INDEPENDENCE OF JUDICIARY IN NIGERIA: AN APPRAISAL

BY

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DEDICATED TO MY
BELOVED MOTHER
AMINATU KAKA AND
IN CHERISHED MEMORY
OF MY FATHER LATE
ABUBAKAR NDATSU
ETSU-MAMMAN AND STEP-FATHER
LATE ABUBAKAR EZHIKO
ETSU-MAMMAN.
AN INSPIRATION TO MY
JUNIOR BROTHER, ABUBAKAR
NDATSU AND MY DAUGHTER
AMINA KAKA NDATSU.

ABSTRACT

The main purpose of this thesis is to analyse and appraise the extent to which "independence of the judiciary" has been secured under the 1979 Constitution of the Federal Republic of Nigeria.

In the introductory chapter attempt is made to bring out the meaning and concept of " independence of the judiciary "; a brief historical background of how this independence of judiciary operated from Nigerian Independence in I960 until the 1979 Constitution came into force. Also briefly discussed are basic theories upon which the new constitution is based.

Chapter two presents the judicial system as conceived by the Constitution Drafting Committee and finally adopted in the new constitution; incorporating the composition, jurisdiction and powers of various Federal and State courts.

"Judicial power" has been entrusted to the judiciary by the constitution. Chapter three discusses the meaning and nature of the term "judicial power" and the functions assigned to the judiciary under the new constitution. Inherent and self-imposed limitations that affect the judiciary in the exercise of its judicial powers is also discussed.

Chapter four appraises the extent to which

independence of the judiciary has been secured under the new constitution. In this regard constitutional and institutional provisions relating to the set-up and general structure of the judiciary has been analysed. Where necessary, examples have been given from other liberal democratic countries particularly Britain, United States of America and India.

Chapter five - the concluding chapter - summarises the observations of the author regarding the extent to which independence of the judiciary has been secured under the new constitution. Suggestions have also been made, which, the author hopes, if adopted, will greatly enhance independence of judiciary in Nigeria.

PREFACE

We are living at a time when as public knowledge of and participation in public affairs grows, more and more institutions are scrutinised, appraised and criticised. Often, such criticisms may be unfair, mainly because those responsible for it are not fully informed of the facts or closely acquainted with relevant considerations and implications.

Judiciary, is one of such institutions that public debate on it has been going on since the coming into force of the new 1979 Constitution. Many people are of the view that the new constitution did not guarantee independence of the judiciary, but to some, it does.

The aim and object of undertaking this thesis therefore are two-fold: (a) to present as clear as possible the structure of the judiciary and the role assigned to the judiciary under the new constitution; analyse and appraise the extent to which independence of the judiciary has been secured and suggest (if necessary) other options for adoption in Nigeria. Secondly, by this presentation and appraisal, the author hopes that public debate on the judiciary and its independence could be better informed.

MOHAMED NDATSU

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ABBREVIATIONS

A.C.	-	Appeal Cases Report
FJSC	-	Federal Judicial Service Commission
SJSC	-	State Judicial Service Commission
C.L.R.	-	Commonwealth Law Report
W.L.R.	-	Weekly Law Report

CHAPTER ONE

INTRODUCTION

"Leave Courts alone" the Chief Judge of Gongola State was reported[1] to have said at the Conference of Chief Judges of the Northern States at Maiduguri. He expressed concern over the failure of the Executive and the Legislative arms of government to uphold the independence of the courts. He was of the view that for sometime now he had observed that both the legislative and executive arms of government were unable to uphold the independence of the courts in the discharge of their duties.

The possibility that the "independence of the judiciary" may be in danger in Nigeria had been made by many high-ranking judges since the coming into force of the 1979 constitution of Nigeria in October 1979. For example, the Chief Judge of the High Court of Anambra State was quoted[2] as citing job insecurity as a major fear of the judges. The Honourable Judge called for the amendment of Section 256 of the Constitution to alleviate that fear or else "other methods to make judges independent may not work".

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1. New Nigerian, February 15, 1983.
2. Daily Times, January 22, 1980.

These pronouncements amongst others prompted me to undertake work on the topic of this thesis.

In this chapter, an attempt is made to bring out the meaning and concept of the term "Independence of the Judiciary"; a brief historical background of how this independence operated since the Nigerian Independence in 1960 to the military administration; also briefly stated are basic theories upon which the new 1979 Constitution of Nigeria is based.

The concept of "Independence of the Judiciary" under any system of government or constitutional set-up can only be seen within the framework and the parameters of the constitution and its operation in practice. In general, independence of the judiciary is taken to comprise two elements: (1) independence of the judiciary (courts) as an organ and as one of the three functionaries of the state; and (2) independence of the individual judge. Independence of the judiciary does not mean freedom of the judges to do whatever they like or act arbitrarily, but that the judges should have absolute freedom in discharging their judicial functions. This independence requires that once appointed, the judge recognises no obligation of compensating favour to those responsible for his selection and appointment; that he is beyond the convert reach of litigant, counsel and friends or relations; that they

are ensured total freedom after entering office from interference in the process of adjudicating causes brought before them. However, the judiciary like other constitutional instrumentality should act towards the attainment of constitutional goals.

In short, there are certain legal or constitutional safeguards which must be present in a constitutional or governmental set-up in any democratic country before it can be said that independence of judiciary is adequately safeguarded. And their absence would generally indicate absence of independence. First, because of the general belief that there is a fundamental relation between the quality of judges and the administration of justice, the selection and appointment to a judicial office should be in the hands of those that can be relied upon to base their choice on qualities which make for judicial fitness. Second, the governmental system is such that it is practically difficult or impossible for the executive to interfere with the judiciary in the discharge of their day-to-day functions. But this does not mean that judges cannot be removed from office under any circumstances whatsoever. Such total insulation may produce or breed ivory tower attitude. An effective procedure should exist for swiftly removing a judge who is manifestly unfit to continue in office without prejudicing the principle of independence. Last, but

not the least, judges should have guaranteed security of tenure. Here, it means that subject to good conduct and behaviour plus efficiency, they should have a permanent appointment up to the stipulated time of retirement; and that they are ensured sufficient pay in relation to other functionaries of the state; sufficient pension after retirement; privileges and certain basic conditions which will make interference with the day-to-day functions of the courts or judges difficult or impossible.

Nigeria inherited her judicial system from Britain. To that extent therefore, under both the 1960 and 1963 constitutions of Nigeria, judges of the Superior Courts of record particularly, enjoy largely the same degree of independence and security of tenure as do their counterparts in the United Kingdom. Salaries of the Supreme Court and High Court judges were on a charge upon the Consolidated Revenue Fund of the Federation in case of the Supreme Court and Lagos High Court Judges.[3] In the case of the Regional High Courts they were a charge upon the Consolidated Revenue Fund of the Region. This means that the general debate in the various legislatures on Annual Estimates - an occasion for

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3. S. 133 of 1963 Constitution.

discussing almost any subject - will not touch upon the salary of judges or their duties. Under the two constitutions, the judges hold their office during good behaviour. All judges of superior courts are removable from office by the President or Governor only upon presentation to him of addresses from both Houses of Parliament or of the Regional Legislature (as the case may be) supported by the votes of not less than two-thirds of all the members of each House, asking that he be removed on the ground of inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour.[4] In fact, under the 1960 constitution, the procedure was even much more cumbersome. Under it, a special tribunal under the chairmanship of a judge would first establish a prima facie case against a judge about to be removed, before the then Governor-General of Nigeria, could refer the matter to the Judicial Committee of Privy Council for determination. It was only if that committee made a recommendation to that effect that the judge complained against could be removed by the order of

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4. S. 113 (2) and 124 (2) of 1963 Federal Constitution; S. 52 (2) of Northern, S. 52 (2) of Eastern, S. 50 (2) of Western, and S. 50 (2) of Mid-Western Nigeria 1963 constitutions.

the Governor-General. It should be noted however that under the 1960 Constitution, final appeals in Nigeria was still going to Privy Council. This arrangement became inappropriate when Nigeria changed to a Republic in 1963 and with the abolition of appeals to Privy Council. The procedure was not used between 1960 and 1963.

Under the military administration, the appointment of the Superior Court judges was centralized at the federal level. The Advisory Judicial Committee was established in 1966[5] consisting of Chief Justice of Nigeria as chairman, Chief Justice of each state, Grand Khadi of the Sharia Court of Appeal of Northern States; Attorney-General of the Federation and Solicitor-General of the Federation as Secretary. Their function was (a) to advice the Supreme Military Council on appointment of superior court judges except that of the Chief Justice of Nigeria which was directly vested in the Head of the Federal Military Government; (b) to advice the council on any matter pertaining to judiciary that may be referred to it by the Supreme Military Council.[6]

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5. (Constitution and Suspension and Modification Decree) NO.1 of 1966.
6. Constitution (Basic Provisions) Decree 1975, Section 13 (3).

The judges who are very much involved in the day-to-day administration of justice in the country, namely, magistrates, judges of Area and Customary Courts were regarded as civil servants. Since independence, these judges were appointed, removed or dismissed by Regional or State Public Service Commissions.

Nigeria under the new 1979 constitution is a representative democracy with periodically chosen or elected leaders governed by a written and supreme constitution designed to secure to all its citizens justice, liberty, equality and fraternity in their various facets. Such a constitutional and representative democracy has its institutions and values rooted in the rule of law. That is plainly demonstrated by the provisions of our constitutional structure and philosophy inspiring our constitution. According to the Preamble, the new constitution we provide for ourselves is: "...for the purpose of promoting good government and welfare of all persons in our country on the principles of Freedom, Equality and Justice, and for the purpose of consolidating the unity of our people."

Thus, it seems right to say that the Rule of Law is the primary principle of our constitution and in its universality it postulates that no one, neither state nor individual shall be denied right and justice. Rule of Law aims at free and democratic society - it emphasise

that all governmental machinery should operate through the law so as to secure political liberty, maintenance of law and order in society. Every decision of an authority ought to be a rational one according to law and not according to might. Rule of law is opposed to tyranny, oppression, and dictatorship. The principal organs of the state are governed by the concept of rule of law and every functionary working under the constitution is required to act in accordance with the provisions of the constitution. Section (1) (1) of the 1979 constitution says the constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

In its daily task of adjudicating disputes, the judiciary is expected to maintain the rule of law and enforce it. It does so by interpreting the law and applying it and in appropriate cases decreeing its observance. It follows therefore that unless a given country has an independent and impartial judiciary, the concept of the rule of law can hardly be achieved.

Another indispensable pre-condition in modern democracy for preventing the abuse of governmental power or authority is the institutional separation of powers. And the basic principle of separation of powers in our new constitutional set-up is that all

arms of government - the legislature, executive and the judiciary holds instrinsically distinct position and has broadly separate functions and responsibilities. The simultaneous co-existence and effective functioning of the three organs is imperative to the working of the constitutional system. The logic of this is to keep the constitutional system in constant balance and guarantee the liberty, freedom of citizens by preventing the abuse of governmental powers or authority. Under the new constitution, we have nineteen "sovereign" states whose existence and general powers are equally recognised by the constitution; in short, the constitution creates a federal system of government - establishing government at two levels - the Central level and State level. Both the federal government and each of the states have its own tripartite division of powers between the legislature, executive and the judiciary.

The legislative power of the federation is vested in the National Assembly which consists of the Senate and a House of Representatives.[7] The legislative powers of a state is vested in the House of Assembly of the state.[8] The executive power of the federation is vested in the President,[9] and Executive power of a state is vested

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7. S. 4 (1) of 1979 Constitution.
8. S. 4 (6) of 1979 Constitution.
9. S. 5 (a) of 1979 Constitution.

in the Governor of the state.[10] Judicial power of the Federation is vested in the Federal courts,[11] namely, the Supreme Court, the Federal Court of Appeal and the Federal High Court. There is scope for creating more courts for the federation under Section 6 (5) (g) and the courts so created may be vested with judicial power in matters with respect to which the National Assembly has power to make laws. Similarly the judicial powers of a state is vested in the state High Court, Sharia Court of Appeal and Customary Court of Appeal.[12] A State Assembly is also empowered to create courts and vest them with judicial powers with respect to matters to which they have power to make laws, but such courts can only be subordinate courts to the State High Court.[13]

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10. S. 5 (2) (a) of 1979 Constitution
11. S. 6 of 1979 Constitution.
12. S. 6 (2) and (5) of 1979 Constitution
13. S. 6 (3) of 1979 Constitution.

CHAPTER II

THE JUDICIAL SYSTEM UNDER THE CONSTITUTION

1. Background to New Judicial Structure:

Like most other countries, courts in Nigeria have been arranged in hierarchical manner - that is, the system provides for graded courts.

The Constitution Drafting Committee which drafted the present 1979 constitution was concerned about evolving a judicial system in Nigeria which would reflect the federal set-up. Accordingly it set up a sub-committee on judicial systems with the following terms of reference.[14]

1. To examine the existing judicial systems in Nigeria and recommend:-

i) The most suitable structures, powers and composition of the Judiciary in the Federation and the States.

ii) Constitutional arrangements suitable to ensure:

a) the independence and impartiality of the Judiciary;

b) the prevention of the abuse of judicial powers by all categories of Judicial Officers,;

c) that Judicial Officers who are guilty of conduct unbecoming of holders of their office are promptly dealt with;

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14. Constitution Drafting Committee Report Volume II p. 101.

d) expeditious and inexpensive accessibility of all persons; and

d) legal aid.

2. To consider and make recommendations with regard to the appointment, tenure and remuneration of all judicial officers and the safeguards necessary to ensure that they are made in accordance with the requirements of national unity.

Having examined the previous structure of the judiciary under the former 1963 constitution, the sub-committee on Judicial Systems came to the view that certain factors were necessary to enable the judiciary function properly within the federal set-up of Nigeria.

Accordingly, the following recommendations were made:-

Firstly, that in order to give relevance to the moral, religious and ethical beliefs of all segments of Nigeria, all the different types of laws and legal norms which exist in the past should be given consideration and fully incorporated into the judicial system at each level as appropriate. To this end, the institutions and personnel catering for these different types of legal sub-systems must be accorded the same status and governed by the same considerations of service, remuneration, privileges and obligations as may be determined.

Secondly, in view of the critical role of the judiciary in maintaining order and assuring justice, the structure of judicial administration should be so constructed as to give relevance to different levels of the political system, the political process and to the ends to which society as a whole is committed. Therefore, the sub-committee felt that in the conduct of their business all courts must be so organised and their personnel must so conduct themselves in such a way as to inspire the confidence of litigants and to remove everything which generates fear, alienation and insecurity as to undermine belief in the quality of justice.

Also recommended was a code of conduct known as "Judicial Code of Conduct" for judicial personnel, so as to maintain the highest standards of conduct among judicial personnel, to be binding on all members of the judiciary at all levels. These, include their prohibition from membership in any political organisation and or tacit identification with any partisan political cause; direct or indirect participation in the management or ownership of major-holdings in any business enterprise; ownership and control of substantial landed property for the purposes of commercial exploitation; membership of secret societies, cults and masomic orders of whatever origin but not in private recreational clubs,

associations and charities.

Also to be prohibited is association or friendship with any persons whose general characteristics, reputation and known associations could reasonably be suspected of capacity either to undermine judicial impartiality or to lower the dignity of the judiciary; association with women of easy virtue and versatile talent such as the so-called "Society Ladies"; the seduction or enticement of other peoples' wives and general sexual immorality; chronic indebtedness, the acceptance of bribes, gratification and any gifts or materials forms of social exchange unless such exchanges involve persons tied to them by family relations or such common courtesies as greeting cards.

It recommended that eligibility to judicial service should substantially follow the criteria of the judicial code of conduct. And the primary responsibility for monitoring and reporting on the conduct of the judiciary and for general control over disciplinary matters shall be vested in the new Judicial Service Commission to be established at Federal and State levels.

Accordingly, new judicial structure for the federation was recommended which were subsequently incorporated in the present constitution.

At the apex of the judicial hierarchy is the Supreme Court. Below the Supreme Court is the Federal

High Court. At the state level, each state has a High Court. Sharia Court of Appeal and Customary Court of Appeal are to be set up only by the states that may desire them.[15]

The courts which are very much involved in the day-to-day administration of justice in the country but which are not provided in the constitution are the Magistrates' Court, Area Courts or Customary Courts. It is true that these courts do not try important matters of constitutional consequencies, but to the extent that they adjudicate on criminal and civil cases and hence make decisions affecting the lives of the overwhelming majority of the people, to that extent they are important.

However, the states have constitutional power to create courts and vest them judicial powers, but such courts can be only subordinate courts to the State High Court.[16] To that extent, depending on local conditions the existing systems of the courts, like Magistrates' court and Customary courts of various grades mostly in the Southern part of Nigeria and Area Courts also of various grades in the Northern part of the country are in operation.

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15. S. 240 (1) and 245 of 1979 Constitution.
16. S. 6 (4) (a), 5 (h) of 1979 Constitution.

Closely related to the exclusion of the lower bench in the constitution is their exclusion from the definition of "judicial office" and "judicial officer" under Section 277 of the constitution. The question then arises: if judges in the lower bench are not judicial officers within the constitution, what are they? What is the legal implication of Section 277 as it relates to the performance of the judicial functions of lower bench judges. Will they have less judicial privileges and immunities than the judicial officers defined in Section 277? With respect, it is submitted here that that cannot be the intention of the framers of the constitution judging by the terms of reference given to the Sub-Committee on Judicial Systems of the Constitution Drafting Committee.[17]

FEDERAL COURTS

In Nigeria, unlike the United States of America, there appears to be no sharp division of matters in the jurisdiction of the state and the federal courts as provided in the new constitution. In the United States, there are federal courts in all the fifty states. There are also federal district courts in each district which exercises original jurisdiction under the federal laws. From the federal district courts, appeals lie to the Federal Court of Appeal established in the Area. And there are state courts in each state which exercise

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17. Constitution Drafting Committee Report Volume II p.101.

civil and criminal jurisdiction under the state laws. In Nigeria, both the "federal courts" and the "state courts" may in some matters have concurrent jurisdiction and in some matters have exclusive jurisdiction. The State courts in Nigeria also exercise jurisdiction in "federal causes" and offences. A federal cause means civil and criminal cause relating to any matter with respect to which the National Assembly has power to make laws. In other words, any civil or criminal matter arising under any federal law is a federal cause. A federal offence is an act contrary to the provision of an Act of the National Assembly or any law having effects as if so enacted.[18]

The constitution specifically provides that the state courts having civil jurisdiction of hearing civil causes or appeals arising out of such causes shall also have like jurisdiction with respect to Federal causes and appeals arising out of such causes.[19] Similarly, in criminal matters, the courts within a state which have been conferred with jurisdiction to enquire into, investigate or hold trials of persons accused of offences against the law of the state, are also empowered to have jurisdiction with respect to the investigation, enquiry into or trial of persons for Federal offences

18. S. 250 (c) (3) of 1979 Constitution.
19. S. 250 (1) (a) of 1979 Constitution.

and the hearing and determination of appeals arising out of the trial.[20] The state courts are to follow their practice and procedure in relation to the federal causes and federal offences.[21] However, only a court presided over by a person who is a qualified legal practitioner in Nigeria is competent to decide federal causes and offences.[22]

THE SUPREME COURT

This court is at the apex of judicial hierarchy in Nigeria. The court is therefore the ultimate guardian of the integrity of the constitution and the rights of citizens. The court shall consist of the Chief Justice of Nigeria who is the head of the Federal Judiciary and such number of other justices of the Supreme Court, not exceeding fifteen, as may be prescribed by an Act of the National Assembly.[23] The court is duly constituted if it consists of not less than five justices. In matters of original jurisdiction, and in appellate jurisdiction on questions as to the interpretation or application of any of the provisions of Chapter IV of the constitution - dealing with Fundamental Human Rights -- the court is required to be

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20. S. 250 (1) (b) of 1979 Constitution.
21. S. 250 (1) (c) of 1979 Constitution.
22. S. 250 (2) of 1979 Constitution.
23. S. 210 of 1979 Constitution.

constituted by seven justices.[24]

The Chief Justice of Nigeria is appointed by the President of the Federal Republic in his discretion, but the appointment is subject to confirmation by the simple majority of the Senate.[25] He can only be removed from office by the President acting on an address supported by two-thirds majority of the Senate. Other justices of the court are also appointed by the President of the Federation on the advice of the Federal Judicial Service Commission and subject to the approval of the Senate by a simple majority.[26]

The qualification for Chief Justice of the Federation and other justices of the Supreme Court is that the person must be qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than fifteen years.[27] The President of the Federation is enjoined to ensure that in the appointment of justices of the Supreme Court and Federal Court of Appeal, there are persons learned in Islamic personal law and Customary law.[28] The justices come within the definition of "judicial officer" as defined by Section 277 of the constitution and according to

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24. S. 214 of 1979 Constitution.
25. S. 211 (1) of 1979 Constitution.
26. S. 211 (2) of 1979 Constitution.
27. S. 211 (3) of 1979 Constitution.
28. S. 252 (1) of 1979 Constitution.

Section 255 of the constitution a judicial officer may retire at the age of 60 and shall retire at the age of 65 years. Until the retiring age, they are to hold their office during good behaviour, but can be removed by reason of inability to discharge the functions of office (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct.[29] Apart from Chief Justice other justices are to be removed by the President on the recommendation of the Federal Judicial Service Commission.

The salaries of all federal judicial officers and other conditions of service shall not be altered to their disadvantage after appointment and shall be a charge upon the Consolidated Revenue Fund of the Federation.[30]

Original Jurisdiction:

The Supreme Court has original jurisdiction in any dispute between the Federation and a State or between states if and in so far as that dispute involves any question (whether of law or fact on which the existence or extent of a legal right depends).[31] Under the 1963 Nigerian Constitution, the Supreme Court also

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29. Fifth Schedule to 1979 Constitution.
30. S. 78 (2) (3) and (4) of 1979 Constitution.
31. S. 212 (1) of 1979 Constitution.

had original jurisdiction in cases involving the interpretation of the constitution.[32] By an Act of National Assembly, the Supreme Court may be conferred with original jurisdiction in certain cases,[33] but no original jurisdiction may be conferred on the Supreme Court with respect to any criminal matter.[34]

Appellate Jurisdiction:

The Supreme Court is the final court of Appeal for Nigeria and has jurisdiction, to the exclusion of any other court, to hear and determine appeals from the Federal Court of Appeal. Appeal lies as a matter of right to the Supreme Court in the following matters.[35]

(a) decisions in any civil or criminal proceeding before the Federal Court of Appeal in which the ground of appeal involves questions of law alone;

(b) decisions in any civil or criminal proceedings on questions as to the interpretation or application of the constitution;

(c) decisions in any civil or criminal proceedings or questions of the contravention of any provision of the chapter iv - Fundamental Human Rights.

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32. 1963 Constitution of Nigeria.
33. S. 211 of 1979 Constitution.
34. S. 212(2)(proviso) of 1979 Constitution.
35. S. 213 of 1979 Constitution.

(d) decision in any criminal proceedings in which a person has been sentenced to death by the Federal Court of Appeal or in which it has affirmed a sentence of death imposed by any other court;

(e) decision on any question whether any person has been validly elected to any office under the constitution or to any membership of any legislative house or whether the term of office of any person has ceased or the seat of a person in a legislative house has become vacant.

In matters other than those, appeal can only lie to the Supreme Court from the Federal Court of Appeal with the leave (permission) of the Federal Court of Appeal.[36]

Generally, only parties to the case are entitled to file an appeal, but other persons having an interest in the matter may with leave of the Federal Court of Appeal or the Supreme Court lodge an appeal. In the case of criminal proceedings, appeal may be taken by the accused person, the Attorney-General of the Federation or the State as appropriate.

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36. S. 213 (3) of 1979 Constitution.

The decisions of the Supreme Court are conclusive and final and no appeal lies further from it. But, the President of the Federation or the Governor of a State as the case may be, exercise prerogative of mercy on convicted persons.[37] The decisions of the Supreme Court are enforceable in any part of the Federation by all authorities and persons, and by courts with subordinate jurisdiction to that of the Supreme Court.[38]

FEDERAL COURT OF APPEAL

Below the Supreme Court is the Federal Court of Appeal which is a new creation under the present constitution. It shall consist of the President as the head and other justices whose number will not be less than fifteen. Among them, at least three justices would be learned in Islamic law and at least three justices learned in Customary law.[39] This was the compromise position taken by the Constituent Assembly in view of the heated debate generated by the recommendation of the Constitution Drafting Committee for the establishment of Federal Sharia Court of Appeal at the federal level to hear appeals from Sharia Courts of Appeal from the states that have them. The court is validly constituted if it consists of not less than three justices. In case

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37. S. 215 of 1979 Constitution.
38. S. 251 (1) of 1979 Constitution.
39. S. 217 of 1979 Constitution.

of Appeals from the Sharia Court of Appeal or a Customary Court of Appeal, the quorum shall not be less than three justices learned in islamic personal law and customary law respectively.[40]

The appointment of the President of the court is made by the President of the Federation on the advice of the Federal Judicial Service Commission, subject however, to the simple majority of the Senate.[41] Other justices of the court are also to be appointed by the President of the Federation on the recommendation of the Federal Judicial Service Commission.[42] The Senate need not approve their appointments.

The qualification for a person to be appointed as Justice of the Federal Court of Appeal is that the person must be qualified to practice as a legal practitioner in Nigeria and has been so qualified to practice for a period of not less than twelve years.[43] No qualification was prescribed for the President of the court. However, presumably, since the appointment must be through the recommendation of Federal Judicial Service Commission, it may be the same as other justices of the court.

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40. S. 226 of 1979 Constitution.
41. S. 218 (1) of 1979 Constitution.
42. S. 218 (2) of 1979 Constitution.
43. S. 218 (3) of 1979 Constitution.

The tenure of office of the President of the Federal Court of Appeal and other justices of the court with regard to time of retirement, salary are the same as they come within the definition of "Judicial Officer" as defined in Section 277 of the Constitution. But the President of the court and other justices can be removed by the President acting on the recommendation of the Federal Judicial Service Commission.

Jurisdiction:

The court has jurisdiction to the exclusion of any other court to hear and determine appeals from the Federal High Court, High Court of a State, Sharia Court of Appeal of a state and Customary Court of Appeal of a state.[44]

There are matters in which an appeal lies as of right to the Federal Court of Appeal from the decisions of the High Court.[45] These are:-

(a) final decisions of the High Court in any civil or criminal proceedings, the court sitting at first instance;

(b) in any decisions in which ground of appeal involves questions of law alone;

(c) decisions in which questions as to the

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44. S. 219 of 1979 Constitution.
45. S. 220 of 1979 Constitution.

interpretation or application of the constitution arise;

(d) decisions in which any of the provisions of the Fundamental Human Rights is being or likely to be contravened;

(e) criminal decisions in which the High Court has imposed a sentence of death;

(f) decisions on any question involving election to any office under the constitution, membership of any legislative house or whether the term of office of any person has ceased or the seat of a person in a legislative house has become vacant.

In matters which are not convered by Section 220 of the constitution, an appeal shall lie from the decisions of a High Court to the Federal Court of Appeal with the leave of the court or the High Court. An appeal lies as of right from the decisions of the Sharia Court of Appeal of a state to the Federal Court of Appeal with respect to any question of islamic personal law in any civil proceedings before the Sharia Court of Appeal.[46] The court also hears appeals from Customary Court of Appeal of a state in the same way as that of the Sharia Court of Appeal.[47] Also, an appeal lies to the Federal

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46. S. 223 (1) of 1979 Constitution.
47. S. 224 of 1979 Constitution.

Court of Appeal as of right from the decisions of the Code of Conduct Tribunal established in the Fifth Schedule of the Constitution.[48] The National Assembly may further confer jurisdiction upon the Federal Court of Appeal to hear and determine appeals from decisions of any other court or tribunal established by the National Assembly.

The decisions of the court are enforceable in every part of the federation by all authorities and persons and by courts subordinate to the Federal Court of Appeal.

THE FEDERAL HIGH COURT

The court shall consist of a Chief Judge and such number of judges as may be prescribed by an Act.[49] The court is duly constituted if it consists of at least one judge of the court.[50]

The Chief Judge and judges of the court are to be appointed by the President of the Federation on the recommendation of the Federal Judicial Service Commission. The qualification for a judge of the Federal High Court is that a person is qualified to practice as a legal practitioner in Nigeria and has been so qualified to

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48. S. 225 (1) of 1979 Constitution.
49. S. 228 of 1979 Constitution.
50. S. 229 of 1979 Constitution.

practice for a period of not less than ten years.[51]

Conditions of tenure of office are the same as that of the Supreme Court and Federal Court of Appeal justices. However, the Chief Judge and other judges of the court are removable by the President of the Federation on the advice of the Federal Judicial Service Commission.[52]

Jurisdiction:

The Federal High Court is to hear and decide matters relating to the revenue of the Government of the Federation as may be prescribed by the National Assembly. It also has the jurisdiction of the former Revenue court.[53] It may further be vested with jurisdiction in such matters as may be prescribed by and in respect of the matters in which the National Assembly has power to make laws.[54]

The powers of the court are the same as that of the High Court of a state,[55] but the National Assembly may confer additional powers on it, to enable it function well.[56]

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51. S. 229 of 1979 Constitution.
52. S. 256 (1) of 1979 Constitution.
53. S. 230 of 1979 Constitution.
54. Ibid.
55. S. 231 of 1979 Constitution.
56. S. 231 (2) of 1979 Constitution.

(3) STATE COURTS

HIGH COURT OF A STATE:

Each state in Nigeria has a High court, consisting of a Chief Judge, and other judges. The number of judges is as prescribed by a Law of the House of Assembly of the state.[57] The High Court is duly constituted, if it consists of at least one judge of the court.[58]

The Chief Judge is to be appointed by the Governor of the state on the advice of the State Judicial Service Commission, but this is subject to the approval by a simple majority of the House of Assembly of the state.[59] The Governor also appoints other judges of the court on the recommendation of the State Judicial Service Commission. In their case, approval of the State Assembly is not required,[60] The qualification for a person to be appointed as a judge of the High Court is that the person must be qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of at least ten years.[61]

Their salaries and other conditions of service is as prescribed by the State House of Assembly,[62] but it

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57. S. 234 (b) of 1979 Constitution.
58. S. 238 of 1979 Constitution.
59. S. 235 (1) of 1979 Constitution.
60. S. 235 (2) of 1979 Constitution.
61. S. 235 (3) of 1979 Constitution.
62. S. 116 (1) of 1979 Constitution.

shall be a charge upon the Consolidated Revenue Fund of the state.[63] It shall not be altered to their disadvantage after their appointment.[64] The Chief Judge and other judges come within the definition of "Judicial Officer" ad defined by Section 277 and shall hold their office during good behaviour. According to S. 255 of the constitution a Judicial Officer may retire at the age of 60 years and shall retire at the age of 65 years. They can be removed by reason of inability to discharge the functions of office (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct. In the case of the Chief Judge, he can be removed by the Governor of the state acting on an address supported by two-thirds majority of the House of Assembly of the State.[65] Other judges can be removed by the Governor upon recommendation of the State Judicial Service Commission.

Jurisdiction:

The High Court of a state has unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue and to hear and determine criminal proceedings in certain specified cases.[66]

63. S. 116 (4) of 1979 Constitution.
64. S. 116 (4) of 1979 Constitution.
65. S. 256 (1) (a) of 1979 Constitution.
66. S. 236 (1) of 1979 Constitution.

Criminal or civil proceedings may originate in the High Court of a state or may be brought before it in its appellate or supervisory jurisdiction. A High Court also has original jurisdiction in certain proceedings to hear and determine any question whether any person has been validly elected to any office or to the membership of any legislative house, or whether the term of office of any person has ceased or the seat of a person in a legislative house has become vacant.[67]

But in matters involving the office of the President or Vice-President, the original jurisdiction is to be exercised by the Federal High Court until Section 262 of the constitution comes into force, thereafter, the High Court of the Federal Capital Territory would exercise jurisdiction.[68]

The court may further be vested with more jurisdiction by law.[69]

SHARIA COURT OF APPEAL

Unlike the High Court, a Sharia Court of Appeal is not necessary to be in each state but only in states which require it. The court consists of a Grand Khadi and such member of Khadis as may be prescribed by the House of Assembly of the state.[70]

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67. S. 237 of 1979 Constitution.
68. Ibid.
69. S. 236 of 1979 Constitution.
70. S. 249 (2) of 1979 Constitution.

The appointment of Grand Khadi is the same way as that of the State High Court judges.[71] The qualification for a person to be appointed as a Khadi of the Sharia Court of Appeal is that the person has attended and has obtained a recognised qualification in Islamic personal law from an institution approved by the State Judicial Service Commission and has held the qualification for a period of not less than ten years. Besides this, a person who has either considerable experience in the practice of islamic personal law or a distinguished islamic scholar may be appointed.[72]

Jurisdiction:

Essentially the Sharia Court of Appeal has jurisdiction to decide matters relating only to islamic personal law. It shall have jurisdiction to decide[73]

(a) any question of Islamic personal law regarding a marriage conducted in accordance with that law including a question relating to the validity or dissolution of such marriage or a question that depends on such marriage and relating to family relationship or the guardianship of any infant;

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71. S. 241 of 1979 Constitution.
72. S. 241 (3) of 1979 Constitution.
73. S. 242 (1) of 1979 Constitution.

(b) where all the parties to the proceedings are moslems, any question of islamic personal law regarding a marriage, including the validity or dissolution of the marriage or regarding foundling or the guardianship of an infant;

(c) any question of islamic personal law regarding wakf, gift, will or succession where the endower, donor, testator, or deceased person is a moslem;

(d) any question of islamic personal law regarding an infant, prodigal or person of unsound mind who is a moslem or the maintenance or guardian of a moslem who is phsically or mentally infirm; or

(e) any other question where the parties want the case determined in accordance with islamic personal law.

The State House of Assembly has power to confer on it further jurisdiction by law.[74]

CUSTOMARY COURT OF APPEAL

Like the Sharia Court of Appeal, a Customary Court of Appeal is to be set up only if a state requires it.[75]

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74. S. 242 (1) of 1979 Constitution.
75. S. 245 of 1979 Constitution.

The court is duly constituted if it consists of such number of judges as may be prescribed by law for the sitting of the court.[76]

The court shall consist of the President of the Customary Court of Appeal of the state and such number of judges of the Customary Court of Appeal as may be prescribed by the House of Assembly of the state.[77]

The appointment of a person to the office of the President of a Customary Court of Appeal shall be made by the state Governor on the advice of the State Judicial Service Commission subject to the approval of such appointment by a simple majority of the House of Assembly of the state. The Governor also appoints a judge of a Customary Court of Appeal acting on the recommendation of the State Judicial Service Commission.[78]

The qualifications for appointment as a judge of the Customary Court of Appeal may be prescribed by National Assembly, except as so provided by the National Assembly, a person shall not be qualified to hold office of a judge of Customary Court of Appeal of a state unless, in the opinion of the State Judicial Service Commission, he has considerable knowledge of and experience in the

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76. S. 248 of 1979 Constitution.
77. S. 245 (2b) of 1979 Constitution.
78. S. 246 of 1979 Constitution.

practice of customary law.[79]

The President of court and other judges are judicial officers within the definition of Section 277 of the constitution. Their tenure of office, like salary, retirement, discipline are the same as that of the Sharia Court of Appeal of a state.

Jurisdiction:

The court shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.[80] But the House of Assembly of the state may confer on it such jurisdiction to decide such questions as may be prescribed by law.

MAGISTRATES' COURTS

Magistrates' court is one of the lower court not specifically provided for by the constitution. However, its existence is noted by the constitution and a State Judicial Service Commission is empowered[81] by the constitution "to appoint, dismiss and exercise disciplinary control over the court and members of the Area Courts and Customary Courts".

In practice, even before the coming into force of

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79. S. 246 (3) of 1979 Constitution.
80. S. 247 (1) of 1979 Constitution.
81. Third Schedule of 1979 Constitution Part II S. 9 (d).

the new constitution, there had been Magistrate courts in every state in Nigeria. The court is usually constituted by a single Magistrate. In each state, Magistrates are usually divided into grades, like Chief Magistrate, Senior Magistrate and Magistrate; this classification in general is the basis of defining jurisdiction and power of each Magistrate.

Before the new constitution, in each state a person is appointed Magistrate by Interim Judicial Committee of the state. But under the present constitution, by the State Judicial Service Commission. Except, Grade III Magistrates who are laymen judges, all Magistrates in Nigeria must be qualified to practise as Barrister and Solicitor and must have attained specified minimum post-qualification experience expressed in terms of years.[82]

Jurisdiction:

Magistrate courts in the Southern States of Nigeria have civil and criminal jurisdiction.[83] Those in the Northern States have criminal jurisdiction only. Civil matters are dealt with in the District Courts - although in practice it is the same magistrate that preside and adjudicate in civil proceedings.

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82. Magistrates' Court Law (Lagos Laws) 1973, cap 82), S. 7 (1)
83. Ibid SS. 17 and 18.

Magistrate courts are essentially courts of summary jurisdiction; they have jurisdiction to deal with cases summarily. The jurisdiction of Magistrates' courts in the Northern States is governed by the Criminal Procedure Code.[84]

AREA COURTS

Like the Magistrates' courts, this court although not specifically provided for in the constitution, their existence is noted by the constitution,[85] the State Judicial Service Commission is now responsible for their appointment, removal, dismissal and organisation.

In all the ten Northern States, there are various grades of Area Courts. The jurisdiction and power governing them is in general uniform throughout the Northern States. Prior to the coming into force of the new constitution, an Area Court in a state is established by warrant by the Chief Judge of the state. It is constituted by an Area Judge sitting alone or an Area Judge sitting with one or more members. All members of Area Courts including Area Judges are public servants.[86]

Area court judges were usually appointed by the Public Service Commission, usually on the recommendations

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84. Northern Nigeria Laws 1963, cap 30.
85. Third Schedule 1979 Constitution Part II S. 9 (d)
86. Area Courts Edict 1968 (NO.4 of 1968) B.P.S., S.3 (1).

of the Judicial Department. In areas where islamic law is predominant, the personnel to be appointed must be knowledgeable in that law. In all cases, Area Court judges receive training at certificate level at the Institute of Administration, Ahmadu Bello University, in criminal law and procedure and the law of evidence.

Every Area Court has civil and criminal jurisdiction under the appropriate Area Courts Edict. All grades of Area Courts have unlimited jurisdiction in the following cases:-

a) Matrimonial causes and matters between persons married under customary law or arising from or connected with a union contracted by customary law other than those arising from or connected with christian marriage.

b) Suits relating to the custody of children under customary law.

Appeals from these courts lie to the Upper Area Courts and from Upper Area Courts appeals go to the High Court. However, in all matters involving Moslem personal law or matters in which the parties have elected that their rights should be determined in accordance with the principles of islamic law, the appeals lie to the State Sharia Court of Appeal.

CUSTOMARY COURTS

These courts exist mostly in some states in the

Southern part of Nigeria, especially in Oyo, Ogun, Ondo. They were abolished in some states, while in others like, Lagos State the powers of the court has been drastically reduced and confined to civil cases only.

Customary courts are usually in grades and the highest grades are presided over by legally qualified persons and they exercise both appellate and original jurisdiction in both civil and criminal matters. Appeals from lower grade customary courts lie to the highest grade and from there to the State High Court.

Although essentially established for the administration of customary law, it is vested with civil and criminal jurisdiction.

Qualifications for appointment of members and judges of these courts differ from state to state, but that of Lagos State[87] stipulates the following (a) a person who is literate in English Language, (b) who possesses at least the primary or standard VI certificate or its equivalent and suitable experience, and (c) who is a native of the area of jurisdiction of the customary court.

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87. Customary Courts Law (Lagos Laws 1973, cap 33) S. 4 (1).

CHAPTER III

JUDICIAL POWER

THE NATURE AND MEANING OF JUDICIAL POWER:

The expression "judicial power" still remains obscure and vague. It can be said out-rightly that no inclusive and exclusive definition of the concept has been clearly formulated; and under the changing conditions of modern government everywhere in the world, it is doubtful whether a complete and exclusive definition is possible. As Windeyer J., observed in Reg v. Trade Practices Tribunal[88] "the concept seems... to defy perhaps it were better to say transcend purely abstract conceptual analysis" and it is "really amorphous."

But it is necessary to define and distinguish the judicial functions and institutions for the purpose of identifying those powers which according to the constitution should be exercised by judicial bodies. A matter might arise for decision whether the particular body is a judicial or an administrative body - since the border-land in which judicial and administrative functions overlap is a wide one. As observed by the Privy Council.[89]

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88. (1970) 123 C.L.R. 361 at p.394, 396.
89. (1930) 44 C.L.R. 543, 544.

> "There are tribunals with many trappings of a court which nevertheless are not courts in the strict sense of exercising judicial power... A tribunal is not necessarily a court in the strict sense because it gives a final decision; nor because it gives decision which affect the rights of subjects; nor because there is an appeal to a court; nor because it is a body to which a matter is referred by another body."

Secondly the proposition can be made here that if the constitution vests "judicial power" in the courts, it follows that the legislature cannot validly vest any function which is "judicial" in any other body which is not a court within the meaning of the constitution. As a corollary of this, "non-judicial" functions cannot be validly vested by the legislature to the courts. These matters, I believe, will one day come up for interpretation in our courts. It is because of the above reason that it is necessary to have an idea of what the concept "judicial power" means.

A layman's notion of judicial power is that of a judge deciding some dispute between parties. But it may be asked: what about the power exercised by a tribunal? Is it a judicial power or not? The most often quoted definition of "judicial power" is that propounded by the first Chief Justice of Australia in 1908 in Huddart Parker v. Moorehead.[90]

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90. (1909), 8 C.L.R. p. 330.

> 'The words 'judicial power', as used in S.71 of the constitution, mean the power which sovereign authority must of necessity have to decide controversies between its subjects whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding decision (whether subject to appeal or not) is called upon to take action.91

Chief Justice Griffith considered that there could be no exercise of "judicial power" unless there was a controversy between parties and probably a power of enforcement.

This definition was accepted by the Privy Council in the case of Shell Co. of Australia v. Federal Commissioner of Tax.[92]

Amplifying this definition in 1944, another Chief Justice of High Court of Australia, Latham C.J., expressed the view that ability to take action to enforce a decision is the most distinctive attribute of judicial power. According to him "if a body has a power to give a binding and authoritative decision, then, but only then, ...all the attributes of judicial power are plainly present.[93]

The institutions, offices and functions which will

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91. Ibid p. 357
92. (1931), A.C. 275 per Lord Sankey at p.297.
93. Rola Co. (Australia) Ltd., Vs. Commonwealth, (1944) 69 C.L.R. p.199.

94. Judicial Review of Administrative Action. (2nd ed), pp.64-65.

be regarded as judicial vary with the purposes for which the classification is being made but in all the varied circumstances certain characteristics are regarded as indicating the existence of a judicial authority or power. Professor de-Smith has suggested[94] three main tests for identifying judicial functions and these for convenience may be summarized as follows:-

1) the performance of the function terminates in a decision or order that is per se conclusive and binding in law, and cannot be impeached (if the court has acted within its jurisdiction) or
2) the manner in which the function is to be performed conforms with the procedural characteristics of a court, for example, these attributes may include the method of initiating the action by means of the act of the parties to the disputes; the hearing of evidence and arguments by both sides; the power to compel attendance of witnesses who may be examined on oath etc.
3) after inquiring and deliberating and act is performed or a decision is made that is binding

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94. Judicial Review of Administrative Action. (2nd ed), pp.64-65.

and conclusive and imposes obligations upon or affects the rights of individuals.

As Professor de Smith points out,[95] the courts apply these tests with varying emphasis in accordance with the nature of the situation and the purpose for which the decision is made. No one of these tests is by itself decisive[96] but where most of these characteristics are present it will be very likely that not only will the function be regarded as judicial but the institution will also be regarded or classified as a court.

The author has identified about four different attributes in these definitions of "judicial power".

i) the existence of a dispute between two or more parties about some existing legal right;

ii) a power to determine authoritatively and conclusively the laws and facts of the dispute;

iii) this final determination binds the parties in the dispute;

iv) a power to enforce compliance with or obedience to the decision.

"Judicial Power" may therefore be broadly defined

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95. Op. cit pp 76-80.
96. Shell Co. of Australia Vs Federal Commissioner of Tax (1973) A.C. p.275 as per Lord Sankey at p.297.

as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the rights and liabilities of one or more parties.

One of the significant aspects of judicial power is the authority of judicial review by the courts. Judicial review is the ultimate power of court to declare unconstitutional and hence unenforceable: (1) any law; (2) any official action based upon a law; and (3) any other action by a public official which the court deems to be in conflict with the constitution. The United States Supreme Court in the case of Marbury v. Madison[97] established this judicial power of the judiciary. In that case, Justice Marshall said emphatically that: (i) it was the province and duty of the judicial department to say what the law is; (ii) a law repugnant to the constitution is void; and (iii) courts as well as other departments of government are bound by that instrument.

2. JUDICIAL FUNCTION

Judges generally are expected to be the guardians of the gate of ordered society; to them belongs the sacred office of ensuring that the principles of right dealing according to law and justice are pursued by

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97. Marbury Vs Madison 1 Cranch (5 Vs) 137 (1803).

citizens towards each other and towards the state and most crutial of all, by the state towards citizens.

The source of their power to function differ from country to country. In Britain for example, the power of English courts is mainly "judicial" - involving the interpretation of the common law and statutes and its application according to the rules and procedure and evidence to the cases that come before them. Accordingly, the constitutional interpretative function of the English court is in essence exercised in disguise, that is, as merely a statutory interpretative function. Cockburn C.J., in the case of R.V. Selwyn[98] said

> "There is no judicial body in this country by which the validity of an act of parliament can be questioned. An act of the legislature is superior in authority to any court of law ...and no court could pronounce a judgement as to the validity of an act of Parliament."

However, English court, whilst incapable of overtly or directly adjudging an Act of Parliament to be null and void has enormous functional powers for rendering a statute or provisions thereof ineffective - void for all practical purposes - by interpretation. To take an example, a recent statute regulating immigration into the United Kingdom contained provisions which manifestly showed the intention of Parliament that the

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98. (1872) 36 J. P. 54.

provisions were to have retroactive effect in some circumstances one of which would involve the imposition by criminal law sanctions. The House of Lords refused to give the relevant sections any retroactive scope and effect and the accused person charged under the said provision of the Act was acquitted.[99]

The position in Britain is if a power is not authorised, or if a power is abused or exercised unreasonably or if the principles of natural justice are not observed, the act may be declared illegal and the courts can declare it void.

The position in Britain contrasts sharply with that of the United States of America. It is true that in the United States only the Supreme court is provided in the constitution. "The Judicial Powers of the United States" declared Article III of the American Constitution, "shall be vested in one Supreme court, and in such inferior courts as the Congress may from time to time ordain and establish... The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States and Treaties made, or which shall be made, under their authority." But the Supreme court was able to assert the interpretative

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99. R.V. Miah (1974) 1 W LR p 683.

function of the United States judiciary as shown by the leading case of Marbury V. Madison.[100] This interpretative function of judicial review although not specifically provided for in the constitution was inferred as inherent in the courts.

The principal function of the judiciary is the administration of justice which consists essentially of adjudication - that is - the resolution of conflicts or rights and interests.

Section 6 of the 1979 Constitution of Nigeria vests judicial powers of the federation in the Federal Courts, namely, the Supreme Court, the Federal Court of Appeal and the Federal High Court. There is scope for creating more courts and the courts so created may be vested with judicial power in matters with respect to which the National Assembly has power to make laws.[101] Similarly, the judicial powers of a state are vested in the State High Court, Sharia Court of Appeal or Customary Court of Appeal.[102] A State House of Assembly is also empowered to create courts and vests them with judicial powers.[103] However, their jurisdiction at first instance or an appeal can only be on matters with respect to which

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100. 1 Cranch (5 U.S.)137 (1803).
101. S. 6 (5) (g) of the 1979 Constitution.
102. S. 6 (2) and (5) of the 1979 Constitution.
103. S. 6 (4) (a), 5 (b) of 1979 Constitution.

the House of Assembly has power to make laws.

The judicial powers vested in the courts extends notwithstanding anything to the contrary in the constitution, to all inherent powers and sanctions of a court of law and to all 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. S.6(6)(a) The term "inherent power" in this context has not been defined, but generally inherent powers of courts are to punish for contempt, in order to maintain the decorum and decency in the court; the power to issue orders in the interest of justice and the power to enforce its orders together with the sanctions attached to its orders.

Section 13 of the constitution places a responsibility on all authorities and persons exercising executive, legislative and judicial powers to conform, observe and apply the provisions of Chapter II of the Constitution - Fundamental Objectives and Directive Principles of State Policy.

The courts in Nigeria, therefore, have explicit power to review legislative, executive and actions of all authorities in order to preserve the respective rights of the federation and its component members.

The constitution of the Federal Republic of Nigeria has laid down interpretative jurisdiction of the various courts.

As to the Supreme Court of Nigeria, the relevant provisions are contained in Section 213 (m)-(m); and as to the Federal Court of Appeal, the jurisdiction to interpret is conferred by Section 220 (1) (c). But in the cases of the Federal High Court and the High Courts of States, this is inherent and inferable from the general jurisdiction conferred by Section 6 (6) (a) and (b).

Specifically, there are the provisions which relate to the power of the court in respect of infringement of the fundamental rights provisions entrenched in Part IV of the Constitution which are set out in Section 42, thus:

1) Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for redress.

2) Subject to the provisions of this constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may

consider appropriate for the purpose of enforcing or securing the enforcement with that state of any rights to which the person who makes the application may be entitled.

And then, of probably greater juridical significance are the overriding provisions contained in Section 4 (8) which specifically subject the enactments of both the Federal and State legislatures to the jurisdictions of the courts as well as prescribe legislative attempts at ouster of jurisdiction, thus:

> "Save as otherwise provided by this constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law; and accordingly, the National Assembly or a House of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law."

As contrasted with the experience under the military rule from 1966 to September 1979, the constitutional interpretative function, the jurisdiction of courts is of enormous significance. Whereas under military rule the jurisdiction of the courts was specifically ousted by particular enactments so that infringements of the constitutional rights of the citizen could not be adjudicated upon where prescribed, no such disability now limits the functional scope of the courts.

Limitations on Judicial Functions:

There are however, in respect of two matters in which the courts seem to be denied jurisdiction.

In Chapter II of the Constitution there are set out certain "Fundamental Objectives and Directive Principles of State Policy". These objectives and principles have a glaring counterpart in the Indian Constitution. The political, economic, social and educational objectives set out therein would ordinarily lay a solid foundation for egalitarian democracy and probably enshrine a national socio-political ideology. But Section 6 (6) (c) says that the judicial powers shall not "extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution."

This provision may seem to deny the courts jurisdiction to entertain any question relating to Directive Principles, but when read and considered along with Section 13 of the constitution, may produce opposite interpretation. Section 13 enjoins all state functionaries to conform to that provision, it is submitted with respect that the correct interpretation of Section 6 (6) (c) can only mean that individuals, cannot lawfully challenge in

a court of law a state organ - executive, legislature or judicial - that it has failed to conform to Directive Principles of State Policy. But the courts themselves are free to take into consideration the provisions of Chapter II of the Constitution with regard to their interpretative function.

The second exception according to Section 6 (6) (d) of the Constitution, is that the exercise of judicial powers by the courts, shall not, extend to any action or proceedings relating to any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law. This second exemption is intended to protect military officers and authorities who ruled the country from 15th January, 1966 to September 1979. The laws and decisions made by the military officers cannot be challenged in courts on grounds of absence legality or competence of the military regime to make them. However, such existing laws may be modified to bring them into harmony with the constitution.[104]

Thirdly, it is not uncommonly assumed that the courts of a nation stand ever ready to right all wrongs suffered to one's person or liberty or property. In a

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104. S.6 (4) (a), 5 (b) of 1979 Constitution.

strictly limited sense, this may be true. For example, if one has suffered an injury recognised by law, and if he has the time, money, energy and witnesses and evidence to prosecute his cause successfully in court, then a remedy is available to him. But this statement camouflages a multitude of barriers to the realization of effective judicial remedies for wronged individuals. Civil rights may be there, but there are certain important factors which limit the effectiveness of courts as guardians of civil rights. Some of these factors are external to judicial process and others stemming from the courts' own evaluation of the limits of their appropriate role.

At the out-set, the initiative in a civil suit must be taken by the injured party if the courts are to offer any assistance in righting the wrong. Even in criminal actions, a substantial burden rests on the injured party to push forward his cause. His complaint and testimony (if he is alive to give them) are usually necessary. Everyday sees abridgements of rights in some form take place with only a very small portion of these leading to actual litigation. This is so because of the fear of cost, reprisals, delay in reaching final decision by the courts etc. One does not lightly undertake a law suit if he takes the time to calculate the potential costs of lawyer's fees, witnesses' fee, courts costs, and his

own time. This is more so, when the party you are suing has no money. It will also be remembered that the ordinary courts are not the only governmental agencies which decide disputes between parties and determine the right of persons. Administrative tribunals and officials often serve in a quasi-judicial capacity in many important areas of controversy between private individuals and between individuals and the government.

Courts also have certain inherent limitations. Our legal system is based on 'adversary system'. The advocate of each party presents the evidence and the relevant provisions of law which is disputed by his adversary who places the evidence and his interpretation of the law applicable to the case. It is by this disputant method that the judge is apprised of the respective stands of parties. After having heard both parties the judge gives his findings or rulings. An aggrieved party may appeal to the superior court. It is evident, therefore that the courts have to function within inherent limitations. They must function within the framework of the law; besides, courts only handle presented cases for settlement. Courts must wait until problems are brought to them. The consequencies lie in the possibility that some questions may never find their way to the courts and some may get there after the problem have lost some

urgency. Similarly, courts especially at the appellate level are to write opinions justifying their decisions, which means judges must find reasons for decisions. While emotions, convictions and prejudices of judges play an important part in decision-making, the legal context in which the process takes place requires that political and personal elements cannot be too openly admitted as the reasons for decision. Wisely, the system of written opinions forces the judge to search for reasons other than his own preferencies - he is forced to rationalize his decision for fear of public opinion.

Another self-imposed limitation is the doctrine of political questions evolved in the United States of America. In brief, this doctrine is of the view that some cases are pre-eminently political in nature, and solutions should be sought in political branches other than in the courts. The legal justification for this is that although boundaries between "political" and "legal" questions cannot be separated logically, courts should be careful not to make decisions that are not likely to be enforced - to do so would be to destroy themselves. An example of this can be seen in the majority opinion in Colegrove V. Green[105] decided in 1946. The case begun as a suit against the Governor and

105. 328 U.S. 549 (1946).

State officials of Illinois, to restrain them from holding an election on the ground that electoral districts in the state were malapportioned, in violation, inter alia, of the equality guarantees in the 14th Amendment to the Constitution. The majority held that a determination of this issue would bring the courts into 'immediate and active relations with party contests'. It was hostile to a democratic system, they said, to involve the judiciary in the politics of the people. Courts ought not to enter this 'political thicket'.

CHAPTER IV

EXTENT OF INDEPENDENCE OF JUDICIARY

SELECTION AND APPOINTMENT OF JUDGES:

What should be the ideal method of selecting and appointing personnel to be entrusted with the task of dispensing justice is a topical issue the world over. According to Schwartz[106]

> "It is almost a truism that the quality of justice depends more upon the quality of the men who administer the law than on the content of the law they administer. 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 function poorly in practice."

It is generally accepted that administering justice is a highly exacting task requiring not only intelligence and understanding, but also detachment and freedom as far as possible from pressures. The appreciation in the Anglo-American countries of the importance of judicial function is the main reason why efforts are usually made to secure proper personnel in the courts.

For example in the United States of America, the appointments to the Federal Bench (Supreme Court) is made by the executive - that is to say - the President.

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106. Schwartz, American Constitutional Law, p.40

But this is subject to confirmation by the Senate.[107] In practice, however, in making the appointments, the President receives advice from a number of sources, including the members of the Senate, the Attorney-General of the United States. Further, before a nomination is made by the President, each nominee, since 1953, is investigated by the American Bar Association's Standing Committee on the Judiciary. And the Federal Bureau of investigation will check the candidates' personal background for integrity and honesty. The American Bar Association's job is to rate the nominee's training, legal qualifications, and experience for the job. Thus, although political considerations may not be ruled out completely, the inbuilt checks and balances including involvement of different organs of government is undoubtedly an effective safe-guard against the appointment of substandard judge.

The 1979 Nigerian Constitution provides that judges in Nigeria shall obtain their offices by appointment. The Chief Justice of the Supreme Court of Nigeria is appointed by the President in his discretion subject to confirmation by the Senate. The Justices of the Supreme Court and the President of the Federal Court of Appeal

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107. Section 2 Article II American Constitution.

are appointed by the President on the advice of the Federal Judicial Service Commission subject to approval by the Senate. All other federal judges - the justices of Federal Court of Appeal, the Chief Judge and Judges of the Federal High Court are appointed by the President on the recommendation of the Federal Judicial Service Commission. No Senate approval is required and it appears that the President is obligated to act in accordance with the recommendations from the Commission.

In each state, the Chief Judge of the High Court, the Grand Khadi of the Sharia Court of Appeal, the President of the Customary Court of Appeal are appointed by the Governor on the advice of the State Judicial Service Commission subject to the approval of the appointments by a simple majority of the House of Assembly of the State. Judges of the High Court, Khadis of the Sharia Court of Appeal and members of the Customary Court of Appeal are appointed by the State Governor acting on the recommendation of the State Judicial Service Commission. It is to be noted here also that the Governor does not seem to be left with discretion in their appointment as he has to act on the recommendation of the State Judicial Service Commission.

The lower rungs of the judiciary - Magistrates, judges and members of the Area and Customary Courts - are to be filled by the State Judicial Service Commission

alone. The Commission has the constitutional responsibility to appoint, dismiss and exercise disciplinary control over them.[108] In fact at present, the commission is now fully incharge of appointment, discipline and removal of other supporting staff of the judiciary in some states - e.g. Niger and Kaduna states. Under the 1963 Nigerian constitution all the above mentioned officers were appointed by the Public Service Commission, now known as (Civil Service Commission). Subject to certain reforms - (Chapter 5), the present arrangement appears to be satisfactory bearing in mind the fact that they are now completely under the partial control of the judiciary. There should be little or no interference in their day-to-day assignments by either the executive or the legislature.

The appointment to the Office of the Chief Justice of Nigeria lies in the absolute discretion of the President and confirmation by the Senate. The argument in favour of this position is that there ought to be mutual confidence between the President and the Chief Justice for the effective running of administration. This argument appears to me untenable in that a President cannot come and go with Chief Justice. A President may come and meet a particular Chief Justice in office and he has no

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108. Third Schedule Part II S. 9 (d) of 1979 Constitution.

constitutional right to replace him unless the term of office of such a Chief Justice expires or he is removed through the constitutionally prescribed procedures. The office of Chief Justice not being completely political, the President will not always have his way of having particular persons as the Chief Justice of Nigeria. Secondly, allowing the President an absolute discretion of appointing a member of the legal profession who only satisfies the prescribed constitutional qualification of 15 years post-call experience is inherently dangerous for our inchoate democracy. This is because, an unscrupulous President who can reckon on the support of the majority in the Senate may use this appointing power to appoint someone who may not command the confidence of other justices of the Supreme Court. Naturally, this will have the adverse consequence of disharmony among the justices of the Supreme Court and in turn affect the administration of justice in the country. The advantage of having someone as Chief Justice who will work harmoniously with the President will be lost if such a Chief Justice does not command the respect of other brother judges.

Apart from the appointment to the Office of the Chief Justice, it is obvious that the Federal Judicial Service Commission and the State Judicial Service Commission play important and significant roles in the

selection and appointment of judicial officers. Who then are the members of these commissions?

The Federal Judicial Service Commission comprises the following:[109]

a) Chief Justice of Nigeria (Chairman)

b) President of Federal Court of Appeal

c) Attorney-General of the Federation

d) Two persons, each of whom has been qualified to practice as a legal practitioner in Nigeria for a period of not less than 15 years recommended by the Nigerian Bar Association;

e) Two other persons, not being legal practitioners who in the opinion of the President of the Republic are of unquestionable integrity.

A State Judicial Service Commission consists of:[110]

a) Chief Judge of the High Court of the State (Chairman)

b) Attorney-General of the State.

c) Grand Khadi of the Sharia Court of Appeal (if any)

d) The President of the Customary Court of Appeal of the state (if any)

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109. Part I, S.7 of Third Schedule to 1979 Constitution.
110. Part II, Section 8 of the Third Schedule to 1979 Constitution.

e) A legal practitioner of at least ten years standing appointed by the Governor of the State.

f) A person of unquestionable integrity nominated by the State Governor.

Examining the question of independence of judiciary with respect to the composition of both the Federal and State Judicial Service Commissions, it can be observed that their number is small especially that of the State Judicial Service Commission. The Federal Judicial Service Commission consists of seven members. And according to Section 146 (1) of the constitution, the quorum for a meeting shall not be less than one third of the total number of members. It means then, that only three members may constitute a quorum. In the case of the states, the commission shall consist of six members, but such states that do not have a Sharia Court of Appeal and the Customary Court of Appeal, shall consist only of four members. There is no requirement of quorum specified in the constitution for the composition of the State Judicial Service Commission. However, assuming the quorum requirement specified by Section 146 (1) of the Constitution is adopted, only two members can constitute a quorum to recommend the appointment of a judge to the State Governor.

The question is: can the composition of these

commissions either at Federal or State levels guarantee the selection of competent, non-partisan judges for Nigeria? It should be remembered that the office of a judge is a strategic one in the machinery of government. It seems that involvement of only two or three people - who can in most cases be easily teleguided by the executive - in the selection and subsequent appointment of judges is not adequate. To further worsen matters, appointment of most of the judges do not require legislative approval. Also the role to be played by each of the members of the commission is not known. If suitability has to do with competence, character and integrity, it stands to reason that only those who are in a position to satisfactorily evaluate these qualities in a prospective appointee should be entrusted with such tasks.

In the composition of the Federal Judicial Service Commission, two representatives recommended by the Bar Association are included. In the State Judicial Service Commission, it is a legal practitioner of at least ten years standing that is required to be nominated to the commission by the State Governor. The legal practitioner need not be nominated by the State Chapter of the Nigerian Bar Association. Clearly, he will be less independent in his approach to issues and more likely to give in to pressures from the executive. It may also be asked: does the representatives of the Bar included in each Judicial

Service Commission enhances the independence of the judiciary? In the United States of America, the Bar Association has a committee on the Federal Judiciary which has set minimum qualifications and determines the type of pre-judicial experience for a judge. It is said that its influence over standards and pre-judicial career patterns has proved to be most effective weapon.[111] In other words, its participation is indirect. It does not participate directly in the appointment of judges. Under the new Nigerian constitution, the Bar has been conceded a right to participate in the appointment and removal of judges except the Chief Justice of Nigeria. This to some extent may afford the members of the Bar an opportunity to recommend only suitable, competent and capable people. They are largely in a position to know the capability and moral standing of a legal practitioner proposed to be appointed a judge because of the day-to-day interaction within the same profession. Their opinion of a good and bad lawyer may influence the commission. However, their presence is more beneficial with regard to selection and appointment but not in the removal of a judge. There are two main reasons for this. First, the identity of these members of the Bar constituting the commission is known, so that this may naturally have undue

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111. Kasunmu, A.B. (ed) The Supreme Court of Nigeria (1956-70) (1977) p.11.

influence on the mind of a judge any time such lawyers appear before his court. The judge is instinctively aware that they are members of the commission that is entrusted to remove him from office. Second, one cannot rule out the possibility of personal animosity towards a particular judge and this may hamper any objective contribution they can make to the judicial commission.

The participation as chairman by either the Chief Justice or State Chief Judge in their respective commissions seems sound only with regard to selection and appointment but it is not desirable to associate them with the removal of a judge from office. With regard to the selection and appointment two reasons can be advanced for the participation of Chief Justice or the Chief Judge. First, it could be argued that as head of the judiciary and embodiment of justice in the federation or in a state respectively, their opinion with regard to desirable qualities of who should be a judge may be useful. Second, they may have seen the work of a prospective appointee either at the Bar or the lower court and may be in a position to assess his competence, character and suitability.

The idea of having laymen in the commission is that they may be able to supply or secure additional information with regard to character and integrity of the person recommended and probably his local position

and affiliates.

The participation of the Attorney-General especially with regard to selection and appointment appears to be alright in the sense that he will be able to represent the views of the executive on the matter and he, being a lawyer probably also of considerable standing, may make useful contributions in the commission.

Another observation with regard to selection and appointment, has to do with the constitutionally required qualifications. The qualifications for appointment to various higher bench judicial offices is a call to the Nigerian Bar with experience computed in terms of years. Can this offer any real assistance in selecting those of real ability and character? What about those who never practised law after obtaining their qualifications? In Britain for example, only practising Barristers who have distinguished themselves in practice have a right to be considered for judgeship appointment of the superior courts. In India, there is a constitutional requirement that distinguished jurists may be considered for appointment. In the United States, although only members of the legal profession are chosen for high judicial office, the choice is not limited to those engaged only in the task of advocacy. In fact, most judicial appointments are made from among lawyers whose work does not at all

resemble that performed by an active English Barrister, such as members of the Executive, the Legislature or law faculties, who have not engaged in legal practice for many years. For example, among the members of the United States Supreme Court in 1954, [113] eight of its members were appointed from among the groups just mentioned - four were appointed directly from positions in the executive branch, two from the Senate, one from a law faculty, and one, the Chief Justice, from the governorship of the State of California. While the ninth was elevated from his seat on a Court of Appeals.

It is submitted with respect that meaningful judicial qualifications cannot simply be legislated. The qualities we seek, particularly the intangibles, such as the character, temperament and ability, require discriminatory choice; virtues of integrity, courage, patience, humility, kindness and understanding human nature are matters which although may not be legislated are very significant and important in the consideration of prospective appointee. It seems to me therefore that the constitutionally prescribed qualifications are only minimum requirements showing that at least only legally qualified persons are eligible for appointments to certain courts. In view of the unique position of the superior courts of

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113. Isiaku, A.U. - Unpublished LL.M Thesis, p.188

record only those who have distinguished themselves either at the Bar or Bench or legal academics of high scholarship and distinction who have satisfied the requirements of Section 211 (3), should be recruited to high judicial offices. Recruitments can also be extended to suitable members of the executive or legislature who satisfy the requirements of Section 211 (3) because although experience in legal practice is important, intelligence, academic and research potentiality is a desideratum at the superior courts.

It is also observed that the appointment of certain judges do not require the confirmation of the Senate (for federal judges) and State House of Assembly (for state judges). The question can be asked whether by that the constitution intends to imply that those judges are inferior. Why should some judges be subject to legislative check while others are not? Since judicial selection and appointment do not depend on the consent of the people as those of the legislature and chief executive, it appears that if requirements of democracy are to be met, peoples' elected representatives in government should be actively associated with the process of appointment and even removal of judges. Secondly, this will also help to displace the argument that judicial offices not subject to legislative confirmation are less important.

Another problem which is not clear is the procedure

and process of selection. Who will propose name of prospective appointees to the commission. Will judgeship vacancies be advertised for eligible persons to apply to the commission? Without submitting the names of many eligible people for consideration, how can the commission select the most competent and suitable people? The way and manner appointment of judges are conducted in mystery and secrecy in this country will definitely affect and restrict the range of competent persons who may present themselves for consideration for appointment.

TENURE OF JUDGES:

The second and most important principle of the concept of a fair trial is that judges should be absolutely independent of government. Security of tenure is one of the cardinal safeguards of ensuring that judicial functions will be properly performed. Unless judges are free to reach their decisions without influence from the executive and legislative branches, constitutional guarantees wither and die and justice fades away. Security of tenure here means (a) that a judge should not entertain any fear of removal while discharging his duties until his retiring age unless with good cause and according to a fair removal procedure; (b) sufficient pay and pension after retirement to dissuade him from corrupt tendencies;

(c) unnecessary pressure of any kind from any quarters in the discharge of his duties. According to United States Supreme Court[114] "It is quite evident that one who holds his office only during the pleasure of another cannot be dependent upon to maintain an attitude of independence against the latter's will."

a) Removal:

Various methods and devices have been employed in different countries at various times in order to guarantee the security of tenure. In both America and Britain, the established rule is that the tenure of judges is during good behaviour. Judges in Britain are removable only through an address supported by two-third vote in the Parliament. This was the position in Nigeria under the 1963 Nigerian constitution. An address by each House of Parliament supported by two-third majority to the President or Governor (as the case might be) was an essential condition of removal of a judge in office.

In America, the federal constitution provides that a judge may be removed only through impeachment. The procedure is laid down in the constitution. The House of Representatives institutes the impeachment proceedings, usually by demand from a member that a committee

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114. Humphrey's Executive Vs. United States, 295, 602 629 (1935).

be appointed to investigate the official conduct of a certain person. After the investigation by the committee, the Committee's Report, if adverse and if adopted, constitutes the actual impeachment, which is analogous to a criminal indictment. The impeachment charge is then sent by the House to the Senate, where the person impeached is tried. The House conducts the prosecution through managers appointed for the task. Conviction requires the concurrence of two-thirds of the members of the Senate present. The judgement on impeachment may not extend further than the removal from office and disqualification from holding any government office in the future. The individual convicted may also be liable to criminal indictment, trial and punishment according to law.

However, a judge who is being impeached is entitled to notice of the charges against him and an opportunity to be heard. Customarily the House before sending an impeachment to the Senate for trial, would receive evidence bearing on the charges made against the judge sought to be impeached. In the Senate also, an opportunity is afforded the judge to present his defence.

In India, removal of superior court judges is governed by THE JUDGES (INQUIRY) ACT 1968. Under it, removal of a judge is largely in the hands of the legislature and an independent tribunal. Usually, a

notice of motion praying for removal of a judge is expected to be adopted by the simple majority of all the members of Parliament. The motion if admitted, an independent committee for the purpose of making an investigation into the grounds on which the removal is sought. The committee is usually headed by a distinguished superior court judge and a distinguished jurist. The charge or charges can then be framed and the judge sought to be removed is notified in writing. He is given an opportunity of presenting a written statement of defence. Where it is alleged that the judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and the allegation is denied, the committee may arrange the appointment of a Medical Board who will undertake the medical examination of the judge and submit a report to the committee. The committee at the conclusion of the investigation, then submits its report to the legislature. If the report of the committee finds that the judge is not guilty of any misbehaviour, or does not suffer from any incapacities, no further step is taken by the legislature and the motion is dropped. If the report finds that the judge is guilty, then the motion together with the report of the committee is taken up for consideration by the legislature. If the motion is adopted by simple majority of all the members of the legislature, then the misbehaviour

or incapacity of the judge is deemed to be proved and an address praying for the removal of the judge is presented to the President of India to remove the judge.

Under the new 1979 Nigerian constitution, the method to remove a judicial officer is provided in Section 256. A judicial officer may retire at the age of 60 years and shall retire at the age of 65 years.

There are two methods of removal, depending on the particular judicial office involved. All judicial officers of the Federation have been divided into two categories.

The first method is removal by the chief executive acting on an address from the legislature. The Chief Justice of Nigeria may be removed by the President acting on an address supported by two-thirds majority of the Senate. The Chief Judge of a State High Court, the Grand Khadi of a Sharia Court of Appeal or the President of Customary Court of Appeal may be removed by the Governor acting on an address supported by two-third majority of the State House of Assembly praying that the judge in question be removed for inability (whether arising from infirmity of mind or body or for misconduct or contravention of the code of conduct). The second category of removal will take in justices of the Supreme Court, President of the Federal Court of Appeal,

Chief Judge of the Federal High Court, Judges of the Federal High Court, Judges of the High Court of the State, Khadis of the Sharia Court of Appeal. For the removal of any judicial officer of the second category, recommendation of the Federal Judicial Service Commission for Federal judicial officers and in the case of state judicial officers that of the State Judicial Service Commission is required.

Although there are problems of security of tenure with regard to the first method, the problem arises more from the second method of removal which is set forth in Section 256 (1) (b). This provision states that in any case other than above, removal will be, "...by the President or, as the case may be, the Governor acting on the recommendation of the Federal Judicial Service Commission or the State Judicial Service Commission that the judicial officer be so removed..."

In this second method, the role of the legislature is completely annihilated. There is no requirement of participation by a legislative body. Firstly, there is, like the appointment of judges, discrimatory treatment of the judges. The power to remove all Federal Justices other than the Chief Justice of Nigeria is vested in the Federal Judicial Service Commission. And the power to remove all state judges other than the three already

mentioned, is vested in the State Judicial Service Commission. Although not stated explicitly, it seems clear that under Section 256 (1) (b), the President or the Governor is obligated to act upon receiving a recommendation for removal from the appropriate Judicial Service Commission. The issue therefore is: is security of tenure and independence of the judiciary secured by placing the power of removal in the Judicial Service Commissions as provided in Section 256 1) (b)? Or would security of tenure and independence of the judiciary be better secured if, instead, the power of removal were vested in appropriate legislative body?

First, Part I, Section 7 of the Third Schedule of the constitution provides that the Federal Judicial Service Commission shall consist of seven members. The quorum shall not be less than one-third of the total number of members. Thus, three members out of seven may constitute a quorum. The result is that any decision taken by the majority vote under Section 146 (2) of the constitution - that is by two members out of three present and voting can remove Federal Judges other than the Chief Justice of Nigeria. Even assuming that all the seven members attend the meeting concerning removal, the votes of only four persons would be sufficient to remove a judge from office.

The situation is similar as to the State Judicial Service Commissions. Part II, Section 8 of the Third Schedule of the constitution provides that a State Judicial Service Commission shall consist of six members in states having Sharia Court of Appeal and a Customary Court of Appeal. The state not having any of the these shall consist of only four members. Assuming full attendance, the power of removal is in the hands of four persons in states having a six-member commission or three persons in states having a four member commission. No quorum requirements are specified in the constitution for the State Judicial Service Commisions. However, assuming the State Judicial Service Commission decides to adopt the same quorum requirement as specified by Section 146 (1) for Federal Judicial Service Commission, it would be possible for votes of two members to remove any state judge other than the Chief Judge of the High Court, the Grand Khadi of a Sharia Court of Appeal, and President of a Customary Court of Appeal. Clearly therefore, the power of removal of most judges whether at Federal or State levels lies with extremely small number of people. Quite apart from the identity of the commission members, the very small size of the commissions can make it easy for executive influence or manipulation and certainly this erodes independence of the judiciary. Whereas manipulation of a large body

would prove difficult, outside parties could easily exert decisive influence on these small commissions.

The second factor relevant to the security of tenure and independence of the judiciary is the identity of the commission members. The Chief Justice of Nigeria is the Chairman of the Federal Judicial Service Commission having the power to remove from office his fellow justices of the Supreme Court. This factor undoubtedly would repress the freedom of mind of a judge since the justices know that the Chief Justice is the Chairman of the commission that could remove them from office, they are likely to be subjected to undue influence by the Chief Justice. For example, there may be occasions when the justices would like to express views dissenting from those of the Chief Justice but this factor may tend to suppress them and thus very often the views of the Chief Justice would become the view of the majority. The case may be different if this fear is removed. Perhaps it may be said that this fear would have little influence on the independence of a judge in routine cases involving non-controversial issues or cases. But in important cases involving controversial issues particularly political issues, a judge would be concerned with losing his job. It does not mean that the Chief Judge may directly influence other justices

in an undue manner. Rather, the influence would be subtle and indirect. In highly controversial cases, the justices may simply be less willing to oppose the views of the Chief Justice because he is the chairman of the commission which has power to remove them from office. Justices may not voice their opposing views with the same strength and conviction they might otherwise have done.

The above argument applies mutatis mutandis to the justices of the Federal Court of Appeal. As the President of the court, he is also a member of the Federal Judicial Service Commission and thus poses threat to the independence of the justices of the Federal Court of Appeal. In fact the membership of the President of the Federal Court of Appeal in the Federal Judicial Service Commission appears anomalous in that it clearly contradicts the rules of natural justice - one should not sit as a judge in one's own cause. It can be said here that if the President of the Federal Court of Appeal is friendly with other members of the commission, he is not likely to be recommended for removal from office regardless of his actions. If on the other hand, he is not friendly with other members, he may be unjustifiably recommended for removal. In either case, the independence of the

judiciary is in jeopardy.

By making two members of the Bar members of the commission and directly involved in the removal of judges may have an effect on the independence of the judges also. The members of the Bar who are members of the commission would in all probability be appearing before the courts. A judge is subject to influence in a particular case if he knows that the lawyer arguing one side of the case has a large share of power to remove him from office.

The chilling effect referred to above also exists at the state level. Part II Section 8 and 9 of the Third Schedule of the constitution provide that the Chief Judge of a State High Court, the Grand Khadi of the Sharia Court of Appeal, and the President of a Customary Court shall be members of the State Judicial Service Commission having power to remove from office the judges of the State High Court, Khadis of the Sharia Court of Appeal and judges of the Customary Court of Appeal.

More serious is the presence of the Attorney-General of the Federation or the state in the commissions. Under Section 138 and 160 of the constitution, the Attorney-General of the Federation is a Minister of the Government of the Federation, having the power to continue or

discontinue at any stage before judgement is delivered, criminal proceedings against any person before any court other than a Court-Martial. He is the chief prosecutor of criminal offences created by an Act of the National Assembly. A person who has the power to decide, initiate and undertake criminal proceedings against any person and whose department argues cases for the executive branch before the federal judges, has the power as a member of the commission, to participate in the removal of judges before whom he appears as government prosecutor. The question is: wouldn't the presence of the advocate who is arguing cases before the judges in whose removal he has a substantial power have influence on the judges? It seems to me it might. Only very bold and courageous judges may remain unmoved in such circumstances. Secondly, by making the Attorney-General a member of the commission, the constitution seem to have given the President of the Republic a direct voice and indirect power in the removal of judges. The Attorney-General is a Minister in the executive branch appointed by the President. Like other ministers, when the Attorney-General acts, he acts in accordance with the President's general instructions. As a practical matter therefore, although Section 145 (1) of the constitution states that the commission shall not be subject to the control of any other authority or

person, the possibility of presidential influence through the Attorney-General's membership cannot be ruled out. This argument also applies to the presence of State Attorney-General's membership of SJSC.

It may also be observed that while Section 256 of the constitution says among others that a judge could be removed on the ground of contravention of the Code of Conduct, the Fifth Schedule to the constitution provides the code of conduct for public officers. A judicial officer has been listed in the list of public officers to which the code of conduct applies - which means a judge is covered by it. The question is: if a judge contravenes the code of conduct, is he liable to be punished by the Code of Conduct Tribunal or is he to be proceeded against under Section 256 of the constitution? Since the constitution does not exclude one or the other, it seems uncertain whether the Code of Conduct Tribunal can punish a judge and at the same time an appropriate authority can proceed under Section 256 of the constitution.

(b) **Salary and Pension:**

Apart from the tenure of office of the judges, another area of influence and pressure on the judiciary by the executive and legislature has to do with the financial requirements of the judiciary plus their up-keep

during their tenure of office and after retirement.

Under the new constitution, the powers of Government at both Federal and State levels have been demarcated. Each organ of the Government is intended to serve as a watch-dog or as the primary balancing force against inherent abuses by the other. According to Dr. Bala Yusuf "One can equate each of these three components to a set of triplets, of same authority or parents, who have been bestowed with equal status and functions and with some expressed powers of checking one another's role with a view to guaranteeing an equitable, stable and harmonious system."115

Explaining a similar position with regard to the United States of America, the United States Supreme Court described the separation of powers doctrine in the following terms:

> The fundamental necessity of maintaining each of three general departments of government entirely free from the control or coersive influence direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of powers of these departments by the constitution; and in the rule which recognises their essential co-equality. 166

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115. Sunday New Nigeria 19 December, 1982.
116. Humphrey's Executive Vs. United States (1935) 295 p.602.

This being the case, anything that will appear to make judiciary at a greater disadvantage in relation to the executive or the legislature or that they have something either to gain or fear from the two branches will certainly not be in the spirit of the independence of the judiciary.

With regard to the salaries of the judicial officers, Section 78 (1) of the constitution provides that officers mentioned in that section including federal judges shall be paid such salaries as may be prescribed by the National Assembly. These salaries and allowances are to be a charge upon the Consolidated Revenue Fund of the Federation, which means that it is not subject to vote by the legislature.[117] Not only that, their salaries cannot be altered to their disadvantage after their appointment, except the allowances. Similarly, Section 116 of the constitution secures the salaries payable to the State Chief Judge, Judges of the High Court, Grand Khadi and Khadis of the Sharia Court of Appeal, President and Judges of the Customary Court of Appeal. Their salaries and allowances are a direct charge on the Consolidated Revenue Fund of the State which cannot be altered to their disadvantage

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117. S. 78 (2) of 1979 Constitution.

after appointment; only allowances can be. The salaries and allowances of the judges of the lower bench is still under executive control, but happily their conditions of service including promotion is now constitutionally under the State Judicial Service Commission.

To some extent, the constitutional provision concerning the security of salary seems alright for judicial officers. Although their allowances can be altered to their disadvantage, this can be countered by the argument that it is only the salary that is one's legitimate entitlement, allowances being more or less a priviledge.

Pension rights is provided for by Section 255 (2) of the constitution for judicial officers at both Federal and State levels. Any judge that retires at the age of 65 and who has served for a period of not less than 15 years is entitled to his annual salary at the time of his retirement as pension for life. Similarly, those who retire at 65, but who have put in less than 15 years shall also be entitled to pension for life at a rate pro-rata the number of years he has served as judicial officer. Any other case apart from the above, the pension and other entitlement benefits may be regulated by an Act of National Assembly or by

a law of State Assembly. This constitutional provision seems unsatisfactory on two main grounds. First, more recognition seems to be attached to the age of retirement for pension benefit other than the number of years of service. For example, if a person is appointed a judge at the age of 35 years and retires at the age of 60 or 64 after about 25 to 29 years service he is more at a disadvantage to a person who is appointed a judge at the age of 50 and retires at the age of 65 years. While the former's pension is as determined by a law to be passed by the legislature, the latter is entitled to his salary for life. Second, there appears to be no security of pension for any judge in Nigeria who retires before the age of 65 years since their pension and other entitlements are as prescribed by the respective legislatures.

(c) Budgetary Position of Judiciary:

The day-to-day financial requirements for the judiciary is another area affecting the relative autonomy of the judiciary vis-a-vis the executive and the legislature. According to Mr Justice Layiwyi, a retired judge of the Kano High Court.

> "The judiciary is often referred to as the third arm of Government but the constitution, in trying to regard it as such, has not made enough provisions for its effectiveness.

> The judiciary still has to go cap in hand begging for funds for its upkeep. The legislature and the executive can vote certain amounts for themselves and they allocate what they deem fit to the judiciary. When the judiciary needs something it has to go to the executive and wait for approval. As a result, the judiciary is potentially powerless and impotent. 118

Under the constitution, all expenditures must be approved by the legislature - that is to say the National and State Assemblies.[119] In practice however the annual budget of the judiciary is usually subjected to screening by the executive and subsequently by the legislature and finally assented to by the chief executive. By comparison, the executive proposes its own budgetary needs although this is subject to legislative scrutiny and approval. Similarly, the legislature proposes its own budgetary needs and invariably approves its own estimates subject to assent by the chief executive, although any veto by the Chief Executive can be overriden by two-thirds majority of the legislature. This state of affairs has made the accounting status of the judicature not as near enhanced or autonomous as that of the other two arms of government. At the federal and state levels, the financial requirement of the judiciary

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118. New Nigerian - June 19, 1981.
119. Sections 75 and 113 of 1979 Constitution.

is at the mercy of the two arms of government.

CHAPTER V

OBSERVATIONS AND SUGGESTIONS

As stated earlier the main aim of this thesis is to analyse and appraise mainly the new 1979 constitution of the Federal Republic of Nigeria with a view to finding out the extent to which independence of the judiciary has been secured under it and to suggest (if necessary) other policy options for adoption by the policy-makers.

Many defects and anomalies are observable with respect to the method of selection, appointment and tenure of office of judges especially with regard to the superior courts. This concluding chapter aims at summarizing these anomalies. Recommendations have been made which the author hopes, if adopted, will enhance independence of the judiciary in Nigeria.

1) Selection and Appointment:

i) Section 211 (1) of the constitution vests the appointment of the Chief Justice of Nigeria at the discretion of the President subject to confirmation by a simple majority of the Senate. Here the President need not receive any recommendation from any independent committee or commission. The author is of the view that without a proper

advice, the President is unlikely to know about the legal ability, knowledge of law and integrity of any proposed appointee. The danger exists in a President appointing any lawyer of 15 years experience who may not command respect of his brother judges at the Supreme Court and hence disharmony in the dispensation of justice from the highest court in the land.

ii) Appointment of some judges at both the federal and state levels is not subject to legislative approval. There seems to be no retionale in this discrimination. Those judges not subject to legislative approval will naturally feel inferior to those that are.

iii) The quorum requirement for the meetings of FJSC provided by Section 146 of the constitution which may by extension apply to SJSC has made the composition of the two commissions too small that it can hardly be relied upon to recommend suitable, capable, non-partisan judges at **ei**ther the federal or state levels.

The ideal appointment procedure to judicial office ought to be in the hands of those who can be relied upon to base their choice on qualities which make for judicial office. The real catalyst of justice in any country is

the judge. This being the case, an independent selecting committee consisting of the bench and the bar are more likely to possess an intimate knowledge of the legal ability of the person under consideration. They are also more likely to have a sufficiently accurate estimate of such a person's antecedents, character and reputation including integrity in the context of the legal profession or the judicial service, as the case may be, as well as his potential capacity as a judge. Information regarding these qualities can better be obtained from the Bar Association if the prospective candidate is practicing or from the Chief Justice or Chief Judge if the person under consideration for appointment is in the judicial service. The part to be played by the executive in the appointment should necessarily be limited because they are not in a position to comment on the legal ability, knowledge of the law and judicial potential. The idea of having laymen of unquestionable integrity to partake in the Selection Committee is that they may be able to supply or secure additional information with regard to character and integrity.

The present composition of both the FJSC and EJSC comprising the Chief Justice or Chief Judge, Attorney-General and representatives of the Bar seem to meet the

above requirements except that it is (a) recommended that all judicial officers should further be subjected to legislative approval - Senate in the case of federal judicial officers and House of Assembly in the case of state judicial officers; (b) the quorum requirement for FJSC provided in Section 146 (1) of the constitution should be deleted in the constitution. All the seven members of the commission at the federal level and all the members of the commission at the state level should be present and partake in making a recommendation to the Chief Executive before the final endorsement of their respective legislatures. This recommendation in essence include an amendment of Section 211 (1) which allows the President absolute discretion in appointing the Chief Justice without a recommendation from an independent selecting body.

2) TENURE OF OFFICE:

(a) Removal:

i) Section 256 of the constitution has created two methods of removal of all judicial officers. The first method is removal by the Chief Executive acting on an address from the legislature. The second method is removal by the Chief Executive on the recommendation of FJSC or SJSC as the case may be. The first method of removal may be said to be fair but it is not without problems.

The reason is that there is no requirement that the judge sought to be removed will be accorded a hearing or have his case properly investigated. A legislative body can hardly be trusted with this type of assignment without any checks and balances. The unreported case of Bornu State Government Assembly and Justice Kalu Anya where the House of Assembly of the State within a few hours resolved to remove the Chief Judge is a classical example of this.

ii) The second method of removal is much more dangerous. It has a negative rather than a positive impact on the security of tenure and independence of the judiciary. The FJSC and SJSC as now constituted, Chief Justices of various courts at federal and state levels have a say in the removal of other judges on their particular courts. The Attorneys-General at federal and state levels have a say in the removal of judges before whom they appear and argue their cases. Even the representatives of the Bar Association who may be members of the commission and may be appearing before these judges have a say in the removal of judges. The President of the Federal Court of Appeal is a member of the very body that has power to remove him from office. Since all these officers have

direct day-to-day dealings with the judges it is unreasonable to expect them to be impartial while making any removal recommendations. Besides, their identity is known to the judges and this will adversely affect the independence of the judges in their dealings with these officers. Apart from this, the quorum requirement provided in Section 146 (1) of the constitution has made the compostion of both FJSC and SJSC so small that it can easily be manipulated by outside influence and particularly the Chief Executives.

It is recommended that the members of FJSC and SJSC should be completely divested of the powers of removal of all the superior court judges. Instead, this power should be vested in the appropriate legislative body. The important merit of this is that the legislature would not ordinarily come in contact with the judges in their daily working activities. Secondly, the question of removal of a judge has the chance of being well debated before a decision is taken by a special majority generally two-thirds of either the Senate in the case of Federal judicial officers and a House of Assembly in case of State judicial officers. However a statutory process akin to an Indian Act - THE JUDGES (INQUIRY) ACT, 1968 can be passed by both the National and State Assemblies to guide the removal of judges. Under the Indian law, the following process is followed in the removal of a judge.

When a complaint for misconduct, breach of code of conduct or incapacity is lodged with a legislature, a simple majority of the legislature may adopt a motion to have the matter investigated. The Speaker constitutes an independent judicial committee consisting of a distinguished judge and other members to have the matter investigated. Charge or charges can then be framed by the committee and the judge against whom an allegation is made can be notified in writing. He is given a full opportunity of presenting his defence. Where the allegation includes incapacity due to any mental or physical causes and this is denied, a Medical Board is appointed to undertake the medical examination of the judge. At the conclusion of the investigation a report is submitted to the legislature.

If the committee finds that the judge is not guilty or does not suffer from incapacity no further step is taken by the legislature. But if the report finds the judge guilty, then a motion together with the report of the committee is taken up for consideration by the legislature. If the motion is adopted by simple majority of all the members then the misconduct, misbehaviour or incapacity is deemed to be proved and an address praying for the removal of the judge is presented to the Chief Executive praying that the judge

be removed. Under these circumstances, the Executive only has a nominal role to play in the removal of a judge.

If these safety valves, checks and balances are adopted in Nigeria, this will, hopefully guarantee the security of tenure of our judges; at the same time allow swift removal of unsuitable or incompetent judges from office.

b) Salary and Pension:

Constitutional provision regarding salaries which makes them a charge upon the Consolidated Fund of either the federal or the state seem alright. The problem concerns Section 255 (2) of the constitution which provides for pension rights of all judicial officers. This provision seems unsatisfactory because (a) more recognition seem to be attached to the age of retirement of a judge than the number of years of service. Only those who retire at the age of 65 years and have put in not less than 15 years service are entitled to their last annual salary as pension for life. Similarly those who retire at 65 but have put in less than 15 years will receive pension for life but on a rate pro rata the number of years the judge had served. Any judge who retires before the age of 65 even if he had served for 30 years can only get his entitlement as prescribed by

either the National Assembly for federal judicial officers or State Assemblies in case of State judicial officers. There are bound to be divergencies in entitlement benefits of judges in different states.

c) Budgetary Position:

Section 75 and 113 deals with authorisation of expenditure of the federation and states respectively. Both sections require the legislature to approve the financial requirement of all organs of government. As a practical matter however, the accounting status of the judicature is not as near enhanced or autonomous as that of the other two arms of government. In many states, the estimates of the judiciary is subjected to both executive and legislative scrutiny. These state of affairs do not enhance independence of the judiciary. Given the expressed separation of powers underlined in the constitution, it is more appropriate for the judiciary to submit its budgetary proposals directly to the legislature thereby eliminating the executive branch. Such process would likely restore the self-confidence of the judiciary: its status would also be raised to an effective third arm of government at both federal and state levels.

(3) LOWER COURTS:*

The position of Magistrates, Judges and members of the Area and Customary Courts now vested in the SJSC by the constitution by Third Schedule Part II, Section 9 (d), is a welcome development. The commission is now incharge of appointment, discipline and removal of the Magistrates and other judges of lower courts unlike when they were under the Public Service Commission. Since the composition of the commission is predominantly composed of judicial officers and these judicial officers do not have day-to-day dealings with their activities it is the view of the author that this will encourage independence and impartiality of the judiciary at the lower levels. The presence of the commission may instil some sense of responsibility and prevent abuse of judicial powers by the judges at the lower level since most of their cases go on appeal to the superior courts and they know that the heads of these superior courts have substantial say in their removal and discipline. It is further recommended that the appointment, removal and discipline of all other supporting staff of the judiciary should be under the commission. This is the position, for example, in Niger State.

However, the present criminal jurisdiction of all the Area Courts in the Northern States in particular

should be drastically reduced. Section 33 (12) of the constitution provides that no person shall be convicted for an offence unless such an offence is defined in a statute. It is the contention of the author that the educational and legal background of the majority of these judges are such that they can hardly comprehend the criminal laws of the land or the ingredients of most offences in statutes which they now have jurisdiction to enforce. Because of this, a lot of injustice is perpetrated in these courts and this does not inspire confidence of the generality of the populace in these courts. The author feels that the Fundamental Rights enshrined in Chapter IV of the constitution could be denied to most Nigerians if they continue to be tried by these Area Courts. The idea that the cases tried by them are subject to appeal is hollow because injustice would in most cases have been perpetrated before the cases are re-decided on appeal.

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* This discussion has no direct relevance to the topic of independence of the judiciary but the recommendations may enhance confidence in the judiciary at lower levels.

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