DYNAMISM OF THE JUDICIARY AND DEMOCRACY: COMPARATIVE ANALYSIS

BY

Ememobong Favour NSOGHO
LAW 1404056

FACULTY OF LAW
UNIVERSITY OF BENIN
BENIN CITY

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BEING A LONG ESSAY WRITTEN AND SUBMITTED TO THE FACULTY OF LAW, UNIVERSITY OF BENIN, BENIN CITY IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF LAWS (LL. B) OF THE UNIVERSITY OF BENIN, BENIN CITY.

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CERTIFICATION

I, Ememobong Favour NSOGHO, MAT. NO. **LAW1404056,** hereby certify that apart from references made to other people's work as duly acknowledged herein, this entire project is the product of my personal research. I further certify that the work reported in this project has not been submitted and will not be submitted, either in part or in full, for the award of any other degree in this institute or elsewhere.

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Ememobong Favour NSOGHO
LAW1404056

APPROVAL

We certify that this project work was completed by **Ememobong Favour NSOGHO,** Mat. No. **LAW1404056 (spillover)**, in partial fulfillment of the requirements for the award of Bachelor of Laws (LL.B) Degree of the University of Benin.

_____ _____

DR. (MRS) M. EZEKIEL **DATE**
PROJECT SUPERVISOR

_____ _____

DR. DANIEL T. ACHI **DATE**
PROJECT COORDINATOR

_____ _____

PROF (MRS) VIOLET.O. AIGBOKHAEVBO, PH. D **DATE** DEAN,
FACULTY OF LAW

DEDICATION

I dedicate this work to God Almighty, my grandfather, Hon. Justice S. O Elaiho and my parents Mr. Pius Nsogho and Mrs. Nosa Elaiho-Nsogho.

ACKNOWLEDGMENT

I want to thank God Almighty for making it possible for me to write this project as well as gave good health and life, I thank my Grandfather recently late Hon. Justice S. O Elaiho, my parents, siblings my project supervisor Dr. Mrs. Ezekiel, my friends Stephany, Chelsea, Osato, Aiye, Gabriel and Samuel; and my second family the Ukadike's, Nwanyiocha and most especially Kay-Francis my strong support system for his constant encouragement and support. I really appreciate.

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ABSTRACT

Nigeria is a nation with a chequered history of democratic rule. The pressure mounted on the Nigerian political system since independence created instability in Nigeria polity. Hence the judiciary could not carry out its rules effectively, the first, second, and third republic collapsed thus, paved way for the inevitability of military; incursions in Nigeria politics, which truncated the Nigerian nascent democracy. This study essay therefore investigates the impact of the judiciary in achieving sustainable democracy in Nigeria. This essay uses qualitative and content analysis method in analyzing the information generated for the study. Cases and instances from the content analysis shows that the independence of the judiciary helps in achieving sustainable democracy in Nigeria; independent judiciary enhances due process in a democratic state. Further analysis showed that incidences and court verdicts in issues relating to how the practice of separation of powers of which the judiciary is a product of enhances the efficiency of the judiciary in Nigeria.

CHAPTER ONE

GENERAL INTRODUCTION

1.0 Introduction

Nigeria is a nation with a chequered history of democratic rule. The pressure mounted on the Nigerian political system since independence created instability in Nigeria polity. Hence the judiciary could not carry out its rules effectively, the first, second, and third republic collapsed thus, paved way for the inevitability of military; incursions in Nigeria politics, which truncated the Nigerian nascent democracy. This study essay therefore investigates the impact of the judiciary in achieving sustainable democracy in Nigeria. This essay uses qualitative and content analysis method in analyzing the information generated for the study. Cases and instances from the content analysis shows that the independence of the judiciary helps in achieving sustainable democracy in Nigeria; independent judiciary enhances due process in a democratic state. Further analysis showed that incidences and court verdicts in issues relating to how the practice of separation of powers of which the judiciary is a product of enhances the efficiency of the judiciary in Nigeria.

The judiciary is the part of a country's government that is responsible for its legal system including all the judges in the disputes and interprets, defends, and applies the law in legal cases. The branch of government whose task is the authoritative adjudication of controversies over the application of laws in specific situations.

Conflicts that allege personal or financial harm resulting from violations of law or binding legal agreements between litigants other than violations legally defined as crimes produce civil cases. Judicial decisions in civil produce criminal cases, which are officially defined as conflicts between the state or its citizens and the accused(defendant) rather than as conflicts between the victim of the crime and the defendant. Judicial decisions in criminal cases determine whether the accused is guilty or not guilty. A defendant found guilty is sentenced to

punishments, which may involve the payments of a fine a term of imprisonment, or in the most serious cases in some legal systems, state imposed physical mutilation or even death.

Judiciaries also frequently resolve administrative cases, disputes between individual groups, or legal entities and government agencies over the application of laws or the implementation of government programs. Most legal systems have incorporated the principle of state sovereignty, whereby governments may not be sued by constate litigints to pursue remedies against government actions. Nevertheless, the right of citizens to be free from the arbitrary, improper, abusive application of laws and government regulations has long been recognized and is the focus of administrative cases.

1.1 Scope of Research

The scope of this research elucidates the impacts and contributions of the judiciary positive or not to the development and growth of democracy using Nigeria as the chosen demographic. The origin of the judiciary, democracy in Nigeria, current state of democracy, the dynamism of the judiciary as an arm of government, the struggles faced by the judiciary in its contribution to democracy.

1.2 Aim and Objective

The aim of this study is to appraise the concept of judicial dynamism and the Nigerian democracy and the contributions of the judiciary in a bid to attaining sustainable democracy. The specific objectives of this study are:

1 To explain the meaning of judiciary

2. To elucidate the idea of the Nigerian democracy

3. The effects of the judiciaries laws on democracy

4. The struggles of the judiciary in a bid to attaining sustainable democracy.

1.3 Methodology

The research employs doctrinal/ analytical method pertinent and apposite literature on judicial dynamism and Nigeria democracy will be retrieved from textbooks, journals internet materials and articles while also eliciting professional opinions from jurists, learned academics. The analytic exposition of the subject matter would involve a painstaking and intense research through sourcing and consulting other helpful materials from the library.

1.4 Independence of Judiciary

Judicial independence, the ability of courts and judges to perform their duties free of influence or control by other actors, whether governmental or private. The term is also used in a normative sense to refer to the kind of independence that courts and judges ought to possess. The ambiguity in the meaning of the term judicial independence has compounded already existing controversies and confusions regarding its proper definition, leading some scholars to question whether the concept serves any useful analytical purpose. There are in general two sources of disagreement. The first is conceptual, in the form of a lack of clarity regarding the kinds of independence that courts and judges are capable of possessing. The second is normative, in the form of disagreement over what type of judicial independence is desirable.[1] The type of judicial independence is highly valued among these who impute to courts a special responsibility for ensuring that individuals and minorities do not suffer illegal or unjust treatment at the hands of the government or a tyrannous majority. On the other hand, that type is considered especially difficult to achieve because the other branches of government ordinarily possess the power to disobey or thwart the enforcement of judicial decisions, if not also the retaliate against the courts for decisions that they oppose. In Alexander Hamilton's

[1] Democracy definition: dictionary; oxford languages Dictionary.com

famous formulation, the judiciary is the "least dangerous branch, having no influence over either the sword or the pursue" and is therefore least capable of defending itself against other branches.

1.5 Functions of Judiciary

1. It interprets the laws: A number of cases are brought before the judges in which the question of the interpretation of the law arises, because in such cases the laws is not clear. Even the matters are brought them in which the laws are silent. In these cases, or matters the judges give their decisions. Later these decisions are quoted in similar cases. In this way the courts expand the laws in an indirect manner.[2]
2. Protection of civil rights: People are given many rights by the state through the laws of the parliament. The court protect these rights.
3. Decides the cases: Many cases relating to the disputes between the citizens, or between the government and the citizens, are brought before the courts. The courts give their decisions on such disputes.
4. Custodian of fundamental rights: In modern times, many countries grant fundamental rights to the people in the constitution. The supreme courts there acts as the custodian of these rights. In the constitution of our country, citizens violates these fundamental rights or if, because of this violation, a person loses his rights, an appeal can be filed in a high court or the supreme court for the protection of these rights. It is the duty of the court to protect the rights of the citizens. Our high court and supreme court have decided many cases in which the question of the violation of the fundamental rights was involved.

[2] Democracy definition: dictionary; oxford languages Dictionary.com

5. Guardian of the constitution: Chief justice Marshall of USA definitely decided in Marbury v. Madison (1803)[3] that the courts had the inherent right to declare the acts of congress invalid. Since then, Marbury case forms the basis of this important authorities exercised by the Supreme Court. If a law passed by the congress violates the constitution, that the law shall be declared void because the constitution is the highest law of the land and it is the duty of the courts to protect it. The principle which was devised by chief justice Marshall is known as judicial review. For the protection of the constitution many laws have been declared illegal which violated any law or any clause of the constitution.

6. Decides the conflicts of jurisdiction between the center and state governments in federations: In federal constitution there is a division of power between the center and states. There is a possibility of disputes arising between the center and the state over the jurisdiction. Therefore, the Supreme Court is given the right to decide these disputes.

7. Advisory: In India, the Supreme Court has been given, the right in the constitution to render advice on legal matters when lacked for by the president. Our late president Dr. Rajendra Prasad sought advice of the Supreme Court on the Kerala education bill. The Supreme Court advised that the bill contained certain clauses with violated the constitution. Dr. Rajendra Prasad refused to give his assent to the bill and returned it with his objections. Later, the Kerala legislative assembly removed all the objection and the president gave his assent. The Supreme Court recently (on 24th October 1994) for the first tie rejected the president reference.

[3] *Marbury v. Madison* (1803) 5 U.S. 137

8. Miscellaneous functions: The court appoints trustees and guardians of the property of minors. It gives approvals of civil marriages, it appoints receivers of these companies which are unable to meet their financial obligations. It also performs the act of the registration of wills it issues certificates for the grant of naturalized citizenship. In some countries, appeals relating the elections are also sent to high courts.

1.6 Meaning of Democracy[4]

A government by the people; a form of government in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system[5]. The term is derived from the Greek demokratia, which was coined from demos(people) and kratos(rule) in the middle of the 5th century BCE to denote the political systems then existing in some Greek city/states, notably Athens. Here the people choose their leaders/rulers by voting for them in elections. Democracy provides a very special challenge because it incorporates aspects of behavior, skills knowledge and attitudes as well as questions of politics and power. Democracy does not consist of a single, unique set of institutions that are universally applicable. The specific form that democracy takes in a country is largely determined by prevailing political, social, and economic circumstances moreover, it is greatly influenced by historical, traditional and cultural factors.

Democracy exists to provide a way for people to live and be together in a way that is beneficial to all. Although many of today's democracies may not have existed before the second world war, there are for a form of governance in most traditional societies where rulers and communities in the way members of the society were treated and lived together.

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4 Democracy definition: dictionary; oxford languages Dictionary.com

5 Robert A. DAHL, "On *Democracy"* New Haven: Yale University Press, 1998.

1.7 Scope of Democracy

In the modern world, democracy is not limited to its very common definition but area or scope has been widened under the influence of global concepts and socio-economic changes the following points show the scope of democracy

i) Democratic rights are not limited to political rights like, the right to vote, to stand in elections and form any political organizations. A democracy should grant some social and economic rights of its citizens.

ii) The power sharing in democracy is extended to the power of sharing between government and social groups.[6]

iii) Modern democracy cannot value only the voice of majority, but it respects the voice of the minority as well.

iv) However, the democracy has extended its scope from government and its activities to eliminate discrimination based on caste religion and gender.

Democracy's scope has typically been defined by nation states boundaries. Political theorists who have addressed the question of democracy's scope have applauded to principle like national self-determination, freedom of association, or economic efficiency. Recently, some have challenged the marriage of democracy and the nation state by appealing to the idea that anyone who is systematically affected or covered by a state's actions should be given a voice in that state's decision making.

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6 Political Science definition – Brainly.ph <https://brainly.ph>

1.9 Historical Development of Democracy in Nigeria

Origin of democracy the term has old Greek roots. It means a rule of the people. Democracy term was first mentioned about 2500 years ago in Greece cities. Back then, it was the opposite to aristocracy form of government. The modern type of democracy developed in the 19th and 20th centuries. Being a democratic country is the latest trend ever since the 1970s. A lot of nations share the values carried by the term and Nigeria is not an exception.[7]

When did Nigeria become a republic? The nation celebrates May 29th as the official public holiday Democracy Day. Still, the democratic start point really began in 1960. It was on the 1st of October when Nigeria publicly announced its independence from Great Britain. There was a long history of different government forms in Nigeria ever since 1960. Let us mention all the main stages and dates in the development of our country.[8]

History of democracy in Nigeria After independence in 1960, (that year Nigerians became the citizens of the 4th biggest democratic country in the word) Nigeria experienced its first military coup in 1966. The new civil war broke in 1967 and lasted till 1970. It was possible to restore the democratic model for a couple of years in 1978. That period didn't last too long and was over in 1983.

Most of the time in its 'young' history, Nigeria was a country with military coups. Some rulers promised to return to democracy, however, only General Abdulsalami Abubakar who took the power after the death of Sani Abacha kept his word. The country's modern Constitution became official in 1999[9].

The elections of 1999 were successful to the previous military ruler. The new President Olusegun Obasanjo put the end to the military regimes that kept switching one after the other

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7 <<https://www.legit.ng/1144313-history-democracy-nigeria-1960.html>>

8 <<https://www.legit.ng/1144313-history-democracy-nigeria-1960.html>>

9 <<https://www.legit.ng/1144313-history-democracy-nigeria-1960.html>>

for nearly 30 years. Nigeria's democracy is celebrated yearly. Though it is undeniable that Nigeria still has many problems to overcome; Nigerians have dreams about a bright and prosperous future with better economy, improved standard of living and security.

When was the first general election in Nigeria[10]? It was the year 1923 when the country faced first general elections ever. They happened on 20th of September, and people were supposed to choose who would win seats in the Legislative Council. These were to be 3 representatives from Lagos and 1 from Calabar. The event was of huge importance due to a number of reasons. Firstly, democracy was introduced into Nigeria only 4 years earlier. Secondly, the new constitution was implemented in 1922, which made it possible to create seats for the Legislative Council. Interestingly enough, only four seats out of 46 were elected, others were only provided or appointed, among which were: 23 ex-officials; 4 nominated officials; 15 unofficial members.[11]

One had to meet some precise requirements to become a candidate during the first general election. The important criteria were to be a man of over 21 years old, with British or Nigerian place of birth, with a salary of over 100 pounds for the previous year. A crucial point was that a candidate had to live in their municipal area for at least a year before the elections. Voters, in turn, also had to meet some criteria. For them, it was vital to have no record of criminal conviction or imprisonment, they had to be hard working and mentally healthy. As it is claimed in sources, only 4 thousand people registered to vote out of 99 thousand in Lagos and 453 in Calabar. As a result, the Nigerian National Democratic Party (NNDP) won three seats and the last one went to the Independents.[12]

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10 *Andrella Tersoo* "History of democracy in Nigeria from 1960".

11 *Andrella Tersoo* "History of democracy in Nigeria from 1960".

12 Andrella Terso "*History of democracy in Nigeria from 1960*".

Nigeria has a rough and complicated political history. Being a democratic country only for the past 20 years, it still has a long way toward a truly democratic system. The first general elections happened in a democratic Nigeria in 1999 and they brought to power the former military head of state Olusegun Obasanjo. The following elections in 2003 kept him in the position, though both of the electoral processes were claimed to be unfair. In 2007 the leader from PDP came to power, Umaru Yar'Adua, however, he didn't last till the end of the term and passed away in 2010. His successor was Dr. Goodluck Jonathan and in 2011 on the next elections, he officially won. Again the international media noticed violations in the electoral process. Since 2015, it was Muhammadu Buhari who won the election. Today, he is calling people of Nigeria to re-elect him again, claiming that his achievements during the time of his ruling are worth giving him a chance to continue developing the country. On 16th of February, people will vote to elect the 5th President and the National Assembly[13].

Generally speaking, Nigeria faced massive changes throughout the time of its modern existence. Thus, having undergone a civil war in 1967 – 1970, it witnessed a military control till 1999. A lot of damage was caused to the people of Nigeria at that time, and there is still a lot to be done now to develop the county. Right now, Nigeria presidential election is the hot topic in the country. The future of the country depends on the upcoming political decision. The history of elections in Nigeria is complicated, but at the same time, it shows a transformation of the country. Many eyes are now set on elections in Nigeria, which will happen soon. Their outcome will definitely be significant and have a huge impact.[14]

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[13] William Guntteridge "*The Military in African politics-success or failure"*. Vol. 1, No. 2, pp. 241-252

[14] William Guntteridge "*The Military in African politics-success or failure"*. Vol. 1, No. 2, pp. 241-252

CHAPTER TWO

JUDICIAL POWERS AND JUDICIAL SYSTEM UNDER THE 1999 CONSTITUTION

2.0 Nature and Meaning of Judicial Powers

The expression "judicial power[15]" 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[16]** observed "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 distinguished 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 and administrative functions overlap is a wide one. As observed by the Privy Council.[17] "in the strict sense of exercising judicial power… A tribunal is not necessarily a court in the strict sense because it gives decisions which affect the rights of subjects, nor because there is an appeal to a count; nor because it is a body to which is a matter referred by another body".

Secondly, the proposition can be made here that if the constitution vests "judicial power" in the courts, if follows that the legislature cannot validly vest any other body which is not a count within the meaning of the constitution. As a corollary of this, non-judicial cannot be validly vested by the legislature to the courts. These matters, I believe will one day cone for

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15 *Reg. v. Trade Practices Tribunal* (1970) 123, C.L.R. , 361 at p. 394, 396

16 *Reg. v. Trade Practices Tribunal* (1970) 123, C.L.R. , 361 at p. 394, 396.

17 Mark Kozlowski 2003. "The myth of the imperial judiciary". New York: New York University Press, vol. 14, No. 2 pp. 293.

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,[18] the chief justice remarked thus:

"The words 'judicial power' as used in [19]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 biding decision (whether subject to appeal or not) is called upon to make action.

Chief justice Griffith considered that there would 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[20] shell Co. of Australia v. Federal Commissioner of Tax[21]. While amplifying this definition in 1994, 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 distributive attribute of judicial power. According to him, "if a body has a power to give a binding … all the attributes of judicial power are plainly presented."[22]

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18 *Huddart Parker v. Moorehead* (1909), 8 C.L.R. p.330

19 Section 17 of the constitution as amended CFRN 1999

20 *Shell co of Australia v. Federal commissioner of tax*

21 (1931) A.C. 275 per Lord Sankey at p. 297

22 *Rola Co. (Australia) Ltd v .Common Wealth* (1994) 69 C.L.R. p. 199

The Nigeria Supreme Court has explained the concept "judicial power" in an all embracing way. On the meaning of judicial power, the Supreme Court remarked thus:

> "Judicial power, as is well known, is, indeed, a very wide expression for apart from its meaning as the power which very sovereign authority must of necessity possess to enable it settle and decide controversies between its subject and also between its subjects and itself (see Griffith C.J. in Huddart[23], Parker & Co. Ltd v. Moorehead (1909)8 CLR 330 at 357 in which is to be found the definition, of the subject, universally acknowledge as adequate) it is also co-extensive with the power of the state to administer public justice and, again, with the power of the state to make laws and execute them as well. (See also Isaacs. J. in Huddari Parker & Co. Property Ltd v. Moorehead (1909) 9 C.L.R at 383)".[24]

The institutions, officers and functions which will be regarded as judicial vary with the purpose 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[25] has suggested 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.

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23 *Huddart Parker v. Moorehead* (1909), 8 C.L.R. p.330

24 *Bornik Motors Ltd & Anor. v. Wema Bank Ltd* (1983) LPELR 808(SC) PER IDIGBE, JSC at Pp. 76-77, Paras D-A

25 Judicial Review of Administrative Action (2nd edition), pp. 64-65

3. After inquiring and deliberating and act is performed or a decision is made that is binding and conclusive and imposes obligations upon or affects the rights of individuals.

As professor de Smith points out, the court 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.[26] 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 powers".

i. The existence of a dispute between two or more parties about some existing legal rights.

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 as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decisions 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:

i. Any law;

ii. Any official action based upon a law;

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[26] *Shell co. of Australia v. Federal Commissioner of Tax*(1973) A.C.P. 275 as per Lord Sankey at p.297.

iii. Any other action by a public official which the court deems to be in conflict with the constitutions.

The United States court in the case of [27]Marbury V. Madison 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 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.

2.1 Judicial Functions

[28]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 rights dealing according to law and justice are pursued by citizens towards citizens. The source of their power to functions differs from country to country. In Britain for example, the power of the English courts is mainly "judicial" involving the interpretation of the common law and status and its application according to the rues and procedure and evidence to the cases that come before them. [29]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[30] said:

> "there is no judicial body in this country by which the validity of an act of parliament can be questioned. 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"

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27 *Marbury v. Madison* 5 U.S 1 Cranch 137 (1803).

28 *Shell co. of Australia v. Federal Commissioner of Tax* (1973) A.C.P. 275 as per Lord Sankey at p.297

29 *R. v. Selwyn* (1872) 36 j.p. 34

30 *R. v. Selwyn* (1872) 36 j.p.34

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.

The position in Nigeria is that if a power is not authorized, or if a power is abused or exercised unreasonably or if the principles of natural justice are to be observed, the act may be declared legal and the courts can declare it void.[31]

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 interest.

Section 6[32] and chapter VII of the CFRN 1999 as amended bests judicial powers of the federation in the superior courts namely Supreme Courts, Court of Appeal, High Court of States, High court of Federal Capital Territory, Federal High court and by virtue of the constitution of the Federal Republic of Nigeria (Third Alteration) Act, No. 3 of 2010, which came into effect on 4th March 2011, the National Industrial Court has now been included as one of the superior courts of Record created by the constitution. It is worthy of note that there is a scope for creating more courts and the courts so created may be vested with judicial powers in matters in respect to which the National Assembly may make laws. While the judicial powers of state are vested in the State High Court, Sharia Court of Appeal or Customary Court of Appeal[33]. A state House of Assembly is also empowered to create courts and vest them with judicial powers. However, their jurisdiction at first instance or an appeal can only be on matters with respect to which the house of assembly has power to make laws. The judicial powers vested in the courts extend notwithstanding anything to the contrary in the constitution, to all

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31 *Garba v. University of Madugari* (1986) in NWLR pt. 18 550

32 Baar, C. (1999). The emergence of the judiciary as an institution, Journal of judicial administration, 8 (4), 216. A judge on judging: the role of a supreme court in a democracy. Harvard law review, 116 (1), 19. Barack, A. (2002b). the role of a supreme court in a democracy. Hastings law journal 53 (5), 1205

33 s. 6 (5) (j) and(k)

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. 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.

2.2 Limitation on Judicial Functions

These 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 are political, economic, social and education in nature.[34] But the chapter is to be effect that the judicial powers shall not extend to any issue or question as to whether any at 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 the constitution.[35]

The above position may seem to deny the court's jurisdiction to entertain any question relating to Directive Principles but when read and considered along with section 13 of the constitution, it may produce opposite interpretation: section 13[36] provides;

> "it shall be the duty and responsibility of all organs of government and of all authorities and persons, exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of this chapter of the constitution."

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34 chapter II, section 13-24 constitution of the federal republic of Nigeria, 1999 (as amended)

35 section 6(6)C of the constitution of the federal republic of Nigeria, 1999 (as amended)

36 constitution of the federal republic of Nigeria, 1999 (as amended)

It is thus submitted with respect that the correct interpretation of the conflict between s. 6(6)c and s. 13 by s6(6) C of the constitution 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 court themselves are free to take into consideration the provision of the chapter II of the constitution with regard to their interpretation function.

The second expectation according to the constitutional provision[37] 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 drop to make such law. This second exemption is intended to protect military officers and authorities who ruled the country from 15th January 1966 to May 1999. The laws and decisions made by the military officers cannot be challenges in courts on grounds of absence legality or competence of the military regime to take them. However, such existing laws may be modified to bring them into harmony with the constitution.

Thirdly, it is not uncommonly assumed that the courts of a nation stand ever ready to right all wrongs suffered no one's person or liberty or property. In a strictly limited sense, this may be true.

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.

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[37] section 6(6)d constitution of the federal republic of Nigeria, 1999 (as amended)

2.3 Judicial System under the 1999 Constitution

The basis of jurisdiction of Nigeria courts is the constitution of the Federal Republic of Nigeria. By virtue of the 1999 constitution of the Federal Republic of Nigeria, all courts in the Nigerian federation derive their jurisdiction or competence form the constitution[38]. Nigerian courts, like other courts in democratic nations, are creatures of statue based on the constitution. Their jurisdiction are based on statues and as a corollary, no court in Nigeria assumes jurisdiction without its enabling statues. Jurisdiction cannot be implied and as a result where there is no enabling state there cannot be jurisdiction. When a court has no jurisdiction, it is futile exercise for that court to embark on the hearing of a matter[39].

Jurisdiction is so fundamental that it is a condition precedent to any action which calls for determination before the court. Jurisdiction is usually an important issue in matters before the court and therefore goes to the roof of the whole action. Once the issue of jurisdiction is raised during a proceedings in order to save the time and before the merits of the case are considered and determined[40] .

The ingredients a which must be present before the courts can assume jurisdiction have been decided by the courts. "a court is only competent when-]

a. it is properly constituted with respect to the members and qualifications of its members;
b. the subject matter of the action is within its jurisdiction;
c. the action is initiated due process of law; and;
d. any condition precedent for the exercise of its jurisdiction has been fulfilled.

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38 *Osadebay v. A. G Bendel* (1991) 1 N.W.L.R pt. 169 525 at pp. 557-558; Din v. A. G Federation (1986) 4 N.W.L.R (pt.87) 147 at 171

39 *Osadebay v. A.G Bendel* p.57; A.G Federation v. Sode (1990) 1 N.W.L.R. (pt 128) 500 at 503, 504, and 505.

40 *Abubarkar v. Usman* (2009) 6 N.W.L.R pt. 1136 69 at pp. 93-94

Noncompliance with any of the foregoing matter is a defect in competence which may be fatal to its jurisdiction"[41] The parties to a dispute cannot confer jurisdiction on a court. In any event where the court lacks jurisdiction, the parties cannot confer and vest jurisdiction on the court[42]

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41 *Shelim v. Gobang* (2009) 12 N.W.L.R pt. 1156 403 pp. 455-456, *Madukolu v. Nkemdilim*

42 *Adams v. Umar* (2007) 5 N.W.L.R. pt.1133, 41 at 97

2.3.1 Federal and State High Courts[43]

The constitution creates Federal and State Courts as well as Election Tribunals. The federal courts are – the Supreme Court, the Court of Appeal, the Federal High Court, the High Court of Federal Capital Territory, Abuja. The State Courts are: The High Court of the State, the Sharia Court of Appeal, The Customary Court of Appeal. The Election Tribunals are: the National Assembly Election Tribunals, the Governorship and Legislative Houses Election Tribunals.

2.3.2 Supreme Court of Nigeria

The constitution establishes the Supreme Court of Nigeria[44]. It is the highest court in Nigeria and the court of last resort. It is situated in the Federal Capital Territory, Abuja. The chief justice of the Federation who is the head of the judiciary in Nigeria and such number of justices not exceeding twenty-one as may be prescribed by the National Assembly. Ordinarily, the court is duly constituted with not less than five justices of the court, except where it is exercising its original jurisdiction or a matter which involves a question of interpretation or application of the constitution or whether any provision relating to Fundamental Rights provisions of the constitution has been, or is likely to be contravened. In this regard, the court is duly constituted if it consists of seven justices of the court.

The decision of the Supreme Court on any matter is final and it is not subject to an appeal to any other person or body. This is however, without prejudice to the power of the President or Governor of a State's exercise of prerogative of mercy in appropriate cases. The decisions of the Supreme Court are binding on all other courts in Nigeria.

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43 Mary Ikande *"Types of court in Nigeria and their functions"* <<https://Legit .ng/1131488-types-court-nigeria>>

44 Section 230 (1) of the 1999 constitution

2.3.3 The Court of Appeal

The Nigerian Court of Appeal is the next court in the hierarchy of courts in Nigeria. Unlike the Supreme Court which is situated only in Abuja, the Court of Appeal is divided into different judicial divisions and sits in certain states in Nigeria. It is established by constitution [45] and headed by the president of the court of appeal and consists of not less than 49 (forty-nine) judges at all times. The court has original jurisdiction to the Excusive of all other courts in Nigeria to hear questions so to whether-any person has been validly elected to the office of the President or Vice-President, Governor or Deputy Governor in Nigeria; appeals from the Federal High Court, the High Court of the Federal Territory, Abuja, High Court of a state, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a State, Customary Court of Appeal of a State, Court Marital and any other Tribunal.

Just like the finality of decisions in Supreme Court, the Court of Appeal also enjoys the finality of decisions on appeals lying to it from the decisions of the National and State Houses of Assembly election petitions and also appeal arising from any civil jurisdiction of the National Court.

2.3.4 The Federal High Court

Like the Court of Appeal, the Federal High Court is divided into different judicial divisions for administrative convenience and sits in more than 15(fifteen) states in Nigeria. The Constitution[46] also provides for the establishment of the Federal High Court. The Federal High Court is headed by a Chief Judge and consists of such number of Judges as may be prescribed by an Act of the National Assembly but is duly constituted if it consists of at least one Judge

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[45] Section 23(7) of the 1999 constitution (as amended)

[46] Section 24(9) of the 1999 constitution (as Amended)

of the court. The Court has exclusive jurisdiction in civil cases and matters as set out under Section 251(1)[47] of the 1999 Constitution (As Amended).

It is important to note that the Federal High Court also has appellate jurisdiction and all the power of the High Court of a State. The court shares concurrent jurisdiction with the State High Court in matters relating to banker-customer relationship, interpretation or application of the constitution and fundamental human rights enforcement cases.

2.3.5 The High Court of the Federal Capital Territory (FCT)/State High Court

There is a High Court of the Federal Capital Territory, Abuja which caters for the FCT and High Court of a State. The Constitution[48] provides for the establishment of a High Court for each State of the Federation. The High Court individually is headed by the Chief Judge and consist of such number of Judges as may be prescribed by an Act of National Assembly (in respect of the High Court of the Federal Capital Territory, Abuja) or the State House of Assembly (in respect of the High Court of a State). A High Court has the widest jurisdiction under the 1999 constitution (As Amended) in civil and criminal matters and has appellate jurisdiction over decisions of Magistrate courts, Customary Courts and Area Courts etc.

2.3.6 National Industrial Court

The National Industrial court is established by Section 254A[49] of the 1999 Constitution, headed by the President of the National Industrial Court and consist of such number of Judges as may be prescribed by an Act of the National Assembly. Like the Federal High Court, the National

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47 Section 25(1) of the 1999 Constitution (as amended)

48 Section 25(5) of the 1999 Constitution (as Amended)

49 Section 25(4)a of the 1999 Constitution (as amended)

Industrial Court is also divided into different judicial divisions for administrative convenience which sits in some states in Nigeria. The exclusive jurisdiction of the National Industrial Court in civil causes and matters are set out in Section 254C[50] of the 1999 Constitution and it has all the powers of the High Court of a state and an appellate jurisdiction.

2.3.7 Sharia Court of Appeal

There is a sharia Court of Appeal for the Federal Capital Territory, Abuja which caters for the FCT and the State Sharia Court of Appeal. Section 260 of the 1999 Constitution (As Amended) provides for a mandatory establishment of a Sharia Court of Appeal and Federal Capital Territory, Abuja while Section 275 provides for an optional establishment of a Sharia Court of Appeal for any State that requires it in Nigeria. Both courts are headed by a Grand Kadi and consist of such number of Kadis as may be prescribed by an Act of the National Assembly for the Sharia Court of Appeal of the Federal Capital Territory, Abuja and the House of Assembly of a State Sharia Court of Appeal. Both courts exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law.

2.3.8 Customary Court of Appeal

Like the Sharia Court of Appeal, there is a Customary Court of Appeal of a State. The Customary Court of Appeal of the Federal Capital Territory, Abuja and a Court of Appeal of a State. The Customary Court of Appeal of the Federal Capital Territory is established by Section 265 of the 1999 constitution (As Amended) and caters for the FCT while Section 280 provides for the optional establishment of a customary court of Appeal for any state that

[50] Section 25(4)c of the 1999 Constitution (as amended)

requires it in Nigeria. Both courts exercise appellate and supervisory jurisdiction in civil proceedings involving question of customary law.

2.3.9 Magistrate Courts and District Court[51]

Although not provided for in the 1999 Constitution (As Amended), it is established by the law of the House of Assembly of a State. A magistrate court is a court of summary judgment as matters are determined in this court without pleadings or briefs filed by the parties. In southern part of Nigeria, they are referred to as Magistrate courts but they are referred to as District courts in the Northern parts of Nigeria when they sit in their civil jurisdiction. The jurisdiction of a magistrate courts is provided for under the various magistrate court rules of each state establishing them.

[51] Commonwealth Magistrate's and judges Association; Response to the Scottish Executive's consultation paper "strengthening judicial independence in a modern Scotland"

CHAPTER THREE

DYNAMISM OF THE JUDICIARY

3.0 Introduction

Recent scholarship has focused heavily on the activism of courts in the fragile democracies of the "Global South". Courts in countries like India, Columbia, and South Africa have issued landmark decisions in difficult political environments, in the process raising unanswered questions about the appropriate conception of judicial and academic effort in these contexts in self-consciously oriented towards using courts to carry out basic improvements in the quality of political systems, seen as badly deficient. In other words, the core task is to improve the quality of the democratic system overtime. These kinds of democracy-improving theories obviously bear a resemblance to "political process" theories in united states constitutional law, but generally differ in terms of the sweeping degree to which democracy is viewed as dysfunctional.[52]

'Judicial dynamism' refers to judicial activism which is the opposite of 'judicial restraint'. Judicial restraint means the self control to be exercised by the judiciary. Judicial activism, on the other hand, means proactive role played by the judiciary to protect the rights of the citizens. The judiciary is the arm of government which administers justice to law. The term is used to refer broadly to the courts, judges, magistrates, adjudicators and other support personnel who run the system. The courts apply the law, settle disputes and punish law breaks according to the law. The judicial system is a key aspect of our democratic way of life. It upholds peace, order and good government. Citizens look to the judiciary to uphold their rights and government look to the courts to interprets laws. The judicial arm of government has important

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[52] Phiroza Anklesaria "*Judicial Dynamism*" Boston College Law review,

David Landau, "*A dynamic Theory of Judiciary role*", 55B.C.L Rev. 1501(2014) <https://lawdigitalcommons.bc.edu/bclr/vol55/iss5/4> . Accessed 15th June, 2021

role to play in the impartial interpretation of the law and in keeping the other arms of government in check. 'The judiciary is one leg of the tripod that the government of a country rests on'.

The symbol of justice is that of a blindfolded lady holding scales. This symbolic gesture speaks volumes about the daily acts of judges that of balancing various competing interest and impartially rendering justice. Indeed, the figure of the Themis, the lady of justice which adorns our court houses, blindfolded and wielding swords in one hand and the scales of justice in the other, depicts equality before the law as well as commensuration of crime and punishment.

One of the most important tasks of the judges is that relating to judicial interpretation. While dealing with interpreting provisions of a statute, are silent or uncertain that a judge, a living oracle of the law in Blackstone's vivid phrase, gives us the judge-made law. The judges as interpreter has to supply omissions correct uncertainties and harmonize results with the demand of justice through a method of free decision. The duty of courts is to ascertain and declare whether the impugned legislation is in consonance with or in violation of the provisions of the constitution. Once the courts have done this, their duty ends.[53]

3.1 Development of Democracy in Nigeria[54]

The Nigeria state has been enmeshed in different kinds of authoritarianism right from colonial era till date. Nigeria state is engaged in fierce struggle to break loose from all from of undemocratic governance. Since Nigeria's independence in 1960, the state has been struggling greatly to sustain democracy. However, the political history of Nigeria shows that whenever,

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53 Boston college law review

54 GNOSI: An interdisciplinary journal of Human Theory and Praxis, vol 2(1) (2018) Democracy and National Development: A focus on Nigeria General Studies Department, Federal College of Agriculture Ishiagu, Ebonyi State.

the judiciary is unable to effectively perform its role in sustaining Nigerian democracy, invariably, Nigeria democracy is truncated, thus the inevitability of military intervention in Nigeria politics.[55]

At independence in 1960, Nigeria opted for west minister model of constitution and the court of final appeal was the privacy council in England. In 1963, Nigeria became a Republic and abolished west winter model constitution for the Washington model. Thus, the supreme court of Nigeria became the court of last appeal. When the judiciary could not carry out its constitutional role of interpretation, adjudication and "checks and balances between the other two organs of government (executive and legislature|) there could be inevitability of truncating democratic process. The pressures mounted on the first republic political system could not be diffused, and the judiciary could not carryout its roles effectively, that republic collapsed and pared away for the inevitability of military incursion in Nigeria politics which truncates the 1960's nascent democracy. The military remained in power for about 13 years (1966-1976). In 1979, democracy was restored and a new democracy as the court was but on the protection of the fundamental human rights of Nigerian citizens as witnessed in Shigaba A Darman Federal Ministry of Internal Affair & Ors.[56] The court in pursuant of section 160 and 191, declared, that the actions of the defendants were unconstitutional, null and void thus, restored the fundamental rights of the plaintiff, which were constitutionally guaranteed; the second republic failed as the judiciary derailed from its constitutionally stipulated role of stabilizing and sustaining Nigerian democracy during that era . if the judiciary had effectively played her role, the military junta would not have had any justification for intervening in Nigerian politics. There were public outery and condemnation during the second republic in the manner in which

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55 <https://www.legit.ng/1214198-first-general-election-nigeria.html>

56 *Odumegwu Ojukwu v. Edwin Onwudiwe*

the court handled election petitions of the 1983 general election. In his dissert, in Odumegwu Ojukwu v. Edwin Onwudiwe; Ariogolu, J.S.C unequivocally quoter in minority judgement thus:[57]

> This case was in my view, one in which by fraud in the election, the rightful winner was made looser and the looser was declared the winner. The respondent, or Dr. Edwin Onwudiwe clearly did not win. This court should say so emphatically and I say so unmistakably.

It is obvious that whenever the judiciary failed to play its stabilizing role in Nigerian democratic state democracy is bound to be truncated. As Nigerian political system has continuously been heated up and judiciary was unable to supply the cushioning effect required to avert the imminent collapse of that democratic dispensation. On December 3rd 1983, the military junta took over power from the civilian government. The military era was characterized by coups and counter coups that brought different military generals at the helm of leadership position of the state at various periods from 1983-1999 (16 years).[58]

The ongoing democratic dispensation came into force on the May 29, 199, with a new constitution known as the 1999 constitution known as the 1999 constitution. The judiciary occupies a significant position in the administration of justice in Nigeria democratic state. By the provision of section 6 of the 1999 constitution of Federal Republic of Nigeria, the judicial powers in all their amplitude are vested in courts. In modern democracy are free and fair election, judicial independence, free press, majority rule and protection of minority rights.[59]

The functions of political parties are necessary for effective democratic governance. The principle of the rule of law is the fulcrum of sustainable democracy. Democracy is the best form of government; the superiority of democracy to other forms of government predicates on

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57 *Odumegwu Ojukwu v. Edwin Onwudiwe*; Ariogolu, J.S.C

58 <https://www.legit.ng/1214198-first-general-election-nigeria.html>

59 Arabian Journal of Business and Management Review (OMAN Chapter) vol 3, No 3; Oct 2013

the theory of separation of powers and the corresponding checks and balances exercised amongst the three organs of government. To consolidate and sustain democracy in Nigeria states, the judiciary must fearlessly and boldly rise to its statutory and constitutional roles, thus, imperative and paramount importance of the theory and practice of separation of powers in Nigerian political system.[60]

3.2 Extent of Independence of the Judiciary in Nigeria[61]

3.2.1 Selection for Appointment and Removal of Judicial Officers

The ideal method of selecting and appointing personnel to be entrusted with the task of dispensing justice is a topical issue the world over. 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 State of America, the appointments to the Federal Bench (Supreme Court) is made by the executive – that is to say – the president but this is subject to confirmation by the senate.[62]

To have a vibrant Judiciary, care must be taken care from the onset in the selection or appointment process. Care must be taken that only highly trained, competent, ethical and intelligent men and women are recruited. They must be creative because their creative role in the society is important in carrying out their responsibilities to ensure a balanced society. Moreso as their decision becomes prudent which will and in the development of the law.

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60 Arabian Journal of Business and Management Review (OMAN Chapter) vol 3, No 3; Oct 2013

61 Idris Ahmed Jamo Democracy and development in Nigeria: Is there a link? Department of Public Administration, Ahmadu Bello University, Zaria.

62 Section 2 Article 2 of the American Constitution.

Underscoring the importance of appointing competent judicial officers to the bench, ***Charles Evans Hughes***[63] states:

> A poor judge is perhaps, the most wasteful indulgence of the community. You can refuse to patronize a merchant who does not carry good stock, but you have no recourse if you are haled before a judge who's mental or moral goods are inferior. An honest, high-minded, able and fearless judge is the most valuable servant of democracy for he illuminates justice as he interprets and applies the law, as he makes clear the benefits and short comings of the standards of individual and community rights among a free people.

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

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

Putting it more succinctly **Oputa JSC**[64] said:

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

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

(i) The first method is appointment by the President or Governor acting on the advice of the National Judicial Council and subject to confirmation by either the senate or house Assembly of a State as case may be. The judicial officers affected by this method of

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63 Charles Evans Huges in 1925 as part of a Presidential address to the American Bar Association

64 Oputa C, "judicial Ethics, Law, Justice and the Judiciary", A journal of Contemporary Legal Problems Vol. 1 No. 8

appointment are Chief Justice of Nigeria[65] President of the Court of Appeal[66], Chief Judge of the High Court of Justice FCT Abuja,[67] Chief Judge of State High Court [68], Grand Khadi of the Sharia Court of Appeal FCT Abuja[69], Grand Khadi Sharia Court of Appeal of States,[70] President of the Customary Court of Appeal FCT Abuja[71], President of the Customary Court of Appeal of a State[72], and President of the National Industrial Court. The real makers of the appointment appear to be the National Judicial Council[73].

(ii). The second method of appointment is by the President or Governor acting on the recommendation of the National Judicial Council. No confirmation by either the Senate or House of Assembly is required. Judicial officers in this category are: Justices of the Supreme Court of Nigeria[74], Justices of the Court of Appeal,[75] Judges of the Federal High Court[76], Judges of the High Court of Justice of States,[77] Khadis of the Sharia Court

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65 Section 231 (1) CFRN 1999

66 Section 238 (1) CFRN 1999

67 Section 250 (1) CFRN 1999

68 Section 256 (1) CFRN 1999

69 Section 270 (1) CFRN 1999

70 Section 276 (1) CFRN 1999

71 Section 271 (1) CFRN 1999

72 Section 266 (1) CFRN 1999

73 The argument has seen that when a power is made exercisable by someone on the advice of another, no discretion is imported; the power has to be exercised only as advised. The role of the repository of the power being the purely formal and normal one of merely executing advice.

74 Section 231 (2) CFRN 1999

75 Section 238 (2) CFRN 1999

76 Section 250 (2) CFRN 1999

77 Section 256 (2) CFRN 1999

of Appeal FCT Abuja,[78] Khadis of the Sharia Court of Appeal of States[79], Judges of the Customary Court of Appeal FCT Abuja[80], Judges of the Customary Court of Appeal of States[81], and Judges of the National Industrial Court.

3.3 National Judicial Council Guidelines and Procedural Rules for Appointment of Judicial Officers

The NJC guidelines and procedural rules shall be complied with by the Federal Judicial Service Commission (FJSC), State Judicial Service Commission (SJSC) and the Federal Capital Territory Judicial Service Committee (FCTJSC) in relation to advice, nominations or recommendations of candidates for appointment as Judicial Officers.[82]

3.4 Summary Procedure for Appointment of a State High Court Judge

Amongst the various judicial offices in Nigeria, since the High Court is more Conventional, its procedure for the appointment of a state High Court Judge as provided in Rules 2,[83] 3[84], 4[85] and 5[86] of the Revised National Judicial Council Guidelines & Procedural Rules 2014:

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78 Section 271 (2) CFRN 1999

79 Section 276 (2) CFRN 1999

80 Section 266 (2) CFRN 1999

81 Section 281 (2) CFRN 1999

82 Rule 1 (1)(3) NJCG&PR

83 Rule 2 NJCG&PR

84 Rule 3 NJCG&PR

85 Rule 4 NJCG&PR

86 Rule 5 NJCG&PR

1. The Chairman of the State Judicial Service Commission shall give notice to the Governor of the state of intention to appoint specific number of Judicial Officers and ask for the Governor's consent or approval. At this stageno name of any candidate is to be submitted to the Governor or accepted from the Governor.
2. The state JSC shall forward a copy of the Notice to the Secretary of the NJC. A copy of the Governor's response shall also be forwarded to the secretary of the NJC when received.
3. The chief judge of the state shall then call for nominations from every judicial officers in superior courts in the state as well as every head of Superior Courts in Nigeria.
    a. The Chief Judge of the State shall also call for nominations from the NBA branches through the Chairmen of the branches.
    b. There will also be a call for applications from qualified lawyers through publication on the website of the state judicial service commission, notice board of the courts and NBA.
4. After close of nominations, the Chief Judge shall shortlist at least double the number of Judges intended to be appointed.
5. The Chief Judge shall circulate names of the shortlisted nominees to all serving and retired judicial officers and to all Nigerian Bar Association branches in the state.
6. The Chairman of the State JSC shall send the National Judicial Council (NJC) Bio-data Form (Form A) to every shortlisted nominees. Each of them will fill the form and return it with their Curriculum Vitae to the Chairman.
7. The Chairman of the State JSC shall then table before the Judicial Service Commission for consideration, screening and selection of the following-
    i. Names of shortlisted candidates,
    ii. Completed NJC Form A and the attachments to it,

iii. Comments (if any) received in respect of each candidate,

iv. Petitions (if any) received against shortlisted candidate,

v. Medical certificate of fitness issued by a Government Hospital in respect of each shortlisted candidate,

vi. Security Report on each nominee by the Department of State Security Services.

8. The state JSC shall forward a Memo containing the names of selected or successful candidates to the NJC and request for NJC's recommendation to the Governor.

9. The NJC shall then recommend the successful candidates to the Governor for appointment.

10. Governor appoints the Judges. It is noted that shortlisted candidates usually undergo an interview conducted by the NJC. In the case of the Chief Judge of the State, there must be confirmation by the State House of Assembly.[87]

It should be noted that Discretion is vested on the President or Governor even in relation to the appointment of a Judicial officer. While they cannot appoint a person who has been recommended by the Council, they are not bound to appoint a person on whom a favourable recommendation has been made. Where the president or the Governor turns down a person recommended by the council or the commission, a non-recommended person cannot be appointed. The council or commission must be requested to recommend other persons. This is where the politicking comes in. appointments with Judicial Service Commission at the State level are often made based on political affiliation and political accounts are taken into

[87] The appointment, tenure and removal of judges under common wealth principles. A compendium and analysis of Best Practice.

consideration on the case of recommendation. For example in the composition of the State Judicial Commission, it is to be comprised of the following members:[88]

[88] Memorandum showing the procedure for appointment and transfer of Chief Justices and Judges of High Courts; doj.gov.in/sites/default/files,memohc_0_1.pdf.

(a) The Chief Judge of the State who shall be the Chairman;

(b) The Attorney General of the State;

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

(d) 2 Members who are legal practitioners and who have been qualified to practice as legal practitioners in Nigeria for a period of not less than 10 years; and

(e) 2 other persons not being legal practitioner who in the opinion of the Governor are of unquestionable integrity.[89]

The appointment of the Attorney General of a state and 2 members from the private bar and 2 other persons who are non-legal practitioners to the Judicial Service Commission are often abused in practice. They are appointed contrary to the constitution based on political considerations and more often than not are used to veto important decisions of the Chief Judge of the state especially where the decisions does not go down well with the interest of the state. Appointment is based on undue emphasis on geopolitical or ethnic considerations and in the process utterly incompetent people are appointed based on these considerations.[90]

[89] Memorandum showing the procedure for appointment and transfer of Chief Justices and Judges of High Courts; doj.gov.in/sites/default/files,memohc_0_1.pdf.

[90] Memorandum showing the procedure for appointment and transfer of Chief Justices and Judges of High Courts; doj.gov.in/sites/default/files,memohc_0_1.pdf.

CHAPTER FOUR

REMOVAL OF A JUDICIAL OFFICER

4.0 Introduction

Removal of judicial officers under our present dispensation is done by the president or governor upon an address presented by at least two third majority of the appropriate legislative house calling for such removal on the ground of misconduct or inability to discharge the functions of the office (in the case of the Chief Justice of Nigeria/ State Chief Judge) or on the recommendations of the appropriate judicial service commission (in the case of other judicial officers). It is clear from the above that appointment and removal of judges in Nigeria have been mainly in the hands of politicians, civilians or military as the case may be.[91]

A lot of judges have faced and some are still facing harassment at the hands of politicians across the country.

During the 2nd Republic, the nation witnessed spate of harassment of some judicial officers by politicians[92]. For instance, sometime in 1982, a frantic attempt was made to remove the then Chief Judge of Bauchi State, Hon. Justice Piper. He was later forced to retire ar the end of 1982. At about the same time the then Chief Judge of Benue State Hon. Justice J. M. Adesiyan was having a rough time with the state legislature. The then Chief Judge of Cross Rivers State Hon. Justice Ilefreh was not having it easy with the executive. In July/ August 1982, a determined effort was made by both the executive and legislature of Borno State to remove the then Chief Judge, Hon Justice Kalu Anyah. He was eventually removed in early 1983.[93].

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91 Minutes of the proceedings of the legislative council, 25/06/1998. Pp.601-602

92 Epilogue To Agudu T. A The Judiciary in the Government of Nigeria' New Horn Press, Usadem, (1983) Pp. 175-182

93 He subsequently challenged his removal in court. See Hon. Kaly Anya v. Attorney General of Borno State & Ors (1983) FCA/K/141/81 of 12/4/83 (1984) 5 NCLR 401

The chief judge of Plateau State, Hon. Justice A. O. Obi was also under press attack by a political party in the state. His appointment was even challenged although unsuccessful in the court. Back home in Sokoto state, the Chief Judge of Sokoto State also had it rough with the legislature on grounds that were strictly political but she challenged the action of the legislature and successfully too at the Federal High Court sitting at Abuja[94].

I will also not fail to point out the mellow drama between the out gone Chief Justice of Nigeria, Justice Aloysius Katsina Alu and suspended president of the Court of Appeal, Justice Ayo Isa Salami . In brief the suspension of the President of the Court of Appeal(PCA) Justice Ayo Isa Salami by the National Judicial Council (NJC) over his refusal to apologize to the NJC and the then Chief Justice of Nigeria (CJN), Justice Aloysius Katsina Alu, and his compulsory retirement by President Goodluck Jonathan who acted under his constitutional authority and the subsequent recall of Isa Ayo Salami from Suspension by the NJC which suspended him and the refusal of President Goodluck Jonathan of approve the acts of the NJC raises question regarding the partisan nature and level of Independence within the Nigeria Judiciary.

Attempts have been made overtime to circumvent the procedure laid down by law in the removal of judicial officers in Nigeria. In Elelu-Habib v. A.G.F[95] the supreme court, Per Mohammed JSC on whether the national judicial council can participate in the removal of a chief judge from office remarked as follows:

> The relevant section of the Constitution states:- 292(1)[96] A Judicial Officer shall not be removed from office or appointment before his age of retirement except in the following circumstances:- (a.) In case of (i.) The Chief Justice of Nigeria (ii.) The 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

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94 See the Judgement of the Federal High Court of Nigeria Abuja in Hon Justice Aisha Sani Dahiru vs National Judicial Council & 3 Ors Suit No. FHC/ABJ/CS/426/2008 (unreported) delivered on the 6th of November 2008

95 (2012) LPELR-SC. 281/2010

96 Section 292 (1) Constitution 1999

the address supported by two thirds majority of the House Assembly of the State, praying that he be so removed for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the code of conduct. "The provisions of Section 292(1) made no provision for the National Judicial Council to play any role in the removal of a Chief Judge of a State, the fact that the council has a vital role to play in the appointment, removal and exercising control over a Chief Judge of a State under Section 271(1)[97] of the constitution and also under paragraph 21 of part 1 of the Third Schedule to the same Constitution is not at all in doubt. Furthermore, the conditions specified under Section 292(1)[98] (a)(ii) of the Constitution for the exercise of the power of removal must be satisfied before such power can be validly exercised by both the Governor and the House of Assembly.

This is because any exercise of power to remove a Chief Judge must be based on his:- 1. Inability to discharge the functions of office or appointment; 2. The inability to perform the functions of his office could arise from infirmity of the mind or of body; 3. For misconduct or 4. The contravention of the code of conduct all these conditions or basis for the exercise of power to remove a state chief judge must be investigated and confirmed by credible evidence and placed before the Governor and the House of Assembly before proceeding to exercise their power of removal granted by the Section of the Constitution. For example the ground of removal for inability to perform the functions of his office or appointment cannot be ascertained and confirmed by the Governor or the House of Assembly in the absence of any input from the National Judicial Council under which supervision the chief Judge discharges his functions as Judicial officer and which body also is directly and responsible for exercising disciplinary control over the said State Chief Judge. It is not difficult to see that for the effective exercise of the powers of removal of a Chief Judge of a State by the Governor and House of Assembly, the first port of call by the Governor on his journey to remove a Chief judge of the state shall be the National Judicial Council which is equipped with the personnel and resources to investigate the inability of the Chief Judge to discharge the functions of his office (the subject of disciplinary action of removal through the committees of the council and where the infirmity of the mind or body is involved) the services of a medical board to examine and Submit appropriate report on the Chief Judge to be affected could also avail the Council in the process of investigation. It is for the foregoing reasons that I hold the view that in the resolution of the issue at hand, the entire provisions the 1999 Constitution in Sections 153(1)(i)(2),[99] 271(1), 292(1)(a)(ii)[100] and paragraph 21 of Part 1 of the Third Schedule to the Constitution of the Federal Republic of Nigeria 1999 dealing with the appointments removal and exercise of disciplinary control over Judicial Officers, must be read interpreted and applied together in resolving the issue of

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97 Section 271 (1) Constitution 1999

98 Section 292 (1) Constitution 1999

99 Section 153 (1)(i), (2) Constitution 1999

100 Section 292 (1)(a), (ii) Constitution 1999

> whether or not the Governor of a State and the House of Assembly of a State can remove a Chief Judge of a State in Nigeria without any input of the National Judicial Council. This is because the combined effect of these provisions of the Constitution has revealed very clear intention of the framers of the Constitution to give the National Judicial Council a vital role to play in the appointment and removal of Judicial Officers by the Governors and Houses of Assembly of the State. In the result, I entirely agree with the two Courts below that having regard to these relevant provisions of the 1999 Constitution the Governor of Kwara State and the House of Assembly of the State cannot remove the Chief Judge of Kwara State from Office without the participation of the National Judicial Council in the exercise.

The more recent happening in this respect was the removal of **Walter Nkanu Onnoghen CJN** from office firstly using ex parte to suspend him from office by the Code of Conduct for Bureau for alleged offences of not declaring his full assets. The prosecution of Onnoghen was criticized by pundits who saw the prosecution as onslaught on the judiciary[101], A major factor that shows the tribunal day to day trial was to secure conviction and not to do justice was on failure to consider the following which thereby led to miscarriage of justice

1. On the authority of Nganjiwa v. FRN (2018) 4 NWLR (PL. 1609)[102] 301 at 340342 only the National Judicial Council has the power to discipline the Appellant for misconduct and not the lower tribunal.
2. The lower tribunal had in the case of FRN V. Sylvester NwaliNguta[103] in charge No: CCT/ABJ/01/2017 delivered on 9th January, 2018 affirmed the position of the Court in FRN Nganjiwa v. FRN and dismissed the charges and acquitted and discharged Justice Nguta being a Judicial Officer subject only to the discipline of the National Judicial Council.

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101 See <https://www.premiumtimesng.com/news/headlines/308039-onnoghens-suspension-coup-against-judiciary-unacceptable-nba.html> accessed 24th June 2021.

102 Nganjiwa v. FRN (2018) 4 NWLR (PL. 1609)

103 FRN V. Sylvester NwaliNguta in charge No: CCT/ABJ/01/2017

3. The lower tribunal has no jurisdiction over serving judicial officers such as the appellant save the National Judicial Council.

4.1 Security of Tenure and Remuneration of Judge and Supporting Staff

It is said that Magistrates, Area and Customary Court Judges and Shariah Court Judges are under the Constitution of the Federal Republic of Nigeria not covered by the term "Judicial Officers 1hey are appointed, promoted and subjected to disciplinary control by the various states Judicial Service Commission,[104] even though they perform the bulk of judicial work and closer to the grassroots, their usefulness is undermined. One wonders why they can be referred to as non-judicial officers. Remuneration at the Superior Courts of records level has been greatly improved upon in recent years even though there can still be room for improvement, compared with their colleagues in other developing and transition states particularly having regard to the volume of work and the environment in which they operate, the major problem has to do with judges of the lower courts. They are not covered. They take home peanuts, their salaries, allowances, environment and social facilities both in their places of work and family matters are pathetic. This paves way for manifest corruption and ineptitude and generally lack of seriousness to work.

Notwithstanding the improved salaries of the Superior Courts of records, allegations of corruption, continuously rears its ugly head in the cause of public discourse and judges of superior courts have been dismissed on proven allegation thereby casting a huge question mark on the independence of the Nigerian Judiciary Sometimes ago, some justices of the Court of Appeal were dismissed by the National Judicial Council for receiving bribes on the course of hearing of election petition cases. We also witnessed the probing of judges of the High Courts, a Customary Court of Appeal judge, Shariah Court of Appeal Judge who and a were

[104] Paragraph 5 Part II of the Third Schedule to the CFRN 1999.

investigated and arrested by security operatives for allegedly carting away large sums of money in Akwa lbom State in an election petition tribunal.

Two factors propel judicial officers to engage in corruption namely:

(1) Greed: This simply mean that some judges want to style themselves after the ostentation's lifestyles of politicians. They want to own duplex or skyscrapers in Dubai; they want to go to France and USA for long term holidays and invest in practically all the known business of the world and most importantly even take chieftaincy titles.

(2) Habit: There seems justification to conclude that some judicial officers appeared to carry over this habit from the lower bench to the higher bench

4.2 Budgetary Provisions (Process)

The involvement of the Federal Government of Nigeria and State Government as the case maybe in the budget process of Courts in Nigeria is an indication of the extent of Judicial independence in Nigeria.[105] Unchecked domination of one branch over the other can produced dysfunctional budgetary allocation process. In Nigeria, this plays down especially at the state level. Clear out constitutional provisions are recklessly ignored by the Governors of the States particularly with regards to capital expenditure for state judiciaries. The constitution provides;[106] "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.

This provision rather than be Complied with by the State Government is often breached especially where the head of Court within the state is not in the good books of the Governor of the State. This dysfunctional budgetary allocation has given rise to disastrous situation for the

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105 Wikipedia, the free encyclopedia history, origins and traditions of the budget. The first budget Archived from the Original on 2013-12-24 accessed 24th June 2021.

106 Section 1213) CFRN 1999

Judiciary. Absence of funds can lead to non-availability of physical structures or grossly inadequate structures like Court halls, chambers, Registries and offices for supporting staff which will in turn affect the flow of cases and other essential services thus leading the system not been able to face the demand and deliver the requisite justice demanded.

Sometimes salaries and allowance of supporting staff can be too low and in arrears for months thereby Creating an atmosphere of frustration and discontentment, which normally breeds indiscipline corruption and eventually breakdown of the system.

4.3 Individual and Institutional Freedom rem Uawaranted Interference with the Judicial Process by the Executive Arm of Government and Politicians[107]

The history of the Judiciary around the world demonstrates that the greatest danger of interference counsel from other government Institutions political parties an independent Judiciary only be independent in unwarranted interference with the judicial process by the executive arm of government and politicians but it must appeal to be independent. This brings into operation the popular adage justice must not only be done, but also must see to be done" To remain just, the courts must not be influenced by any outside sources or appear to be capable of such influence. To aid such a perception, they must have no real or apparent contact with a political party. If such contact exists, they would appear to be bias in favour of the policies of that party or if the party controls the state, to be biased in favour of the state succumbing to pressures from the executive arms to inappropriate interference with judicial independence.

Access to judges outside official channels has been one of the greatest problems that further threaten the independence of the Judiciary in Nigeria. Governors of states have direct access to judges within the state even as it relates to matters in court and lawyers and clients often boast of their accessibility to judges or even panel of an election petition hearing particular cases.

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107 Higgs, Robert (2018) "Government Growth". In David R. Henderson (ed.) Concise Encyclopedia (2nd ed.) Indianapolis; library of economics and liberty ISBN978 - 0865976658

The unresolved saga between the out gone Chief Justice of Nigeria and the embattled President of the Court of Appeal is an example Thence the unbridled access to judges and justices amount to self-erosion by the Judiciary of the principle of independence of the Judiciary. What is more, judges, drivers, stewards, gardeners, salesmen, orderlies, registrars and other staff reveal information to who visits their boss to the outside world Intimidation and lawlessness by members of the executive especially Governors abound Governors show contempt 1o court order when it does not please them and even the legislators One wonders the justification where legislators had the impudence to summon a Chief Judge to come and answer questions in connection with appointment in a Court of Appeal, a Court when the Chief Judge had no influence whatsoever or a situation when a state police commissioner refuses to comply with a High Court order on seven successive occasions.

CHAPTER FIVE

5.0 DEVELOPMENT OF DEMOCRACY IN OTHER PRACTISING COUNTRIES

Democracy in England

Among the assemblies created in Europe during the Middle Ages, the one that most profoundly influenced the development of representative government was the English Parliament. Less a product of design than an unintended consequence of opportunistic innovations, Parliament grew out of councils that were called by kings for the purpose of redressing grievances and for exercising judicial functions. In time, Parliament began to deal with important matters of state, notably the raising of revenues needed to support the policies and decisions of the monarch. As its judicial functions were increasingly delegated to courts, it gradually evolved into a legislative body. By the end of the 15th century, the English system displayed some of the basic features of modern parliamentary government: for example, the enactment of laws now required the passage of bills by both houses of Parliament and the formal approval of the monarch.[108]

Other important features had yet to be established, however. England's political life was dominated by the monarchy for centuries after the Middle Ages. During the English Civil Wars, led on one side by radical Puritans, the monarchy was abolished and a republic—the Commonwealth was established (1649), though the monarchy was restored in 1660. By about 1800, significant powers, notably including powers related to the appointment and tenure of the prime minister, had shifted to Parliament. This development was strongly influenced by the emergence of political factions in Parliament during the early years of the 18th century. These factions, known as Whigs and Tories, later became full-fledged parties. To king and Parliament

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108 <https://www.legit.ng/1214198-first-general-election-nigeria.html>

alike it became increasingly apparent that laws could not be passed nor taxes raised without the support of a Whig or Tory leader who could muster a majority of votes in the House of Commons. To gain that support, the monarch was forced to select as prime minister the leader of the majority party in the Commons and to accept the leader's suggestions for the composition of the cabinet. That the monarch should have to yield to Parliament in this area became manifest during a constitutional crisis in 1782, when King George III (reigned 1760–1820) was compelled, much against his will, to accept a Whig prime minister and cabinet—a situation he regarded, according to one scholar, as "a violation of the Constitution, a defeat for his policy, and a personal humiliation." By 1830 the constitutional principle that the choice of prime minister, and thus the cabinet, reposed with the House of Commons had become firmly entrenched in the (unwritten) British Constitution.[109]

Parliamentary government in Britain was not yet a democratic system, however. Mainly because of property requirements, the franchise was held by only about 5 percent of the British population over 20 years of age. The Reform Act of 1832, which is generally viewed as a historic threshold in the development of parliamentary democracy in Britain, extended the suffrage to about 7 percent of the adult population. It would require further acts of Parliament in 1867, 1884, and 1918 to achieve universal male suffrage and one more law, enacted in 1928, to secure the right to vote for all adult women.

5.1 Development of Democracy in the United States

Whereas the feasibility of representative government was demonstrated by the development of Parliament, the possibility of joining representation with democracy first became fully evident

[109] <http://nationalsic.org/about/history/jstor.org/stable/1943883>

in the governments of the British colonies of North America and later in the founding of the United States of America.

Conditions in colonial America favoured the limited development of a system of representation more broadly based than the one in use in Great Britain. These conditions included the vast distance from London, which forced the British government to grant significant autonomy to the colonies; the existence of colonial legislatures in which representatives in at least one house were elected by voters; the expansion of the suffrage, which in some colonies came to include most adult white males; the spread of property ownership, particularly in land; and the strengthening of beliefs in fundamental rights and popular sovereignty, including the belief that the colonists, as British citizens, should not have to pay taxes to a government in which they were not represented ("no taxation without representation").

Until about 1760, most colonists were loyal to the mother country and did not think of themselves as constituting a separate nation of "Americans." After Britain imposed direct taxation on the colonies through the Stamp Act (1765), however, there were public (and sometimes violent) displays of opposition to the new law. In colonial newspapers there was also a sharp increase in the use of the term *Americans* to refer to the colonial population. Other factors that helped to create a distinct American identity were the outbreak of war with Britain in 1775 and the shared hardships and suffering of the people during many years of fighting, the adoption of the Declaration of Independence in 1776, the flight of many loyalists to Canada and England, and the rapid increase in travel and communication between the newly independent states. The colonists' sense of themselves as a single people, fragile as it may have been, made possible the creation of a loose confederacy of states under the Articles of Confederation in 1781–89 and an even more unified federal government under the Constitution in 1789.

Because of the new country's large population and enormous size, it was obvious to the delegates to the Constitutional Convention (1787) that "the People of the United States," as the opening words of the Constitution referred to them, could govern themselves at the federal level only by electing representatives—a practice with which the delegates were already familiar, given their experience of state government and, more remotely, their dealings with the government in Britain. The new representative government was barely in place, however, when it became evident that the task of organizing members of Congress and the electorate required the existence of political parties, even though such parties had been regarded as pernicious and destructive—"the bane of republics"—by political thinkers and by many delegates to the Constitutional Convention. Eventually, political parties in the United States would provide nominees for local, state, and national offices and compete openly and vigorously in elections.[110]

It was also obvious that a country as large as the United States would require representative government at lower levels—e.g., territories, states, and municipalities—with correspondingly limited powers. Although the governments of territories and states were necessarily representative, in smaller associations a direct assembly of citizens was both feasible and desirable. In many New England towns, for example, citizens assembled in meetings, Athenian style, to discuss and vote on local matters.[111]

Thus, the citizens of the United States helped to provide new answers to question 1—What is the appropriate unit or association within which a democratic government should be established?—and question 3—How are citizens to govern? Yet, the American answer to

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110 Francis Newton Thorpe Democracy in America "the evolution of man is the hope of the state "

111 U.S. Department of State archive Bureau of Democracy, Human rights and labour

question 2—Who should constitute the *dēmos*?—though radical in its time, was by later standards highly unsatisfactory. Even as the suffrage was broadly extended among adult white males, it continued to exclude large segments of the adult population, such as women, slaves, many freed blacks, and Native Americans. In time, these exclusions, like those of earlier democracies and republics, would be widely regarded as undemocratic.

Democracy or Republic?

Is *democracy* the most appropriate name for a large-scale representative system such as that of the early United States? At the end of the 18th century, the history of the terms whose literal meaning is "rule by the people"—*democracy* and *republic*—left the answer unclear. Both terms had been applied to the assembly-based systems of Greece and Rome, though neither system assigned legislative powers to representatives elected by members of the *dēmos*. As noted above, even after Roman citizenship was expanded beyond the city itself and increasing numbers of citizens were prevented from participating in government by the time, expense, and hardship of travel to the city, the complex Roman system of assemblies was never replaced by a government of representatives—a parliament—elected by all Roman citizens. Venetians also called the government of their famous city a republic, though it was certainly not democratic.[112]

When the members of the United States Constitutional Convention met in 1787, terminology was still unsettled. Not only were *democracy* and *republic* used more or less interchangeably in the colonies, but no established term existed for a representative government "by the

[112] Wikipedia: the free encyclopedia Blewett, Lynn A; et al (December, 2006) "How much health insurance is enough? Revisiting the concept of under insurance" Medical care research and review. 63(6)I 663 – 700.

people." At the same time, the British system was moving swiftly toward full-fledged parliamentary government. Had the framers of the United States Constitution met two generations later, when their understanding of the constitution of Britain would have been radically different, they might have concluded that the British system required only an expansion of the electorate to realize its full democratic potential. Thus, they might well have adopted a parliamentary form of government.[113]

Embarked as they were on a wholly unprecedented effort to construct a constitutional government for an already large and continuously expanding country, the framers could have had no clear idea of how their experiment would work in practice. Fearful of the destructive power of "factions," for example, they did not foresee that in a country where laws are enacted by representatives chosen by the people in regular and competitive elections, political parties inevitably become fundamentally important institutions.

Given the existing confusion over terminology, it is not surprising that the framers employed various terms to describe the novel government they proposed. A few months after the adjournment of the Constitutional Convention, James Madison, the future fourth president of the United States, proposed a usage that would have lasting influence within the country though little elsewhere. In "Federalist 10," one of 85 essays by Madison, Alexander Hamilton, and John Jay known collectively as the Federalist papers, Madison defined a "pure democracy" as "a society consisting of a small number of citizens, who assemble and administer the government in person," and a republic as "a government in which the scheme of representation takes place." According to Madison, "The two great points of difference between a democracy and a republic, are: first, the delegation of the government, in the latter, to a small number of

[113] Compton's Pictured encyclopedia and fact – index ohio 1963 p.336

citizens elected by the rest; secondly, the greater the number of citizens, and greater sphere of country, over which the latter may be extended." In short, for Madison, *democracy* meant direct democracy, and *republic* meant representative government.[114]

Even among his contemporaries, Madison's refusal to apply the term *democracy* to representative governments, even those based on broad electorates, was aberrant. In November 1787, only two months after the convention had adjourned, James Wilson, one of the signers of the Declaration of Independence, proposed a new classification. "The three species of governments," he wrote, "are the monarchical, aristocratical and democratical. In a monarchy, the supreme power is vested in a single person; in an aristocracy…by a body not formed upon the principle of representation, but enjoying their station by descent, or election among themselves, or in right of some personal or territorial qualifications; and lastly, in a democracy, it is inherent in a people, and is exercised by themselves or their representatives." Applying this understanding of democracy to the newly adopted constitution, Wilson asserted that "in its principles,…it is purely democratical: varying indeed in its form in order to admit all the advantages, and to exclude all the disadvantages which are incidental to the known and established constitutions of government. But when we take an extensive and accurate view of the streams of power that appear through this great and comprehensive plan…we shall be able to trace them to one great and noble source, THE PEOPLE." At the Virginia ratifying convention some months later, John Marshall, the future chief justice of the U.S. Supreme Court, declared that the "Constitution provided for 'a well regulated democracy' where no king, or president, could undermine representative government." The political party that he helped to organize and lead in cooperation with Thomas Jefferson, principal author of the Declaration

114 "Census Bureau's 2020 population count" United States Census Human development Report 2020. The next frontier: Human Development and the Anthropocene" United Nations development Programme.

of Independence and future third president of the United States, was named the Democratic-Republican Party; the party adopted its present name, the Democratic Party, in 1844.

Following his visit to the United States in 1831–32, the French political scientist Alexis de Tocqueville asserted in no uncertain terms that the country he had observed was a democracy indeed, the world's first representative democracy, where the fundamental principle of government was "the sovereignty of the people." Tocqueville's estimation of the American system of government reached a wide audience in Europe and beyond through his monumental four-volume study *Democracy in America* (1835–40).

Solving the dilemma

Thus, by the end of the 18th century both the idea and the practice of democracy had been profoundly transformed. Political theorists and statesmen now recognized what the Levelers had seen earlier, that the nondemocratic practice of representation could be used to make democracy practicable in the large nation-states of the modern era. Representation, in other words, was the solution to the ancient dilemma between enhancing the ability of political associations to deal with large-scale problems and preserving the opportunity of citizens to participate in government.[115]

To some of those steeped in the older tradition, the union of representation and democracy seemed a marvelous and epochal invention. In the early 19th century the French author Destutt de Tracy, the inventor of the term *idéologie* ("ideology"), insisted that representation had rendered obsolete the doctrines of both Montesquieu and Jean-Jacques Rousseau, both of whom had denied that representative governments could be genuinely democratic.

[115] Democracy in America English edition. vol.1 olli.libertyfund.org/title/democracy-in-america-english-edition vol. 1

"Representation, or representative government," he wrote, "may be considered as a new invention, unknown in Montesquieu's time.… Representative democracy…is democracy rendered practicable for a long time and over a great extent of territory." In 1820 the English philosopher James Mill proclaimed "the system of representation" to be "the grand discovery of modern times" in which "the solution of all the difficulties, both speculative and practical, will perhaps be found." One generation later Mill's son, the philosopher John Stuart Mill, concluded in his *Considerations on Representative Government* (1861) that "the ideal type of a perfect government" would be both democratic and representative. Foreshadowing developments that would take place in the 20th century, the *dēmos* of Mill's representative democracy included women.

5.2 Development of Democracy in Norway

200 years ago Norway had about 900 000 inhabitants and the country was reckoned to be among the poorest in Europe. In the following century the population increased to 2.2 million. In the same time period, from 1860 to 1920, more than 700 000Norwegians emigrated to North America, many of them driven out by poverty. What caused the increase in population? More food was being produced in agriculture and in the fisheries, so nutrition had improved and many could afford to build better houses.[116] The first vaccination (smallpox) was introduced in 1810 and hygiene also improved. The country was in the midst of a process of rapid modernisation. Both an agricultural and an industrial revolution were in fact taking place. In a country where communication between different regions had been made difficult by tall mountains and long distances, a communications revolution evolved. People were 'knit' together in new ways by steamboats, railwaylines, roads, telephone lines and so on. Culturally

[116] Country reports on Human Rights Practices 2011

the modernization showed through the establishment of a school system that was compulsory for all and had a common curriculum. From 1889 everyone had to go to school for at least seven years. This process was enhanced by the founding of a large number of interest associations. In this way people joined organisations they sided with. To many, these organisations came to be a good training ground for performing on the public stage and many also learnt that the aims these organisations wanted to pursue, must in the end be realised through political participation.[117]

Background The development of democratic institutions in Norway started more than two hundred years ago. The year 1814 may be characterised as a major turning point in Norwegian history. Until this year Norway had been in union with Denmark for more than 400years. It was called a union, but Denmark was no doubt the stronger part. The two countries were for many years governed by absolutist monarchs and their common aim was to weld the countries together politically, economically and culturally. In short, the kings wanted to create a united nation with the Danish capital, Copenhagen, asits centre. The position of Norway in this union can to some extent be characterized as that of a colony. Vital political decisions were made in far-away Copenhagen, often by people who did not know Norway very well. The important political institutions were also located in Copenhagen and a disproportionately large part of the money paid by the people of Norway as taxes, ended in Copenhagen and was spent in Denmark. But it should also be added that historians still discuss the financial relations between Norway and Denmark.[118] The government in Copenhagen did quite a lot to help encourage trade and industry in Norway, especially in the 1700s, and goods produced in Norway enjoyed

[117] The economist intelligence unit (8 January, 2019) "Democracy index 2019" "2019 world press freedom index reporters without borders 2019 "Norway" freedom House freedom House.

[118] Walter Gibbs: Norway keeps leftists in power, the New York Times "Norway to have single chamber parliament" Norden

advantages in the Danish market. Compared to the way other peripheral countries (like Ireland) were treated at this time in Europe, it may be argued that Norway was lucky to have Denmark as its 'mother country'. Economic activity increased sharply in Norway during the 1700sand an urban bourgeoisie began to develop. The population was also increasing rapidly. Local government had to expand and a number of new public servants, embetsmenn11, as they were called, were employed. Many of the persons employed in government and the leaders of trade and industry in Norway had a Danish back-ground. But after a generation or two in Norway, many of them gradually began thinking more like Norwegians. Questions like the following began to appear: Why should all the important decisions be made in Copenhagen? Why do we not have a Norwegian bank in Norway? Why should we send our sons all the way to Copenhagen to get a university education? This 'independence' thinking can be seen as an early emerging Norwegian patriotism. There was, however, no question about leaving the union, but rather a wish that the union should adjust some more to Norwegian demands. At the end of the 1700s there were clear signs of an emerging Norwegian patriotism in the upper classes in Norway. This could, under the right circumstances, develop into a national movement aimed at establishing Norway once more as an independent nation. The question was whether the Norwegian society was strong enough, rich enough and self-conscious enough to be able to leave the association with Denmark and step into the ranks of independent states.

A new constitution and democratic institutions During the year 1814 'the right circumstances' did appear. On the European continent war had been raging for many years (the Napoleonic wars). Denmark-Norway managed for some years to keep itself neutral. But it became steadily more difficult to balance between the principal antagonists, France and Britain. In 1801 and later in 1807 British forces attacked Copenhagen and captured the Danish-Norwegian fleet and after the last attack a choice had to be made. The king in Copenhagen decided to ally with Napoleon. This might have been the best decision for Denmark, but it resulted in serious

problems for Norway. Britain put up a sea blockade and Norway was completely isolated by the British navy. In this way the export by ship of Norwegian goods like timber, fish and iron was prevented. At the same time the vital import of grain from Denmark was stopped.[119] This meant difficult times and lack of food for many and starvation for the poor. To many it also illustrated the problems of staying in a union with Denmark. Norway had to find her own way. The events on the continent, with Napoleon's defeat to Russia in1812, marked the beginning of the end of the emperor. Sweden decided to join Britain and her allies and demanded Norway as the ' reward' for her support. This led to what may be called a Norwegian rebellion. In an attempt to prevent the transfer of Norway to Sweden, the Danish crown prince was sent to Norway on a secret mission to start an uprising. He probably had a hope that if Norway could stand up as a kingdom of her own, it would be very difficult for Sweden to force Norway into a Swedish-Norwegian union. And perhaps Norway would want to renew her union with Denmark after the war? At once the crown prince of Denmark took a leading role in the Norwegian rebellion. It was decided that a national assembly had to be elected. A constitution had to be agreed upon by the assembly and then a king could be elected. Norway would then be a kingdom in her own right. At the beginning of April in 1814, 112 elected representatives met and started working on the new constitution. By the 17th of May the work on the constitution was finished and the crown prince was elected king. Norway had been restored as an independent state. And the representatives could do what they did knowing that behind them was a strong national movement. A national awakening had taken place. What kind of a constitution had the representatives drafted for Norway? We clearly see the inspiration from the American Constitution of 1787 and the new constitution in France from 1791.[120] The

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119 abcnews.com/storyline/trumps-address-to-congress

120 Wiley Online Library <https://doi.org/10.111/j.1467- 9477.2006.00140>

Norwegian constitution was written in five weeks and it is the most important legacy of 1814. Ever since it has been the basis on which political life and the country's civil rights have rested. The sovereignty of the people was to be the backbone of the constitution combined with the division of power. Power was divided between Stortinget (the national assembly), the king and his government and the courts. Stortinget was to make laws and decide on the national budget, the king was to have the executive power while the independent courts had the judicial power. Stortinget was to be elected on the basis of a wide franchise. The rules of suffrage were liberal for the time and all men over 25 years of age who were public officials, farmed taxed land or had a property of a certain value, got the right to vote. This meant as many as 30-40 per cent of all men. In this way many of the small farmers were given political influence, not only as voters, but they could also be elected members of Stortinget. No other country in Europe had such a wide franchise at that time.1814: the Swedish-Norwegian union. The year 1814 also meant that the political drama on the European continent left its mark on the development in Norway. Early in 1814Norway left the union with Denmark and the year ended with Norway having to enter a new union, this time with Sweden. The nations that defeated Napoleon had promised the Swedish king Norway as a prize and a small and poor country like Norway had no chance to stand up against this. But in the autumn the situation in many ways had changed to the advantage of Norway. A democratic constitution, her own political institutions, with the national assembly at the centre and a strong national movement were vital elements. So, when Norway was to enter the forced union with Sweden, it became much more a union between equal partners than had been the case in the Danish-Norwegian union. True enough, the Norwegians had to accept the Swedish king and he was given much power. Norway was not allowed to have her own foreign policy and the king also had a suspensive veto on legislation. But the rest of what had been won in the spring of 1814 was saved. The first paragraph of the constitution stated: 'The Kingdom of Norway is a free, self-governing, indivisible and

inalienable real munified with Sweden under one king.' Comparing the two countries, Sweden was definitely the strongest. The country had also been dominated for a long time by an aristocracy ruling in an alliance with the king. This meant that Sweden was strongly influenced by powerful groups with rather conservative attitudes. Could a more democratic Norway safeguard her constitution and political institutions in the union in the coming years?[121]

As expected, the first years after the war proved to be difficult years for the new state. Many private companies went bankrupt and the state lost money as well. Financial problems were made worse by an enormous rate of inflation. A special tax, called 'the silver tax', had to be paid in silver by all who were well off. But what was even more threatening was the king's plan to weaken democracy and to put Norway into a closer union with Sweden. Again and again the king's proposals were rejected by Stortinget and the independent position of Norway was gradually secured. The leaders of the resistance against the king's attempts to strengthen his power and to weaken the democratic institutions of Norway were the embetsmenn, a small but very important group of officials, or public servants. They were few, only about 2 000, but thanks to their background and their position in society more generally, they came to constitute what we could call a national class along with the business elite and some of the largest farmers[122]. Since Norway lacked an aristocracy, the farmers and the middle classes were ready to accept the embetsmann group as their political leaders, at least for the time being.

Another important step in the development of democracy in Norway was taken in 1837 with the introduction of local self government. A local board elected by the people was given the power to decide how they would govern their municipality in certain areas such as the building of schoolhouses, the salary of the teachers, building and maintenance of local roads and the

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121 Wiley Online Library <https://doi.org/10.111/j.1467- 9477.2006.00140>

122 Wiley Online Library <https://doi.org/10.111/j.1467- 9477.2006.00140>

care of the poor.[123] This reform was introduced in Stortinget by a group of farmers, but was also supported by the embetsmann group. So far the local com-munities had been governed by public servants. This group came tolose some of their power and it may seem strange that the embetsmann group in Stortinget would support the reform. But this tells something about the way they looked upon their role as a national class. They were, quite naturally, interested in safeguarding many of their privileges, but they were also progressive. More power to the people and more of local self government meant to the embetsmann group that the administration of local communities was improved. The idea was that as the leading class in Norwegian society, they also had to take responsibility for the modernising process of the nation. Material progress would also come easier with good governance and this would enhance development for everyone. The local board that was to be elected was called the Formannskap and the law that established local self government was called Formannskapsloven. In the first years rather few took part in the local elections, but gradually interest increased. And these local boards came to be very important for the development of Norwegian democracy.[124] An increasing number of persons became involved in politics and the running of their local communities and they had to learn the basics of political participation. They also came to learn that some of the problems they met in local government were strongly influenced by decisions made in Stortinget. So really to change things in their own communities they also had to get involved in politics at the national level. Seen from a more general point of view the task of local government is to make decisions in local matters and to be a link between citizens and central government. To most citizens central government is something distant and the most important link is the vote every fourth year. In the long periods between

123 Wiley Online Library <https://doi.org/10.111/j.1467- 9477.2006.00140>

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elections, local government should give citizens a feeling that they are included in the system of governance. In other words: a feeling of ownership. Interest associations may often have the same function. After the introduction of local government the king gradually became less involved in Norwegian politics. He was not the young and energetic man any longer. He had not succeeded in his attempts to direct Stortinget and the cabinet. The political institutions of Norway would not accept the power of a strong monarch. With the king more in the background, the officials of Norway came to dominate the cabinet. The cabinet itself ended as a self recruiting body of politicians with a background as embetsmenn.[125] For several years the embetsmenn also came to play a dominating role in Stortinget, much because the majority of farmers and others with a middleclass background looked upon them as representatives of the leading national class and accepted their leadership.

Parliamentary Government

Early in the 1860s a growing tension between groups of representatives appeared in Stortinget. The majority belonged to the farmers' group. They were only loosely organised and had so far accepted the leadership of the embetsmann group. But now things had started to change, both inside the national assembly and outside.[126] In Norway, as in most of Europe, there was a rapid economic development and this implied that changes were taking place in the balance between different social groups. The position of the embetsmenn as the leading national group had been marked by their control of the cabinet and their leader-ship in Stortinget. But a fast growing

125 Wiley Online Library <https://doi.org/10.111/j.1467- 9477.2006.00140>

126 Wiley Online Library <https://doi.org/10.111/j.1467- 9477.2006.00140>

middle class was now less inclined to accept this leadership. The values of the middle class and their ideas of how society should develop did not always correspond with the ideas of the embetsmenn. Attempts had been made as early as 1859 to organise an alliance in Stortinget between the farmers' group and the growing number of representatives with a middle class background, but with little success. Ten years later, however, an alliance was formed between the two groups. It was called the Liberal alliance. From now on they could control what was taking place in Stortinget, but still they had no control over decisions made in the cabinet. The conflict between the old national class of embetsmenn and the fast growing middle class gradually came to be linked to the question of the introduction of parliamentarism in the Norwegian political system.[127] The constitutional principle that a cabinet must have the support of a majority in the national assembly was not mentioned in the constitution. On the other hand, the national assembly was the elected and therefore the democratic body which expressed the will of the people. The conflict was intensified by the role of the king. He came to side with and support the embetsmenn. In this way the conflict also brought into the open the old antagonism felt by most Norwegians towards the Swedish king. The embetsmenn came to stand out as a group which would fight against democratisation, in an alliance with the king. Things had really been turned upside down. In 1814and for many years on, the embetsmenn had been the strongest defenders of the constitution against the king's attempts to curtail the democratic institutions. Now they had ended up in an alliance with the king, against the majority in Stortinget.[128] To many Norwegians the embetsmenn came to be looked upon as representatives of an old and outgoing regime. The social foundations of this regime were also under pressure.

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127 H.B.lees-Smith "*The parliamentary system in Norway*" Journal of Comparative Legislation and International Law third series, vol.5, No.1 (1923), pp. 35-46.

128 H.B.lees-Smith "*The parliamentary system in Norway*" Journal of Comparative Legislation and International Law third series, vol.5, No.1 (1923), pp. 35-46.

The old alliance between embetsmenn, businessmen and large farmers was crumbling. New groups of businessmen tended to side with the Liberals. Parallel to the political and social processes, new ways of expressing and exerting political influence developed. An impressive number of voluntary organisations were part of this, together with a number of new newspapers. The political rally, as a way of meeting and discussing political questions, also appeared for the first time in the 1870s. In Stortinget the Liberals passed amendments to the constitution giving ministers in the cabinet access to the sessions in Stortinget. In this way ministers would have to come to the nation-al assembly to defend the policies they were implementing. But the king claimed he had an absolute veto in constitutional matters, even though nothing was said of this in the constitution. The ministers of the cabinet advised the king to refuse to give his consent.[129] They feared they would come under pressure if they were to appear in Stortinget to explain and defend their decisions. In the end the cabinet would loose its independence and this was not in accordance with the idea of the division of power as it was expressed in the constitution. Finally, the Liberals were to use the weapon of last resort. They decided to make the members of the cabinet appear before the Court of Impeachment. A requirement for impeachment was a clear majority for the Liberals in Stortinget. The election campaign of 1882 marked a turning point with regard to political involvement. The dividing lines between the opposing forces were now more clearly drawn than earlier and this campaign was the first in Norway where strong efforts were made to mobilize the voters. The arguments were morepolarized than before; you were for or against government by the people, for or against popular control of the constitution. The involvement and turn out of voters were also

[129] H.B.lees-Smith "*The parliamentary system in Norway*" Journal of Comparative Legislation and International Law third series, vol.5, No.1 (1923), pp. 35-46.

much higher than in earlier elections.[130] The campaign was fought in a fair way and basic rights of a democratic society like the right of assembly, the right of expression and the right of publication were now recognized. In 1884 the prime minister and several of the cabinet ministers were sentenced to lose their positions for having advised the king not to sanction the constitutional amendments. The king had to ask the leader of the Liberals to become the new prime minister and parliamentarism had won its way. A coup d'etat was planned by the king and those who supported the cabinet ministers, but in the end no one dared to start what could have ended in a civil war.[131] For the first time in Norway a government had been formed by a prime minister because he had the support of a majority of the representatives in the national assembly. Stortinget was from now on the source of the cabinet's power. To the Liberals this was an important step in the democratisation of Norway.

Universal suffrage

The rules of suffrage, which had been liberal in 1814, remained almost unchanged up to 1884. Large groups of people were dissatisfied and demanded the right to vote. To expand democracy, the Liberal Party had pledged to introduce universal suffrage. In 1898this right was given to all grown men and in 1913 the same right was given to all women.[132]

The deepening of democracy in the 1900sThe development of democratic institutions is the basis for deepening democracy, but in society a feeling of ownership to these institutions must also be developed. During the first century with democratic institutions, the upper and the

130 H.B.lees-Smith "*The parliamentary system in Norway*" Journal of Comparative Legislation and International Law third series, vol.5, No.1 (1923), pp. 35-46.

131 H.B.lees-Smith "*The parliamentary system in Norway*" Journal of Comparative Legislation and International Law third series, vol.5, No.1 (1923), pp. 35-46.

132 Fredikke Marie Quam Folkvord, magnhild.2013: rabaldermenneske Og Strateg, Osto: Det Norske Sanal get.

middle classes had or were in the process of developing this ownership. So what about the working classes? When and how would they demand the same access to political power? A Norwegian sociologist, Stein Rokkan, has developed a model to illustrate the thresholds a rising political movement often has to pass to reach political power.

1. The first is the threshold of legitimating: from which year or decade will historians judge that there was regular protection of the rights of assembly, expression and publication and within what limits?
2. The second is the threshold of incorporation: how long did it take before the potential supporters of rising movements of opposition were given formal rights of participation in the choice of representatives?
3. The third is the threshold of representation: how high were the original barriers against the representation of new movements and when and in what ways were the barriers lowered to make it easier to gain seats in the legislature?
4. The fourth is the threshold of executive power: how long did it take before parliamentary strength could be translated into direct influence on executive decision making?

The upper classes of Norway, led by the embetsmann group had passed all four thresholds from the start in 1814. The state of Norway was their state. The middle classes had also passed the first, the second and the third of the thresholds from1814, but they were excluded from the executive power until 1884.The first working class movement was organised in Norway in the wake of the revolutions in many European countries in 1848.The movement spread rapidly and in 1851 there were about 400workers' unions all over the country. The leaders of the movement demanded the right to vote for all men, equality before the law, better primary schools, universal military service and the abolition of the corn tax. The officials feared the movement

and the leaders were imprisoned.[133] The movement thereafter died out. This means that for the working classes the first threshold had not been passed by 1850. In the 1870s the embetsmenn did not fear a working class movement in the same way as before and the first trade unions were now being organised. In 1887 the trade unions started the Labour Party, but the party could not elect representatives to Stortinget until universal suffrage for men had been introduced. In 1903 the first representatives of the Labour Party could take their seats in Stortinget. With the introduction of universal suffrage for both men and women the Labour party soon became the largest of the political parties, but they had to wait some years until parliamentary strength could be translated into direct influence. As they could not muster a majority on their own, support from another party in Stortinget was required to form their own government.[134] This sup-port came in 1935 from the Farmers Party and from then on the Labour party has been the dominating party in Norwegian politics. The last threshold had been passed. The strong position of the Labour Party has been accompanied by the development of a strong trade union movement. From the start in 1887 there has been a close cooperation between the two. This has also caused changes in the understanding of what democracy is and how democratic development shall continue in the future. To the Labour movement it has been very important to reduce differences between social groups and in this way create more equal opportunities for everyone. Likewise, the fight against poverty and the creation of a social safety net for everyone has been seen as part of a good democratic society. New groups reaching executive power will often put their own imprint on the concept of democracy.

133 Fredikke Marie Quam Folkvord, magnhild.2013: rabaldermenneske Og Strateg, Osto: Det Norske Sanal get.

134 Ibid

Democratic development in the post war period

The Norwegian historian Berge Furre claims that probably the two most important features of development in the post war period in Norway has been the building up of the welfare state with its social safety net and the changes brought about by the woman's liberation movement. Both these developments can be seen in the light of democratic institutions meeting new challenges. The battle for equality has led to more women being involved in politics and the number of women in democratically elected bodies has also increased sharply. As an example, today it will be unthinkable in Norway to form a Government where less than 40% of the cabinet ministers are women. The development of the welfare state is a signal to every citizen that the state will try to help everyone, when in need.[135]

The women's liberation movement was especially active in the1970s and paved the way for a more equal relationship between men and women in many areas of society. One example of this is the development of the modern Norwegian family. This type of family is characterized by the Norwegian sociologist Ivar Frønes as the 'negotiating family'. The father's traditionally dominating position in family life has been replaced by a more democratic negotiating process, where all family members shall be heard. The family has in this way become a training ground for democratic behaviour. This implies the development of independence among children and the ability to reflect and to make personal judgements. In this way democracy has been made broader and deeper in the post war period. But democratic development has also met problems. A living democracy must be based on a society with people who want to develop personal opinions, who want to get involved, who want to do something, like getting involved in political work or in other voluntary organisations. Even so, you may chose to be just a spectator

135 Social assistance in DECD Countries by Ian Gough Norway: relevance of the social development model for post-war welfare policy.

who watches the political process taking place like a struggle between elitist groups. More and more people are today choosing to be spectators and this is an increasing problem in Norway today.[136] Some find that the political process is important and that it is possible to change things in society by getting involved. But as a politician, at the local or at the national level, you will probably experience that today there is more scepticism than before concerning politicians and their motives. This scepticism is a democratic problem for politicians of course, but also for the political sys-tem itself. Luckily, research shows that even though there is an increasing scepticism of politicians, people's confidence in the political system is still very strong. In fact, more than 80% of the population says that they have confidence in our political system (Makt og demokratiutredningen 2003). From this we may conclude that our political system and our democratic institutions are still strongly supported by most people.

5.3 Conclusion

The Judiciary is the mighty fortress against tyrannous and oppressive laws. The importance of the Judiciary cannot therefore be over emphasized. It is not an overstatement to assert that an independent Judiciary is the greatest asset of a free people. The Judiciary by the nature of its functions and role is the citizen last line of defense in a free society That is the line separating constitutionalism from totalitarianism.

I however need to appreciate that the position of the Judiciary in a democratic setting is a delicate one. More often than not, the Judiciary has been the sacrificial lambs on the altar of societal imperfection and contradictions. When politicians rig election, it is the Judiciary that is called upon to decide who actually won the election. Again, when politicians loot the nation's treasury in their unconscionable quest to become millionaires and billionaires, it is in the judges

136 <https://www.sv.uio.nopublications>

that are called upon to hold the tribunals to inquire into their activities or to try them, and so on and so forth. n other circumstances, the Judiciary finds itself in a no win situation and whichever party loses readily cast aspersion on the integrity of the presiding justices. This is the unfortunate lot the Nigerian Judiciary finds itself today.

Interestingly, the constitution itself as interpreted by the courts lied against itself in section1 7(2) (e) of the 1999 Constitution The section provides:

The independence, impartiality and integrity of the courts of law and easy accessibility thereto shall be secured and maintained

Impressive as this provision may appear to be, it is however placed under Chapter I of the Fundamental Objectives and Directive Principles of State Policy whose provisions are non-justiciable by virtue of section 66) (c) of the Constitution. Thus, the high sounding declaration of section 17(2) (e) of the Constitution has no bite and what could have been a constitutional guarantee of judicial independence is no more than a slogan in Nigeria. Under the checkered years of its Fourth Republic, Nigeria has made important strides in judicial independence. But the country still has a long way to go to reach the haven of full judicial independence and political culture rooted in the rule of law. The road to that experience will be paved by commitment comprised of key steps that include support from the political branches, contributions from the judiciary itself, broad-based judicial reforms and public support, all of which are predicated on the maintenance of civil-democratic rule.

Key among these factors will be the public's willingness to fight for judicial independence. Attaining judicial independence in Nigeria will require a mass movement similar to the one that successfully challenged military rule during the 1990s and paved the way for the return of democracy and creation of the Fourth Republic. Even so, the legacies of authoritarian military rule run deep in Nigeria. The disabilities from military rule are proving more difficult to

overcome than initially thought, even for the branch of the government that never experienced disbandment during the thirty long years of military rule.

5.4 Recommendations

To revive the seemingly lost confidence in the Judiciary and boost the independence of the Judiciary, the following recommendations are proffered:

1. States governments should be made to uphold and comply religiously with the provisions of section 121/3) of the Constitution of the Federal Republic of Nigeria 1999 which provides that "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 court concerned" and default in doing so should be criminalized
2. There is the need to diversify the pool from which judicial appointments are made in view of the declining intellectual depth and overall quality of the judgments of some judges in Nigeria which are often conflicting. Review of criteria for appointment of judicial officers to include qualified candidates from the bar, academia and industry is advocated.
3. There is the need to experiment inter- state transfer of judges.
4. Every obstacle to justice must be removed in the discharged duties of judicial officers. In developing community such as Nigeria, there is the need to devise the vision and objective of justice and the rule of law. Government should in their economic reform programmes also take the Judiciary into consideration as failure might lead the economic reform programmes becoming unsuccessful.
5. Magistrates, Area Courts, Sharia Courts and Customary Court judges as well as Chairmen of the Rent Tribunal of the various states should be treated as judicial officers especially as far as salaries and tenure of office are concerned.

6. Corrupt judges should be further wiped out by applying an experimental practice of "detection by deception" which hopefully will be very effective in detecting corrupt judges and lawyers.

7. Alike. Chapter l of the 1999 Constitution should be justiciable by judicial activism.

8. There is need to reduce the expansive role of the Chief Justice of Nigeria ('CJN') in the judicial system. Under the1999 Constitution, the CJN heads the Supreme Court, the NJC the National Judicial Institute, the Federal Judicial Service Commission, and the Legal Practitioners Privileges Committee (LPPC"). As one Nigerian legal practitioner thoughtfully points out, these powers maybe "too enormous" in a manner that makes them prone to despotic abuse." For example, the NJC is vested with responsibility of disciplinary action over all judicial officers in Nigeria, including justices who sit with the Chief Justice on the Supreme Court. Furthermore, the CJN has the exclusive power under the Nigerian Constitution to appoint fourteen out of the nineteen members of the Council. This occurrence raises the troubling question of whether such a body 'so dictatorially composed can be independent of the Chief Justice.

9. To reduce the caseload of the Supreme Court, Nigeria should consider creating a constitutional court that is separate and distinct from the present Supreme Court. This constitutional court would handle matters of original jurisdiction relating to the constitution, including disputes between the national government and a state, among the states, or between the National Assembly and any other branch of government This would allow the Supreme Court to focus on appellate maters. A possible model for such a court can be the Constitutional Court of South Africa, which was established with the onset of majority rule in 1994, and is comprised of eleven members Nigeria currently has too many members on the Supreme Court The twenty-one members on the current Supreme Court would be nearly enough for two courts of eleven members each.

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