the Military Tribunal instead of the regular Courts.

It should be noted that the Court's ability to interpret and adjudicate matters brought before it particularly in relation to the Ouster Clauses in Military Decrees and Edicts does not amount to confrontation between the judicial and executive arm of government. The judiciary is only applying its judicial review power and the doctrine of the rule of law and separation of powers as is provided in the constitution.

Although, it is not only under the Military regime that the judicial functions are limited in terms of appointment, promotion and removal of judicial officers, under civilian rule the judiciary is also limited. But under Military rule, the judiciary is place at a serious disadvantage especially when the appointment promotion or removal of top judicial officers must receive the

---

59. Ibid.

assent of the Military executive (S.M.C., A.F.R.C. or P.R.C.) after receiving the advice of the Advisory judicial committee set up by the Military regime itself. The Military should develop executive maturity and guarantee the independence of the judiciary in terms of appointment, promotion and removal of judicial officers by all owing the Federal and State judicial service, commissions to perform the role of the A.J.C. Of recent, the Supreme Court justices called for the establishment of a National Judicial Council to take up the responsibility of the Federal and State Judicial Service Commissions".[60]

We are in complete support of this suggestion. But, this was rejected by the chairman of the committee dealing with the Federal Judicature set up by the Babangida regime, Professor D.A. Ijalaiye on the ground that it is a negation of the ~~time~~ time Federal System of Government. That it is a sure means of introducing a unitary form of Government in Nigeria". It can be defended, he said "in a Military regime which is a one line command".[61(a)]

---

60. See the Report of the Constituent Assembly 1988-89, Vol.II p.379.

61. See footnote No.60 above.

However genuine his reasons could be, the opinion of the learned senows on the highest bench in the Land should be preferred to that of the Committee. A similar committee was set up by the Abacha regime to probe corruption in the Federal judicature, and make recommendations. But as at the time of this writing the report was not available at hand.

Indeed, if a judge merits his appointment, he is more likely to have his own views and will not allow himself to be pushed about. But if a judge knows that he owes his appointment to the favour of the federal or state government, he is more likely to dance to the tune of the executive and there, the possibility of external pressure will be more.

A Legal practitioner, Gani Fawehinmi suggested that there should be advertisement in official gazette for competent persons to apply for appointment as judges"[61(b)] We recommend all these suggestions.

As regards poor funding and payment of salaries to judicial officers, we suggest that there should be a continuous review of judges' salaries and money allocated to

---

61(b) See "The Guardian", March 14, 1989, p.3. Where Chief Gani (Esq) complained about the secrecy surrounding appointments and removal of judges.

the judiciary upwards like the British model to suit changing times. It will stamp out not only corruption in the Nigeria judiciary, but it will enable the judges dispense justice freely and fearlessly.

A comfortable judge with social amenities e.g. car to go to the chamber and complete law reports and other legal books and stationery to use at his disposal will definately dispense justice without any delay or influence from any angle. It is on this basis that we also share the recommendations made by Honorable Justice Oputa (J.S.C.) (as he then was). He recommended that the constitution should establish a constitutional body to be known as; "The Judicial Council", similar to the; "Army Council" so that all monies meant for the judiciary should be noted by the legislature or the Military in power and paid over directly to the judicial council and not through executive functionaries"[62]. By this, the judiciary will be strong, independent and without any limitation from the executive or the legislature whatsoever, either under military or democratic system of government.

---

62. See Hon. Justice Oputa in: 'A Journal of Contemporary legal problems (Justice) Vol. I. No.3 of July 1990; p.24.

On the issue of Military Tribunals, we suggest that it should be discouraged so long as there are regular Courts to take care of the legal issues involved. But where the Military Tribunals become inevitable, then the rules of practice and procedure in the ordinary Court, should be made applicable. The Tribunal should be properly constituted without any influence from the Military in power as far as possible. Military personnel should be discouraged from being members of the Tribunals except where it is 'technically' necessary e.g. where Military or police intelligence is required. Lawyers should be allowed to represent litigants without any molestation. Appeal from the tribunals decision should be allowed not to the highest Military authority e.g. the S.M.C., A.F.R.C. or P.R.C. but to the highest court of the land - the Supreme Court Trial should not be in secret but in public, in open Court and on ordinary juridical days.

What is more, the Attorneys-General of the Federation and the states should advice the Government or Military executive (as the case may be) of the need to accept court's or tribunal's judgments and orders in good faith and obey them or else appeal against them. That is executive maturity.

This is indeed a great task on the Attorneys-General ~~That is executive~~ in Military regimes. The establishment of judicial institute in Abuja, the new Federal Capital by the Babangida regime for the continuing legal education and training of the judges is worthy of praise and commendable. We will also add that the Judicial Institute should increase the frequency in organising further legal Training Seminars, symposia and re-education of judicial personnel in the current legal problems e.g. how to handle legal matters especially the effects of Military legislations (e.g.'Ouster Clause' Decrees and Edicts) when there is a Military revolution as experienced in Nigeria.

We will conclude by stating that the Nigerian judges need to be bold, assertive and without being sub-serviant to any Military or civilian regime in the performance of its functions. This will guarantee the practice of constitutional democracy without any interference from the Military. As Mr. Justice Kuba Ardo (as he then was), the Chairman of the defunct Constitution Review Committee once remarked,

> "It is a very poor government indeed whose judiciary is nothing but a dependent appendage of the executive".[63]

---

63. See Hon. Justice Kuba Ardo "Separation of Powers under the 1979 Constitution" in the Nigerian Bar Journal, Vol. XVIII: No.1, 1983, p.26.

It is therefore without dispute that an independent, impartial and upright judiciary is a necessity to a sustainable democracy. Where this is available, the Judiciary cannot be limited by any authority even under Military regime.

BIBLIOGRAPHY

1. Abiola Ojo; 'Constitutional Law and Military Rule in Nigeria'; Evans Publication (1983/84 Edition.

2. D.O. Aihe and P.A. Oluyede; 'Cases and Materials on Constitutional Law in Nigeria'.

3. T.O. Elias, "Nigerian Law and Custom"; (1953) 2nd Edition.

4. Obilade A.O.: 'The Nigerian Legal System (London) Sweet and Maxwell (1979).

5. B.O. Nwabueze 'Nigerian Appeals to the Privy Council; (Nigerian Bar Journal) Vol. IV No. 1, April, 1963.

6. B.O. Nwabueze; 'Judicialism in Commonwealth Africa'. C. Hurst & Co. (1977).

7. Salmend on Jurisprudence (1968) 2nd Edition.

8. Mackintosh. 'Nigerian Government and Politics (1967).

9. Schwas's; 'Nigeria' (1966)

10. Msuean Ayua (Mrs). 'The Rule of Law under Military Regime in Nigeria'; December, 1988.

11. De Smith: 'The New Commonwealth and its constitution' London, Stevens & sons (1964).

12. Niki Tobi: Legal Impact of the Constitution (Suspension and Modification) Decree No. 1 1984, on the Constitution of Federal Republic of Nigeria (1979).

13. B.O. Nwabueze; The Presidential Constitution of Nigeria'. C. Hurst & Co. (London) (1982).

14. A.B. Kasunmu (ED). "The Supreme Court of Nigeria 1956-60. Heineman Educational Books (Ibadan) 1977.

15. Obafemi Awolowo" "Road to Nigeria's Greatness" 4th Dimension pubishing Co. Ltd. 1977-80.

16. B.O. Nwabuere' "Nigerian Presidential Constitution Longmar pub. (1985).

17. A.O. OBI Lade, "The Nigerian Legal System (1956) 5th Ed.

NEWSPAPERS AND MAGAZINES

1. The Cardian, Wednesday July 24, 1985
2. The African Garudian, November 22, 1993
3. Nigerian Tribune, November 20, 1975
4. The Sunday Times, December 28, 1975
5. Sunday Concord Vol.4, No. 146 January 1, 1984
6. The Guardian, Tuesday July 16, 1985
7. Daily Sketch July, 1986
8. Daily Times, 18th August, 1975
9. New Nigeria, 21st August, 1975
10. Nigerian Tribune, Friday April 26, 1985
11. The African Guardian, June 21, 1993
12. The African Guardian, June 12, 1993
13. New Nigeria 28 - 29 August, 1993
14. The African Guardian November 22nd, 1993
15. National Concord, 15 July, 1993
16. National Concord, 22 July, 1993
17. Vanguard, June 14, 1994
18. New Nigeria, June 14, 1994
19. Vanguard, July 4, 1994
20. National Concord, July 12, 1993
21. The Guardian, March 14, 1989.

ARTICLES/JOURNALS

1. The New Commonwealth and its Court (1964) p.298.

2. Abiola Ojo; 'The Search For Grundnorm in Nigeria, Lakanmis Case'.

3. A.O. Obilade; 'Reform of Customary Court System in Nigeria under the Military Government' (in Journal of African Law Vol.13 No.1, 1966).

4. Nik; Toni; 'Some innovations in the Constitution of the Federal Republic of Nigeria (1981) Vol.2 Solicitor Advocate.

5. Hans Kelson; 'Pure Theory of Law, Law Quarterly Review Vols.50 and 51.

6. Hon. Justice Kayode Eso; 'Is there a Nigerian Grundnorm?' (delivered at the University of Benin Convocation Ceremony January 31, 1983).

7. Hon. Justice Idigbe (as he than was) memorial lectures in the University of Benin Convocation Ceremony January 31, 1983.

8. Hon. Justice Kayode Eso; 'The Nigerian Grundnorm - A Critical Appraisal in the 'Justice' Vol.1 No.2, June, 1990.

9. Chief Rotimi Williams (S.A.N) Text Lectures 'Fundamental rights under the Military regime' delivered at Ogun State University.

10. L.O. Adegbite; 'Human Rights in Nigerian Law and Social Chance in Nigeria'.

11. Abiola Ojo; 'Fundamental Human Rights in Nigeria (The 1963 and 1977 Constitutional Provisions in Nigeria', (in the 'Justice') Vol.8 1977-1980.

12. 'Commentaries on the Constitutions of United States (1833)'.

13. Justice H. Burto: 'The Corner Stone of Constitutional Law:' The extra-ordinary case of Malbury V. Madison 36, American Bar Association Journal (1950).

14. Nsunguru Ndombana: 'Concept of Judicial Review: (Justice', Vol.II No.11 November, 1991.

15. The New Delhi Conference of International Commission of Jurists: ('The Rule of Law in a Free Society').

16. Hon. Justice Oputa (as he then was): 'The Independence of the Judiciary in a democratic society, its needs, its positive and negative aspects. (Justice' Vol.1 No.3, July, 1990.

17. Hon. Justice Buba Ardo: "Separation of Powers Under 1979 Constitution" (Justice') Vol. XVIII, No. 1, 1986.

18. Andrew Obaseki: J.S.C. (as he then was) "The relevance of Law as an effective instrument of social engineering in contemporary Nigeria" delivered in University of Lagos.

19. J. Nnamdi Aduba: 'Independence of the Judiciary in Nigeria's 3rd Republic (Justice') Vol. 1 No.5, September, 1990.

20. Report of the Constituent Assembly Vol.II 1988 - 89.

21. O. Adewoye: 'Prelude to the Legal Profession in Lagos 181601880: (1970) = J.A.L.

22. Nigerian Bar Journal: Vol IV. No.1, April, 1963.

23. Nigerian Law Journal (Vol.1. November, 1964.

24. Journal of African Law Vol. 13 No.1., of 1966.

25. Solicitor and Advocate (1981) Vol. 2.