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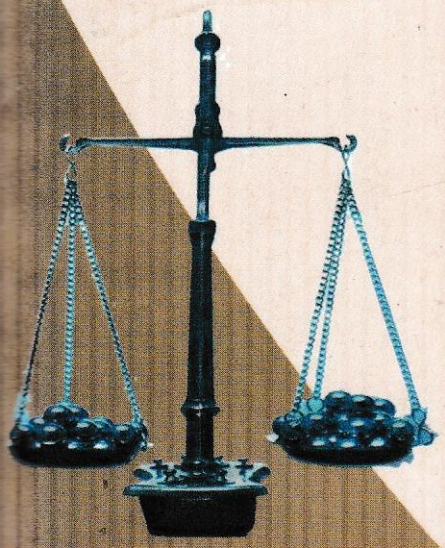

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M. L. UWAIS, GCON.
Chief Justice of Nigeria
(1995-2006)

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CHAPTER ONE

THE JUDICIARY AND DEMOCRACY IN NIGERIA: A CASE FOR INDEPENDENCE OF THE JUDICIARY*

If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice[1]

Introduction

Unlike Alice in Lewis Carroll's Alice *in Wonderland*, I will not start from the beginning and get to the end. I find it more convenient to start from the end and get to the beginning. I will start with the **judiciary**, then get to **its independence**, and finally to its role in consolidating **democracy**. A first look at the topic leaves one with the rather presumptuous impression that it is asking for an assessment of **how** the Judiciary **has helped** or **is helping** to consolidate democracy – presumptuous in the sense that it assumes that the Judiciary **can** or **should help** to consolidate democracy in Nigeria. I suppose one should first decide that the Judiciary can or/and should help consolidate democracy before one then examines 'how'. This may sound hair-splitting to some, but in a country like Nigeria, where democracy is easily seen in terms of politicians and what they do, the unannounced contributions of the Judiciary to the consolidation of democracy are often totally oversighted. The topic is therefore very topical and of contemporary relevance.

It is not correct to think, as some are wont to do, that government, whether democratic or whatever, should be left to the politicians, who are already forming groupings and alliances such as the Movement for the Defence of Democracy (MDD), and Movement for the Restoration of Democracy (MRD), all aimed at consolidating democracy. Those who would say so appear to forget or ignore the fact that the Judiciary is an indispensable partner in democratic governance and so it is in its interest that democracy be consolidated. The Judiciary cannot afford to be an unconcerned bystander or unperturbed looker-on in the democratic experiment in Nigeria. All hands must be on deck to ensure that it sails, because "the ship of democracy, which has weathered many storms, may sink through the mutiny of those on board"[2] unless all hands are

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* **Professor Enefiok Essien, Dean, Faculty of Law, University of Uyo, Nigeria**
This a revised form of a paper presented by this writer, on December 1, 2005, at a Retreat/ Conference for Chief Magistrates, Directors and Senior Judicial Administrators in Akwa Ibom State, organised by the Judicial Service Commission at Marezi Hotels Ltd, Eket, Akwa Ibom State.

1 Learned Hand, Address, Legal Aid Society of New York, February 16 1951.

2 Grover Cleveland, Letter to Wilson S. Bissel, 1894, in David Shrager & Elizabeth Frost, *The Quotable Lawyer* (1986) New England Publishing Associates Inc. USA, p. 85

on deck. This paper, therefore, has the burden of saying whether it is the place of the Judiciary to consolidate democracy and, if so, how it has fared in this regard. Could the Judiciary have fared better given a bit more independence? Let us now begin from the end.

The Judiciary, Independence of

The Judiciary is the arm of government charged with the primary function of interpreting the law. In this sense, it has the pivotal role of checking the excesses of the Executive and the overbearing tendencies and exuberance of the Legislature. The Constitution gives the Judiciary the power to entertain suits between persons or between governments and cases between government and any person in Nigeria.[3] The Judiciary is the ultimate interpreter of the Constitution and has the delicate task of determining the extent and content of the power conferred on each branch of government. Significantly, the executive or any other authority is governed by the Constitution and statute law, as interpreted by the Judiciary. The Judiciary can rein in the Executive or other authority by way of judicial review, and thus maintain the rule of law, and sustain democracy. However, though constitutionally vested with extensive judicial power, the court cannot decide hypothetical issues, nor go beyond issues canvassed by the parties or pronounce on issues/ questions not in controversy between the parties. When we talk about the Judiciary, we basically have in mind the judicial officers, i.e. the Justices of the Supreme Court and of the Court of Appeal, the Judges of the Federal and States High Courts, the Kadis and Judges of the Sharia Court of Appeal and Customary Court of Appeal respectively. There are, of course, the less visible and often forgotten judicial officers in the Magistrates Courts and the Customary/District Courts who, strictly speaking, are not contemplated in the meaning of "judicial officers" in section 277(1) of the 1999 Constitution.

For the purpose of this paper, our attention shall be limited to the superior courts, i.e. from the High Courts up to the Supreme Court. These are courts whose proceedings and judgments are most impactful, widely publicised and regularly reported.

Considering the pivotal role of the Judiciary in consolidating democracy, both the mode of appointment and the calibre of the appointees are crucial. Much the same view was taken by Professor Kurland of the Chicago University Law School when he asked:

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[3] Section 6(6) of the Constitution of Nigeria 1999, Cap.C23 Vol.3 LFN 2004

> *If the Judiciary is to be the primary agency for social reform, shouldn't we be more concerned about the quality of the people we choose for judges?*[4]

Since the quality of justice and judicial sustenance of democracy thus depend more on the quality of the men who administer the law than on the content of the law they administer, the appointees must be competent, upright and free to judge without fear or favour. Indeed, one must agree with Socrates[5] that four things must belong to the judge:[6] to hear courteously, to answer wisely, consider soberly and to decide impartially. These are the attributes which judicial officers must have if democracy is to thrive. Plato, however, added a fifth attribute, namely, that "a judge should not be a youth, but old". His reason for insisting on old age is the need for experience: it is assumed that an older person should have acquired the requisite experience to prepare him for the task. In his words:

> *The judge should not be young; he should have learned to know evil, not from his own soul, but from late and long observance of the nature of evil in others: knowledge should be his guide, not personal experience.*[7]

This fifth criterion is liable to criticism. In Akwa Ibom State, for instance, and in fact in most States now in Nigeria, quite a number of judges are young and yet they have acquired enough experience to qualify them for the judicial task. One may, for that matter, recall that the old age of the biblical Methuselah did not imbue him with even one tenth of the wisdom of the relatively youthful Solomon. Indeed, even in the judicial circle, the youthful and the old are sometimes mutually suspicious as to who is more competent. As recalled by McCollouch,[8] an American jurist:

> *When my father became a judge, I said to him "be kind to the young lawyers". When I became a judge, he said to me "be kind to the old lawyers.*

This is, however, not to downplay the need for experience before appointment into a judicial office. Lack of experience may result in a bully or a "talking judge" who continually descends

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4 Philip B. Kurland, American Educator, Professor, University of Chicago Law School, U.S. News & World Report, January 19, 1976

5 Socrates, 470-399 B.C. Franklin Pierce Adams, *F.P.A. Book of Quotations*, 1952

6 "Judge" here is used liberally to refer to Judicial Officers.

7 Plato, *The Republic* c. 370 B.C.

8 Claude, McColloch, *American Jurist, Notes of a District Judge*, 1948

into the arena, or an extrovert who unleashes his temper and temperament too easily. What becomes decisive to a judge's functioning is his general attitude toward law, the habits of mind that he has formed or is capable of unforming, his capacity for detachment, his temperament or training for putting his passion behind his judgment instead of in front of it[9] and his capacity to resist temptations and pressure when they come. It is in consideration of these qualities that it is often said that "judges, like Caesar's wife, should be above suspicion".[10] Where there is suspicion, then the court ceases to be a court of justice because the justice, even when done, cannot be seen because of the suspicion. To rise above suspicion therefore, judges must have and exhibit high ethics, because no system of justice can rise above the ethics of those who administer it. That is why we insist on the possession of these intrinsic ethical values by our judicial officers. Where a judge has these values, he will be well poised not only to deliver judgments but also to dispense justice, so that his court is not only a court of law but also a court of justice. That will justify the fluvial metaphor of law and justice flowing in the same channel, with their waters mixing freely. It is by dispensing justice that the judiciary, which the court represents, can consolidate democracy. Where these intrinsic virtues are present then extrinsic attributes, such as language proficiency, diction, poesy and non-law knowledge become secondary, though of an advantage and would do great credit to the bench.[11]

For democracy to thrive, the judiciary must strive to maintain its place as the clichéd last hope of the common man, and the court, as a real temple of justice, where justice is blinded so that it sees and respects no person and knows nobody. Justice has no relative: no parent, son or daughter, nor friend or foe. Justice is an orphan. It is truth in action. It is like the Kingdom of God – it is not without us as a fact, it is within us as a great yearning. And because we all yearn for it, it becomes a problem if the judiciary turns it into a mirage. The personal and social contentment that comes with a sense of justice is what engenders peace in a fledgling democracy like Nigeria. And, interestingly, of the three arms of government – executive, legislative and judiciary – it is peculiarly for the office of the judiciary to promote peace, through justice. A

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9 Felix Frankfurter, Forward, *Columbia Law Review*, April 1955

10 Charles Bowen, English jurist, in *Leeson, v. General Council of Medical Education and Registration* (1889) LR 43C.D. 385

11 E.g., a good grasp of literature and classics could be of immense use. As learned Hand put it in 79 *University of Pennsylvania Law Review* I,12(1930): "... It is important to a judge called upon to pass on a question of Constitutional Law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Robelaise, with Plato, Bacon, Hume and Kant... Men do not gather figs of thistles, nor supple institutions from judges whose outlook is limited by parish or class."

failure in this regard would spell doom for democracy, because where there is no faith in the judiciary the society would resort to self-help instead of to the court, and the logic of the fish would prevail - where the strong swallows the weak, and might becomes right, so that only the fittest would survive. The ensuing rule of man, rather than rule of law, can only lead to anarchy, which is antithetical to the growth of democracy. Under the current dispensation in Nigeria, non-resort to judicial resolution of dispute, and resort to force, has led to destruction, anarchy and loss of property, life and limb in different parts of the country, such as occurred in Plateau and Anambra States. Some may argue that the upheavals in those States arose from political questions, in which case the court was a *forum non conveniens*, while others may contend that the court (or the judiciary) would not have been trusted to be independent in its decision since government allegedly was the cause or was interested in the result of the chaos. This may not be so, but it nonetheless brings to the fore, once again, the vexed issue of independence of the judiciary.

The Presidential Committee on the Review of the 1999 Constitution easily agreed that "an independent, impartial, courageous and innovative Judiciary is a *sine qua non* for the growth and sustenance of democracy in Nigeria"[12]. There is however no use attempting a comprehensive definition of *independence* in the context of the judiciary. At times the meaning just emerges contextually. At other times aspects of it become obvious circumstantially. Basically, it simply means that the judiciary should not be dependent on or controlled by the legislature or/and the executive, so that the judiciary will have freedom of action, freedom of thought, unfettered by any unseen hands. It means self-sufficiency (financial independence) and a total shield from politics and, probably, religion – which is the opium of the people. The judge must be free from direct and subterranean control by the executive. He must be free from and unfettered by external direction, influences or direction by political and legislative superior in the disposition of individual cases, and inwardly free from partisan or popular bias. This approximates the definition hazarded by W. H. Jones, that independence of the judiciary means:

> *...that deciding officers shall be independent in the full sense, from external direction by any political and administrative superiors in the dispensation of individual cases and inwardly free from the influences of personal gain and partisan or popular bias; thirdly, that day to day decisions shall be reasoned, rationally*

[12] Report of the Presidential Committee on the Review of the 1999 Constitution, Vol.I (Main Report) February 2001 at p.57

justified in terms that take full account both of the demands of general principles and the demands of the particular situation.[13]

The question of independence of the judiciary may thus be viewed from two angles. One is personal (or inward), and the other is impersonal (or outward). The personal aspect has to do with the mind-set of the particular judge. The impersonal has to do with the constitutional and statutory constraints which in some respect appear to subject the judiciary to the executive, say in matters of funding and appointment.

There may well be some judges who, once a case involves the government, they prefer to play the Pontius Pilate. They would adjourn the case *ad infinitum, ad nauseam* and if possible, *sine die*, because they do not want to deliver a judgment in the matter, if the judgment would be unfavourable to government. Such timorous approach is to be condemned, because the court should do justice not minding whose ox is gored. The judge should think along the lines of the English Chief Justice, Sir James Mansfield, who said "Let justice be done though the heavens fall",[14] or along the lines of Oyemade, J. who asserted:

I will not allow myself to be intimidated into sending innocent persons to jail. Even if this means losing my job, I am still sure of living a decent life. The only thing we have in this country is the judiciary. We have seen politicians... but the only protection the ordinary people have ... is fearless and upright judiciary.

A judge who succumbs to pressure, real or imaginary, is himself eroding the independence of the judiciary. It would not lie in his mouth to cry for independence when he is indeed subverting it. It is heartening that the bench has people like Galadima, JCA who would proclaim:

[The] court has gone through a most unfortunate phase in the judicial annals of this great country, for [the] court to be disrupted by partisan politicians in the course of delivering its judgment ... Well-meaning citizens should rally round the court to protect its independence and integrity for the assurance and continuation of orderly society.[15]

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13 W. H. Jones: "The Role of Law and the Welfare State", in *Anneles de lefaculte de Droit D'intanbul* (1959) IX p. 245, in A. Aguda: *The Judicial Process and The Third Republic* (1992) F & A Publishers, Lagos, pp. 35-6

14 Sir James Mansfield, English jurist & Chief Justice, in *Rex v. Wilkes* (1769), 4 Bur. Part IV, p. 2549

15 *Ukachukwu v. UBA & Ors* (2005) 5 NWLR (Pt.930) 370 held 16

This aspect of personal independence is of grave concern, although less talked about because of the intrinsic element of impropriety and self-incrimination. It would be the height of ostrichism to deny that there are such pressures on the judge, or that even without actual pressure the judge on his own sometimes decides to be "careful" because of perceived governmental interest. How else could we explain that the Federal High Court would give judgment/order which favours the Federal Government while the Anambra State High Court would give contrary judgment on the same set of facts in favour of Anambra State Government. Something must clearly be wrong. This is unhealthy for democracy, because it sets the State against the Federal Government and makes a mockery of the judiciary. Why would a State High Court Judge give judgment in favour of the State Government while a Federal court gives judgment in favour of Federal Government on the same set of facts?

Outward or impersonal independence relates to factors extraneous to the judge, which fetter or inhibit his freedom of judicial action. They derive from the Constitution and may be considered under the following sub-heads:

(A) Appointment

Under the 1999 Constitution[16] a central agency, i.e. the National Judicial Council, is created and saddled with the duty of recommending candidates for appointment to the higher bench at both Federal and State levels, subject to confirmation of the Senate in the case of the Chief Justice of Nigeria, Justices of the Supreme Court, President of the Court of Appeal and Chief Judge of the Federal High Court.[17] In the case of the State Judicial Officers, the Governor makes the appointment, on the recommendation of the National Judicial Council, and subject to the confirmation of the State House of Assembly in the case of the Chief Judge.[18] Ditto for the Grand Kadi of the Sharia Court of Appeal[19] and the President of the Customary Court of Appeal.[20]

The 1999 Constitutional provisions are great improvements on the provisions of the 1979 Constitution under which the Chief Justice of the Federation was appointable by the President without recourse to the then Federal Judicial Service Commission.[21] This posed serious threat to the independence of the judiciary because the President could appoint his crony,

16 Cap. C 23 Vol.3LFN 2004
17 Sections 231, 238 and 250 of the Constitution
18 Section 271
19 Section 276
20 Section 281
21 The Federal Judicial Service Commission is now replaced with the National Judicial Council in the 1999 Constitution

though unfit. In fact even for the other judicial officers, the heavy membership of Attorneys-General in the Federal Judicial Service Commission wielded a huge political influence on who was recommended for judicial appointment. These are now overcome in the 1999 Constitution. As rightly noted in the Report of the Constitutional Conference, Vol. II, at page 95, "It is important to note that nominees or appointees of the Executive and Legislature have been excluded. This, in effect, will eliminate political considerations in our top judicial appointments or removal or dismissal from top judicial offices."

This is not to say that there is no more politics in the appointment of judicial officers - which may thus compromise their independence. As identified by Justice Umezurike, even now, the appointment of judges at both State and Federal levels has in some cases been turned into a geo-political affair which brings all sorts of traditional rulers, chairmen of town unions, leaders of thought or other social formations into the fray.[22] As a result, many of these judges owe their appointment to these non-legal geographical cleavages rather than to merit or quality.[23] Their allegiance is neither to law nor to justice, let alone of democracy. Perhaps we should heed the advice of Sir Robert-Wray, that " the method of appointment of judges should, so far as possible, insulate the choice of candidates from political motives."[24]

The constitution also tries to ensure that there is no gap in leadership, by providing for Acting Appointment of a Chief Justice of the Supreme Court,[25] the President of the Court of Appeal,[26] the Chief Judge of the Federal High Court,[27] Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja,[28] President of the Customary Court of Appeal of the Federal Capital Territory, Abuja,[29] and High Court of a State.[30] Ditto for Sharia Court of Appeal of a State,[31] and Customary Court of Appeal of a State.[32] In all such Acting Appointments, the 1999 Constitution specifically demands that the most senior judicial officer in the respective

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22 Hon. Justice A. I. Umezurike, "An Incorruptible Judiciary as an Accelerant to Eradication of Corruption in Nigeria", *Independent Summit* Friday, February 18, 2000 at p. 6

23 *Ibid*

24 Quoted by Ademola, A. "Independence of the Judiciary: Problems and Prospects in Nigeria", Sir *Louis Mbanefo Memorial Lectures No. 4, 1987, Enugu, at p. 2*

25 Section 231(4)

26 Section 238(4)

27 Section 250(4)

28 Section 261(4)

29 Section 266(4)

30 Section 271 (4)

31 Section 276(4)

32 Section 281(4)

court shall be the one appointed. This is an innovative departure from what obtained under the 1979 Constitution where the appointor (the President or Governor as the case may be) was to act entirely in his absolute and unfettered discretion.[33] The rationale for inserting the "most senior" clause in the 1999 Constitution is to avoid subjecting such important appointments to the extraneous, subjective or possible political influence of the Executive and/or Legislative arms of government. Needless to add that this procedure also enhances, in no small measure, the independence of the judiciary[34] and therefore, democracy. There is however no constitutional indication that the "most senior" clause will also be used in appointing the substantive occupant of the apex office in the respective courts. The National Judicial Council appears to be trusted to make a wise and reasonable recommendation whether or not the person recommended is the most senior.

(B) Security of Tenure:

The UN Basic Principles on the Independence of the Judiciary provides that judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiration of their term of office, where such exists. Similarly, the International Commission of Jurists stated in the Declaration of Delhi 1959, that the "principle of irremovability of the judiciary, and their security until death or until a retiring age fixed by statute is reached, is an important safeguard of the rule of law.[35]

On attainment of national independence in 1960, the common law tradition regarding the tenure of judicial officers became our inheritance as a former colony of Britain. Thus, a judge could only be removed for inability to discharge the functions of his office or for misbehaviour. Even then, the question of removal had to be referred to an independent tribunal and to the Privy Council.[36] The 1963 Republican Constitution later reversed the position, by providing that a judge may be removed from office by the President of the Federation or the Governor of a Region, on an address presented to him by the legislature and supported by not less than two thirds of the members of the House praying that the judge be removed on the grounds of inability to discharge the functions of his office or for misbehaviour.

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33 Section 211(4) 218(4) 229(4), 235(4) Constitution

34 Report of the Constitutional Conference Containing the Resolutions and Recommendations Vol.II,1995, p.91

35 The *Rule of Law in a Free Society* (A Report of the International Commission of Jurists), New Delhi, India 1959 at p. 12

36 See Sections 113 and 124 of the 1960 Constitution

The 1999 Constitution has followed the 1979 Constitution as it relates to removal of judicial officers: Judicial officers are divided into two - those in one group are removable by both the executive (President) and legislature (Senate) acting together, or by the executive (Governor) and the Legislature (State House of Assembly) acting together, while the other group are removable only on the recommendation of the National Judicial Council. To quote *in extenso*, the 1999 Constitution provides:

292 – (1) A judicial officer shall not be removed from his office or appointment before his age of retirement except in the following circumstances-

(a) in the case of –

(i) Chief Justice of Nigeria, President of the Court of Appeal, Chief Judge of the Federal High Court, Chief Judge of the High Court of the Federal Capital Territory, Abuja, Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja and President, Customary Court of Appeal of the Federal Capital Territory, Abuja, by the President acting on an address supported by two-thirds majority of the Senate.

(ii) Chief Judge of a State, Grand Kadi of a Sharia Court of Appeal or President of a Customary Court of Appeal of a State, by the Governor acting on an address supported by two-thirds majority of the House of Assembly of the State, praying that he be so removed...

(b) in any case, other than those to which paragraph (a) of this subsection applies, by the President or, as the case may be, the Governor acting on the recommendation of the National Judicial Council that the judicial officer be so removed...

It is not immediately obvious why one set of judicial officers are removable at the instance of the legislature, while those in another set are allowed to go through the scrutiny of the National Judicial Council before removal. It is submitted that in order not to politicise the process, legislature should have no hand at all in the removal of judicial officers. As noted by the International Commission of Jurists, the reconciliation of the principles of irremovability of the judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be before a body of judicial character assuring at least the same safeguards to the judge as would be accorded to an accused person in criminal trial.[37]

[37] *The Rule of Law in a Free Society*, Op. cit., p. 12

A recommendation was strongly made along the same line by the Constitutional Conferees in 1995, that "in order to ensure the independence, integrity, impartiality and credibility of the Judiciary, the Senate and the Houses of Assembly should be divested of involvement in the appointment and removal of Judges, and a national independent body, the National Judicial Council, should of necessity bet set up and entrusted with making recommendations for the appointment and removal of Federal and State Judges and Kadis of Superior Courts of record."[38] The abuse that could attend the involvement of the legislature in the removal process is exemplified in the case of ***Kalu Anya v. AG of Borno***.[39] In 1982 the Borno State House of Assembly commenced impeachment proceedings against the State Chief Judge, who had fallen out of grace with both the legislature and the executive because of his judgments against the State Government. The only serving grace was the Court of Appeal, which held that unless a misconduct is proved in a court or other tribunal, the Assembly cannot validly pass a resolution for the removal of the Chief Judge.

However, though the Constitution allows certain judicial officers to be removed through the legislature rather than through the National Judicial Council, the itemised powers[40] of the latter vest it with the power to make recommendations for the removal of all the judicial officers of the superior courts of record. So since the National Judicial Council has this power, it is expected that the Executive will never exploit the constitution in political cases by going through the Legislature to remove the judge. This apparently would still be within the constitution. The remedy therefore lies in amending the constitution so that all removals follow a recommendation by the National Judicial Council.

(C) Remuneration and Working Conditions

Using Akwa Ibom State judiciary as a microcosm, one can say that the working conditions of judicial officers appear to have improved significantly. What with ample stationery, conducive offices/chambers, comfortable court halls, gleaming functional vehicles, satisfactorily furnished secured homes and respectable salaries. This is as it should be, because by tradition a judge is not expected to be engaged in business ventures or hold directorship of companies. His social life is (supposed) to be limited and restricted to very discreet associations. That is why it is said that "what a judge does with his time while he is not on the bench is of great interest to the public.

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38 Report of the Constitutional Conference. Vol. II 1995. pp 4-95

39 Suit no. FCA/K/141/82

40 See item 21(a)(b)(c) and (d) of the Third Schedule to the 1999 Constitution

It is absolutely necessary that the clear light of day should illuminate any off-the-bench activity by a judge – and particularly any money he makes off of it".[41] Thus, his social privations ought to be compensated for by generous conditions of service.[42] Besides, it is reasoned that generous conditions of service will attract the right calibre of men to the bench and remove (or reduce?) susceptibility to corruption. The legendary "incorruptible judge" can only be a comfortable judge, though what is "comfort" may depend on the judge. In a paper presented by Ijalaye sometime in 1991, he compared the salaries of our judicial officers with those of their counterparts in the United Kingdom to highlight the poverty of the financial attention accorded our judges. Such comparison may appear uncharitable and out of place in view of the marked differences in socio-economic, labour and market conditions in the two countries, nay, two continents. Happily however, this is now history. What is however not history is what happens to his salary and entitlements after his retirement, because this has a direct bearing on how he performs his work today. As Alexander Hamilton once said:[43]

> *Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support...*

A judge who knows that the provision for his support will lapse once he leaves office may have his independence affected against his will. This is compounded by the constitutional restraint on him after retirement. According to section 292(2) of the 1999 Constitution:

> *Any person who has held office as a judicial officer shall not on ceasing to be a judicial officer for any reason whatsoever thereafter appear or act as a legal practitioner before any court of law or tribunal in Nigeria.*

It is not uncommon to find retired judges complaining about non-payment or undue delay in payment of their pensions, which have adversely affected their accustomed life style. This may affect the morale and psyche of the serving judges, and may have effect on the quality of justice delivered. This fact was recently recognised by the retiring Supreme Court Justice, Hon Justice Dennis Edozie, when in his valedictory address in Abuja he asked that the Federal Government should transfer the administration of judicial officers' pensions to the National Judicial Council, so as to solve the problems associated with the disbursement of the pensions and enhance the independence of the judiciary.[44]

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41 Roger J Traynor, American jurist; Chief Justice, California Supreme Court, *New York Times* August 9, 1970

42 Karibi-Whyte, A. G., *The Relevance of The Judiciary in the Polity-In Historical Perspective*, (1987) NIALS, Lagos, p. 94

43 Alexander Hamilton, *The Federalist*, 1788, in *The Quotable Lawyer, op. cit.* p.144

44 Alexander Hamilton, *The Federalist*, 1788, in *The Quotable Lawyer, op. cit.* p.144

(D) Self-accounting Status

One of the greatest factors militating against the independence of the judiciary is the control over finances being exerted by the Executive. The 1999 Constitution has clearly outlined the separation of powers with section 6 expressly and specifically allocating judicial powers of the Federation and of the States to the judiciary. It is patently against the spirit and intendment of the Constitution for one arm of government to obstruct the performance of the other, by financial strangulation. That would be an executive sabotage of democracy. Thus, the funds due to the judiciary should not be withheld by the Executive, to be given only as a reward for "good behaviour", i.e. doing what the Executive wants or, at least, not doing what the Executive does not want. Just as funds are budgeted and appropriated to the Executive and to the Legislature, the same should be done to the Judiciary. The 1995 Constitutional Conference had recommended that the judiciary should be self-accounting. To this end, it should prepare its own annual budget and defend same, and then the budgetary allocation is disbursed directly to the Judiciary as in the case of Local Governments.[45] The 1999 Constitution may not have done exactly that but it has offered quite a reprieve. It has made some far-reaching provisions bordering on judicial control of its funds. For the federal courts, section 162 (9) of the Constitution provides:

> *Any amount standing to the credit of the judiciary in the Federation Account shall be paid directly to the National Judicial Council for disbursement to the Head of Courts established for the federation and the States under section 6 of this Constitution.*

For the State, a similar provision is made in section 121(3) thus:

> *Any amount standing to the credit of the judiciary in the consolidated Revenue Fund of the State shall be paid directly to the Heads of the courts concerned.*

It has been opined, quite rightly, that with these constitutional provisions the Executive should allow the judiciary, both Federal and State, to budget for and control their capital funds, and make their capital proposals in all estimates.[46]

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45 Report of the Constitutional Conference, Vol. II, op cit., at p. 97

46 Hon Justice E. R. Nkop (C.J. of Akwa Ibom State): "Independence of the Judiciary," a paper delivered at the public sitting on the Review of the 1999 Constitution at Conference Hall, Governor's office Annex, Uyo, on Monday 15th November 1999

As a further financial safeguard, section 84(7) of the Constitution provides that the recurrent expenditure of judicial officers in the Federation (in addition to salaries and allowances of judicial officers) shall be drawn upon the Consolidated Revenue Fund of the Federation of the Federation. Unfortunately, this provision is limited to judges of superior courts of record and does not extend to officers of inferior courts. Also by section 81(3), any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the Federation shall be paid directly to the National Judicial Council for disbursement to the heads of the courts for the Federation and the States. The National Judicial Council itself has similarly been mandated to "collect, control and disburse all moneys, capital and recurrent, for the judiciary."[47] With all these constitutional provisions, the problem of financial autonomy or paucity of funds for the judiciary may lie more with the manner of implementation than with poverty of enabling provisions.

DEMOCRACY

Right now in Nigeria, we live in a democracy, i.e. the people's government, made for the people, made by the people, and answerable to the people.[48] It is what Abraham Lincoln short-handedly called government of the people, by the people, for the people. "Democracy" comes from two Greek words – demo (meaning people) and cracy (which means rule). So, democracy literally means a rule or government by the people. In political science, it means a form of government in which sovereign power resides in the people and is exercised by them either directly or indirectly through their elected representatives. There is no use going through the concepts of democracy through the ages,[49] so one may say simply that Nigeria is a democracy because it is governed by the principles of democracy.[50]

One of those principles is the recognition that the diffusion of authority among different centres of decision–making is the antithesis of totalitarianism or absolutism, and so the Constitution has separated the important functions of law making (by the legislature), execution of the laws (by the Executive), and interpretation cum application of the laws (by the Judiciary). Each has its own set of personnel operating with its own indices and procedure and is not expected to butt into the other.

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47 Item 21(e), Schedule III Part I to the 1999 Constitution.

48 Daniel Webster, 1782-1852, Franklin pierce Adams, *FPA Book of Quotations*, 1952.

49 i.e. as conceived by Aristotle, Plato, the Romans, the British, the Americans, the then Soviets

50 Those principles are not uniform, as even the Soviet Union at its height claimed to be a democracy as much as the United States of America, Britain or France.

The Judiciary is not expected, for instance, to dabble into law-making, as this is the exclusive province of the legislature. This view has given birth to the main thesis that, "it is the duty of a judge to administer the law, not to make it,"[51] since "laws should be made by the legislature, not by judges."[52] That, however, is not to say that the judges must be helpless in cases of *casus omissus*. As law and equity now flow in the same channel since unification by the Judicature Act, the judge now administers both law and equity and so he must do equity where there is no law. To send away an aggrieved person because of a legal lacunna would be to legalise self-help and destroy democracy. The maxim has always been *ubi jus ibi remedium*; thus, a wrong cannot go without a remedy. If in giving a remedy the judge makes the law, then so be it. That is why, after acknowledging that there is a vibrant debate as to whether the Judge should make law, as this would be against the principle of separation of powers, the Supreme Court went on to agree that "perhaps the Judge could be involved in making the law if the intention of the law-maker is not clear and he is in a difficult position in the circumstances of the case before him. In such a circumstance, since he cannot adjourn the matter for the legislature to make a law to place the situation on his hands, he could make the law".[53] It has in fact been said that part of the law of every country which was made by judges has been far better made than the part which consists of statutes enacted by the legislature,[54] which again is why Richard M. Nixon, the 37th American President, asserted that "our chief justices have probably had more profound, and lasting influence on their times and on the direction of the nation than most presidents have had".[55] This appears to be recognised as well in Nigeria, which is probably why the ultimate national service award of Grand Commander of the Federal Republic (GCFR) is given to Chief Justices of the Supreme Court just as it is given to Presidents.

This should not be seen as a green light for conscious and unbridled, pro-active judicial legislation. Judicial legislation usually is and should remain reactive – reacting to a need to right a wrong, at times almost subconsciously, based on the professional urge to do justice. Conscious and deliberate law-making belongs to the legislature, and so it would be wrong and undemocratic for the judiciary to seek to stop the legislature from doing its work, say by an injunction, or to meddle in executive functions, say by a foray into political matters. It would be interesting to

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51 Latin Legal Phrase, W. Gurney, *Putnamis Complete Book of Quotations, Proverbs and Household Words,* 1927, p.115

52 Cesare Beccaria, *TraHato dei delitti e delle pere*, 1764, p.8

53 *INEC v. Balarabe Musa & Ors* (2003) 3 NWLR (Pt. 806) 72, held 21

54 John Austin, *Austin's Jurisprudence*, 1832

55 Richard M. Nixon, Television broadcast, May 21 1969

know how the judiciary has discharged its functions in the Nigerian democracy. Can it be said that the judiciary has acquitted itself creditably?

Judging the Judge

To assess the judiciary is to judge the judge. There is no doubt that the political temperature in the country has been very warm, and the warmth has not passed the judiciary by. Incidentally both the Executive and the Legislature are composed of politicians, only the Judiciary is apolitical from head to toe.[56]

Because the court is apolitical, it has persistently refused to have a say in political disputes, such as imposing an election candidate on a party – an exercise which is purely within the domestic affairs of the party,[57] but has however not shied away from saying who is entitled to belong to a political party, since freedom of association is a constitutional right.[58] Accordingly, it has judicially legislated that even a civil (or public) servant can belong to a political party because Section 79(2)(c) of the Electoral Act 2001 which disallows such membership is inconsistent with Sections 40 and 222(b) of the Constitution which allow it, and therefore void *pro tanto*.[59]

There is no gainsaying that the judicial handling of political cases has a direct bearing on the sustenance of democracy. It is not in vain that electoral matters are regarded as *sui generis*.[60] Such matters are to be decided expeditiously and where they last long, the eventual judgment should not be such as would bring chaos. One may recall here the ruling of Justice Stanley Nnaji of January 2, 2004, ruling the Governor from office and stripping him of police protection, a ruling which backfired with Nnaji's dismissal from the Enugu State Judiciary following the recommendation of the NJC. Both the assumption of jurisdiction and the eventual ruling were definitely antidemocratic.

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56 This is unlike the United Kingdom where the Lord High Chancellor (usually referred to as the Lord Chancellor, for short) who is the head of the judiciary is a politician as well as chairman (or Speaker of the House of Lords (i.e., Legislature – "Upper House") and also a cabinet Minister – which makes him a member of the Executive arm of government.

57 *Rimi v. INEC* (2005) 6 NWLR (pt. 920) 56 held no. 7. The court would not decide which candidate a political party would sponsor at an election, because this is a political and non-justiciable question, but would decide who was the candidate a political party sponsored at an election, which has taken place and in respect of which statutory return was made and withdrawn, because here the interest of the electorate which voted at the election has intervened and the issue at stake is no longer a party affair: *Bolonwu V. Ikpeazu* (2005) 13 NWLR (Pt. 942) 479 held 1.

58 *INEC v. Balarabe Musa* (2003) 3 NWLR (Pt. 806) 72, held 18

59 Ibid, at page 166 D-G

60 *Allaince for Democracy v. Fayose & Ors*.(2005) 10 NWLR (Pt 932 151 held 23; *Abubakar v. INEC & Ors* (2004) 1 NWLR (Pt 854) 207 held 2

It is equally undemocratic for a judge to allow election matters to be pending for more than 2 or 3 years for a 4-year tenure. This is an affront to the rule of law. As graphically put by Pat-Acholonu JSC:

> *The very big obstacle that anyone who seeks to have the election of the President or Governor upturned is the very large number of witnesses he must call due to the size of the respective constituency ... By the time the court would have heard from all of them... the incumbent would have long finished and left his office and even if the petitioner finally wins, it will be an empty victory bereft of any substance.*[61]

As a matter of deliberate policy therefore, election cases require urgency so as to stabilize the polity as quickly as possible. The case in Anambra State is still fresh in our minds, where the State Governor, Dr. Chris Ngige, had remained in office for almost three years in a four-year term before an appellate court judgment removed him from office in March 2006. Such protracted legal tussle should be avoided so as not to unnecessarily heat up the system. As far as political and electoral questions are concerned, the judiciary has generally acted within its constitutional limits. There certainly have been isolated cases of wrongful assumption of jurisdiction to try political matters and cases of legally unsupportable interim injunctions, for which the judges concerned have been appropriately disciplined.

It is not possible for the entire public to be totally satisfied with a court judgment in a political case. No matter which way the decision goes, the judiciary cannot escape criticism from partisan politicians who have become partisan critics. So, somehow, the judiciary must be the defenceless scapegoat. Taken all in all, however, it can be said that the judiciary has adopted non-interference in political questions and executive matters, in line with the doctrine of separation of powers. This has helped to consolidate democracy.

Even the internal affairs of the legislature have been carefully avoided by the Judiciary. This includes issues like interference with House rules vis-à-vis legislators, pronouncement on whether a seat in the legislative House has become vacant and whether the judiciary can obstructively issue an order to hinder the legislative functions.

With regard to the first issue, the legislature usually has standing rules, which govern the conduct of legislative business. It is the House rules, which give the presiding officer in the House the

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61 *Buhari, & Ors v. Obasanjo & Ors* (2005) 13 NWLR (Pt.941) 1 held no 95 (c)

power to constitute, reorganise or dissolve committees of the House. The court will generally not interfere with any action taken in pursuant to such rules. Presently, legislators do not appear to legally complain their removal from leadership of the House or of the Committees. There were complaints in earlier legislatures. In **Senator Okwu v. Senator Wayas**,[62] the plaintiff complained that he had been wrongly removed as leader of his party (NPP) in the Senate and that it offended against a section of the standing rules of Senate. The defendant objected to the jurisdiction of the High Court to hear the matter as it concerned the internal affairs of the legislative arm of government. The court sustained the objection. The most recent case of judicial self-restraint occurred in Oyo State, where some legislators applied to the State High Court to stop the impeachment process of Governor Ladoja.[63] After considering that impeachment is a constitutional function of the House of Assembly, the court held that it was "purely a political matter and an internal affair of the House of Assembly. And when the House is performing its constitutional duty, the court cannot intervene. The impeachment is purely political which the court cannot dabble into. And so the case was dismissed.[64]

The court will, however, intervene if the House rules violate the provisions of the Constitution or if the House does not comply strictly with its own standing rules. This explains why the Federal High Court at one time declared as void the amended rules of the House of Representatives, which barred newly elected members of the House from occupying any principal positions in the House. Again, taken all in all, the judiciary has consolidated democracy in Nigeria by keeping a safe distance from functions and powers that are purely legislative.

By its robust exercise of interpretative and declaratory roles, the judiciary has admirably kept its date with the general populace and therefore promoted democracy. Judicial decisions in recent matters that could make or break the country come to mind. There was the case of ***A-G of the Federation V. A-G of Abia State & Ors***,[65] which sought a determination of the seaward boundary of the eight littoral defendant States within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from that State pursuant to the proviso to section 162(2) of the 1999 Constitution. The Supreme court held, rather simplistically, that the seaward boundary of the littoral States is "the sea", i.e. "the low

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62 (1981) 2 NCLR 522

63 "Court Can't Stop Ladoja's Impeachment – Judge", in Daily Sun, Friday December 30, 2005, page 4

64 *Ibid.*

65 (2002) 16 WRN 1

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water mark along the coast", thus ignoring the long stretch of natural prolongation of sub-water land which prolongates from the littoral States' land territory, normally referred to a continental shelf, wherefrom hydrocarbon is obtained. The shortcoming and social/financial injustice of this judicial decision led to a legislative intervention by enactment of the Revenue Allocation (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004 which provides:

> *1. (i) As from the commencement of this Act, the 200 metre water depth isobath contiguous to a State of the Federation shall be deemed to be part of that State for the purpose of computing the Revenue accruing to the Federation Account from the State pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, 1999 or any other enactment.*
>
> *(ii) Accordingly, for the purposes of the application of the principle of derivation, it shall be immaterial whether the revenue accruing to the Federation Account from a state is derived from natural resources located onshore or offshore.*
>
> *2. This Act may be cited as the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act, 2004 and shall be deemed to have come into force on 1st April 2002.*

Coming, as it were, on the heels of the Supreme Court judgment which had held that the littoral States' territory ends at the sea, i.e., at the low water mark along the coast, the 2004 Act which thus extends the littoral States' seaward limit to 200 metre water depth and expressly abolishes on-shore/off-shore dichotomy, was for this reason challenged by land-locked federating States. They saw the Act as a "legislative judgment" which achieved legislatively what was judicially denied the littoral States. They thus filed the case, **A-G of Adamawa State & Ors v. A-G of the Federation & Ors**[66] wherein they contended, inter alia, that by reason of the Act, a part of the Nigerian soil or land will be ceded to the littoral States. The Supreme Court held, rightly, that the Act is only "deeming" the seaward land prolongation to be part of the littoral States with a view to determining the States' rights in respect of oil allocation, so as to rectify the anomalies that existed in the past,[67] and that the "deeming" means simply a notional rather than a real land extension.

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66 (2005) 18NWLR (Pt.958) 581

67 Ibid, held no. 11

Conclusion

The judiciary has greatly assisted in stabilizing and consolidating democracy in Nigeria by its interpretative role, its refusal in many cases to grant frivolous interim injunctive orders and its upholding of the Constitution. As custodians of the constitution, judges are saddled with the responsibility of ensuring due functioning and enhancement of constitutional provisions. There is therefore a need for the judiciary to strive to ensure that our fledgling democracy is not allowed to lie prostrate.[68] It is in recognition of this that the courts have refused many *ex parte* applications for interim injunctive relief against government, and have refused to be drawn into "the miasma of political cauldron and have itself bloodied[69] and thereby lose respect and derail democracy. The judiciary has upheld the Constitution even against the wishes of the Executive and Legislature, as in the case of Governor Joshua Dariye v. EFCC, where the constitutional immunity was upheld.

The judiciary would certainly do more with less (allegations of) corruption. Not too long ago the Chief Justice of Nigeria was openly accused (albeit falsely) of corruption in the print media. A lawyer even had the shameless boldness to stand before the Supreme Court and falsely accuse it of corruption, 'falsely' because there was not even a shred of the remotest evidence to support it. While the Supreme Court may be absolved, it is not so with the lower courts, particularly the State and Federal High Courts. Not long ago, some judges were dismissed for various forms of corrupt practices. And not long ago some judges were forcefully retired for reason of corruption. As the judiciary improves on its image and record of achievements, and as it strives to consolidate democracy through justice according to law, let us hope that the other arms of government will allow it the independence it constitutionally deserves to better discharge its functions.

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68 *Peter v. Okoye* (2002) NWLR (Pt. 755) 529 at 554

69 *Abaribe v. Abia State House of Assembly* (2002) 4 NWLR (Pt 788) 486