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JUDICIAL INDEPENDENCE UNDER NIGERIA'S FOURTH REPUBLIC: PROBLEMS AND PROSPECTS

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INTRODUCTION AND PURPOSE OF STUDY

Since independence from the United Kingdom ("U.K.") in 1960, Nigerians celebrate each of their exposures to democratic rule, free of military intervention, with the appellation *republic*.¹ The Fourth Republic, instituted in 1999, is the longest running such exposure to democracy.² The extended period in democracy presents an opportunity to systematically analyze the possibilities and constraints of post-1999 judicial independence in Nigeria. This extended period in democracy therefore provides the context for this article.

1. See *The History of Nigeria*, TOTAL, www.ng.total.com/01_about_nigeria/0103_history.htm (last visited Dec. 6, 2014). The practice is redolent, for example, of the French people who adopt a similar formula. France is now in its Fifth Republic, having been inaugurated by former military general Charles de Gaulle in 1959. See, e.g., NICHOLAS ATKIN, *THE FIFTH FRENCH REPUBLIC* (2005) (providing a political history of the French Fifth Republic); PHILIP THODY, *THE FIFTH FRENCH REPUBLIC: PRESIDENTS, POLITICS, AND PERSONALITIES* (1998) (discussing modern French history and politics, and focusing specifically on five presidents from 1959 to 1998).

2. See *History of Nigeria*, *supra* note 1 (listing all four Republics with dates and events associated with each Republic). *Fourth* implies the current republic is preceded by three previous ones. See *id.* But that is not exactly true, given that there are only two such Republics: the First from 1960 to 1966, and the Second from 1979 to 1983. See *id.* A Third Republic projected for 1993 became stillborn when the military government under General Ibrahim Babangida from 1985 to 1993 annulled the presidential election that would have ushered in that republic. *Id.* Each of the prior republics ended when the Nigerian military seized power for themselves after overthrowing the affected civilian regime. See *id.* Nothing attests to the arbitrariness of military rule better than the death of the Third Republic, before it had a chance to be born, despite the wealth of national resources invested preparing for that Republic. See *TRANSITION WITHOUT END: NIGERIAN POLITICS AND CIVIL SOCIETY UNDER BABANGIDA* (Larry Diamond et al., eds. 1997) (examining the rise and fall of democratic transition and economic structural adjustment program in Nigeria during the regime of General Babangida). To appreciate the level of constitutional and institutional damage the failed transition to democracy represented, the seventeen-member Political Bureau, responsible for providing recommendations for restructuring the country's political order in readiness for the Third Republic, "met 149 times, visited all the 301 local government areas in the country, and received a total of 27,324 contributions, among them 14,961 memoranda, 1,723 recorded cassettes and video tapes and 3,933 newspaper articles." Larry Diamond, *Nigeria: Pluralism, Statism, and the Struggle for Democracy*, 2 *DEMOCRACY IN DEVELOPING COUNTRIES: AFRICA* 90 n.109 (1998).

A judicial tribunal's independence breathes life into the liberties guaranteed for citizens in a national constitution,³ and promotes human rights.⁴ It is also imperative for rooting the culture of the rule of law,⁵ as well as necessary for political and economic progress in Nigeria and other African countries.⁶ In a nutshell, "judges are

3. See Linda C. Keith, *Judicial Independence and Human Rights Protection around the World*, 85 JUDICATURE 195, 195 (2002) (singling out an independent judiciary as "the indispensable link in the machinery for securing individual protection against states' human rights abuses").

4. *Id.* Human rights are broad-ranging guarantees right-holders (individuals and groups alike) need for a life of self-dignity that modern governments are specially obligated to safeguard, rather than alienate, for their citizens. See JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 22 (4th ed. 2012) (anchoring justification for human rights on "the requirement that the state treat each person with equal concern and respect," consistent with the precepts of the Universal Declaration of Human Rights ("UDHR"), adopted by the United Nations General Assembly in 1948). They are back-up claims against the government and society that right-holders hope that they do not use, *see id.* at 20 (contending that "[t]o assert one's human rights is to attempt to change political practices . . . so that it will no longer be necessary to claim those rights as human rights"), but which claims assume particular urgency in Nigeria and other African countries precisely because of the widespread abuses of these rights that occur in these lands. See, e.g., FRANS VILJOEN & CHIDI ODINKALU, THE PROHIBITION OF TORTURE AND ILL-TREATMENT IN THE AFRICAN HUMAN RIGHTS SYSTEM: A HANDBOOK FOR VICTIMS AND THEIR ADVOCATES (2006) (helping advocates, lawyers, and victims of torture to develop effective litigation strategies regarding violations of torture and related mistreatment under the African Charter on Human and Peoples' Rights ("ACHPR")). Constitutional instruments, such as the U.S. Declaration of Independence, take the view, drawing on the natural-rights doctrine of the British philosopher John Locke, that "governments are instituted among men" solely to protect these rights. See Philip C. Aka, review of CRIMINAL LAW REFORM AND TRANSITIONAL JUSTICE: HUMAN RIGHTS PERSPECTIVES FOR SUDAN (Lutz Oette, ed. 2011), 59 AFRICA TODAY 131, 134-36 n.1 (2013). The UDHR embodies a succinct statement of these rights, which are subsequently elaborated by various multilateral human rights treaties. See DONNELLY, *supra*, at 7.

5. An independent judiciary is a key element of any system built on the rule of law. See Anthony M. Kennedy, Keynote Address at the Annual Conference of the American Bar Association (Aug. 5, 2006), <http://www.c-span.org/video/?193757-1/justice-kennedy-address> (stating that in a system based on the rule of law, "[t]he Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all of its officials").

6. See John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959

charged with the ultimate decision over life, freedoms, rights, duties and property of citizens" that, without judicial independence, they have little chance of discharging effectively.⁷ In many polities, including Nigeria, the judiciary complements and completes the political system.⁸ It checks the government through judicial review,⁹ settles disputes between individuals and groups, and interprets the laws, beginning with the constitution as the ultimate law.¹⁰ Judicial

(2013) (contending that inculcating a culture of the rule of law is the basis for political and economic development in Africa). See also JENNIFER A. WIDNER, *BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA* (2001) (making a similar argument as Professor Mbaku in a work that explicitly links the rule of law and judicial independence, drawing on the life and career of Francis Nyalali, Chief Justice of Tanzania from 1977 to 2000).

7. See Basic Principles on the Independence of the Judiciary, Preamble, U.N. Human Rights Commission Res.'s 40/32 (Nov. 29, 1985) and 40/146 (Dec. 13, 1985), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> [hereinafter Basic Principles on Judicial Independence] (The principles were "[a]dopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan" from August 26 to September 6, 1985 "and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.").

8. For elaboration of the concept of the political system, see DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* (1965) (applying a systems theory to the study of political science, based on the five-fold scheme of input, conversion, output, feedback, and environment).

9. See BARBARA BARDES ET AL., *AMERICAN GOVERNMENT AND POLITICS TODAY: ESSENTIALS* 2011-2012 ED. 456 (16th ed. 2011) (pointing out that in the U.S. the power of judicial review "enables the judicial branch to act as a check on the other two branches of government, in line with the system of checks and balances established by the U.S. Constitution"). Key features of this system in the U.S. include a president and legislature (Congress) elected separately; lawmaking based on a balance of congressional and presidential powers; a Supreme Court imbued with the power of judicial review that may strike down laws as unconstitutional, meaning they may not be enforced; and the president, the legislature, and the states together being able to override decisions of the Supreme Court. See MICHAEL J. SODARO, *COMPARATIVE POLITICS: A GLOBAL INTRODUCTION* 194-96 (3d. ed. 2008). Nigeria has operated a presidential system of government, patterned on the U.S., in-between military rules, since 1979. See *Nigeria: Past, Present, and the Future*, EMBASSY OF THE FEDERAL REPUBLIC OF NIGERIA, WASHINGTON, D.C., <http://www.nigeriaembassyusa.org/index.php?page=nigeria-past-present-and-future> (last visited Dec. 6, 2014).

10. See EDWARD S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955) (analyzing the Constitution as the supreme law of the land). Adding a needed economic spin to this concept,

independence is the key for effective performance of these and other judicial functions.¹¹

This article coincides with growing concerns regarding the performance of the judiciary, which many commentators consider mixed,¹² at a time when the face of the Nigerian court system is

constitutional economists, such as James M. Buchanan, maintain that a constitution in its capacity as higher law, intended for use by generations of citizens, must be amenable and adjustable for pragmatic decisions. See James M. Buchanan, *The Domain of Constitutional Economics*, 1 CONST'L POL. ECONOMY 1-18 (1990) (explaining constitutional political economy, in the work's abstract, as a "research program that directs inquiry to the working properties of rule, and institutions within which individuals interact"); James M. Buchanan, *The Constitution of Economic Policy*, reprinted in 77 AM. ECON. REV. 243-50 (1987) (statement on constitutional political economy in 1986 while accepting his Nobel Prize honor in economics). Given that politicians and bureaucrats charged with responsibility for upholding the public interest ironically often seek their own self-interests, Buchanan and other constitutional economists prefer interventions into and control of the economy that will not profoundly and perversely affect the social and economic life of individuals. *Id.* Buchanan is a noted apostle of public choice theory, which advocates the application of economic thinking to traditional problems of political science. See Robert D. McFadden, *James M. Buchanan, Economic Scholar and Nobel Laureate, Dies at 93*, N.Y. TIMES (Jan. 9, 2013), <http://www.nytimes.com/2013/01/10/business/economy/james-m-buchananeconomic-scholar-dies-at-93.html>. He theorized that pursuit of self-interest by modern politicians often leads to harmful results. *Id.* For example, to court and appease voters during election times, politicians will approve tax cuts and spending increases for projects and entitlements that the electorate favors. *Id.* However, such outlays can lead to ever-rising deficits, huge public debt burdens, not to mention big governments. *Id.* John Maynard Keynes argued that budget deficits sometimes may be unavoidable and at times even desirable during fiscal emergencies as a means to increase spending, create jobs, and cut unemployment. *Id.* However, Buchanan pointed out that it is that kind of reasoning that allowed politicians to rationalize the seemingly never-ending deficit spending that characterizes many economies today. *Id.*

11. See *infra* Part I.

12. A sample of these critical works, popular and academic, include: Rotimi T. Suberu, *The Supreme Court and Federalism in Nigeria*, 46 J. MOD. AFRICAN STUD 451, 451-85 (2008) (focusing on a set of 15 cases decided by the Supreme Court up to 2007); Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria*, 31 BROOK. J. INT'L 9, 11-82 (2005) (commenting on the "problems and failures" of the Nigerian judiciary); Joel Nwokeoma, *Nigerian Judiciary as Temple of Corruption*, THE WILL (Oct. 3, 2012), <http://thewillnigeria.com/opinion/5331-Nigerian-Judiciary-Temple-Corruption> (last visited Dec. 7, 2014) (ruefully positing that the judiciary has not lived up its role as "bulwark" against corruption); Jiti Ogunye, *A New Nigerian Judiciary is*

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changing.¹³ Even in its present format, Nigeria's current constitution contains ample guarantees for judicial independence, including protections coming from the agencies linked to judicial independence.¹⁴ The reality though is that in many respects, the Nigerian judiciary lacks much needed independence.¹⁵ Consistent with injunctions suggested in the U.N.'s Basic Principles on the Independence of the Judiciary, Nigeria has made some important strides in the application of constitutional guarantees relating to judicial independence under the Fourth Republic.¹⁶ Nevertheless, the government has yet "to translate [these principles] fully into reality."¹⁷ Thus, while constitutional provisions for judicial independence are important, ultimately, those guarantees of protection, no matter how ample, will be inadequate unless the masses resolve to fight for judicial independence. In tackling the problem of judicial independence in Nigeria, this article takes a necessarily comparative approach that draws on lessons from other countries,¹⁸ particularly the

Necessary, SAHARA REPORTERS (Oct. 3, 2011), <http://saharareporters.tumblr.com/post/11023892224/a-new-nigerian-judiciary-is-necessary-by-jiti> (proposing a complete overhaul of the Nigerian judiciary).

13. See *infra* Part IV. (analyzing two forces of Nigerian politics since 1999 with potential implications for judicial independence).

14. See *infra* Appendix B. (identifying institutions connected with judicial independence in Nigeria).

15. See *infra* Part III. (analyzing judicial independence under the Fourth Republic).

16. *Id.*

17. See Basic Principles on Judicial Independence, *supra* note 7 (indicating that "the organization and administration of justice in every country should be inspired by [principles revolved around the right to a fair and public hearing], and efforts should be undertaken to translate them fully into reality").

18. A well-known adage of comparative politics, drawn from the wisdom of the British author and poet Rudyard Kipling (1865-1936), is that a researcher knows England not, who draws all of his or her insights exclusively from England. SODARO, *supra* note 9, at 28. This wisdom, joined by Nigeria's enmeshment of the U.S. political system, indicated in the next footnote, justifies the comparative perspective this article adopts. From a methodological standpoint, the technique utilized in this study combines the most-similar-systems design and within-case comparison. J. TYLER DICKOVICK & JONATHAN EASTWOOD, COMPARATIVE POLITICS: INTEGRATING THEORIES, METHODS, AND CASES 14-17, 19 (2013) (describing the features of the two research designs). In the first, the logic is that "two cases (such as two countries) that are similar in a variety of ways would be expected to have very similar political outcomes." *Id.* at 14. In the second, "the researcher look[s]

United States ("U.S."), whose presidential system of government was adopted by Nigeria in 1979.¹⁹

Part I. of this article provides a comprehensive definition of judicial independence. This definition takes some of its reference points from the United States, consistent with the comparative tenor of the piece. Part II. provides a brief historical background narrative, from the pre-colonial to the post-colonial periods, necessary for proper understanding of judicial independence in Nigeria. Part III. assesses judicial independence under the Fourth Republic, using a variety of measurements that include the seven indicators of judicial independence distilled in Part I. and the U.S. Department's *Country Reports on Human Rights* in Nigeria for 1999, 2003, 2012, and 2013, years germane to the timeline from 1999 to the present at the cynosure of this work. Part IV. spotlights two forces of Nigerian politics under the Fourth Republic since 1999 with possible implications for judicial independence. The two factors are the adoption of Islamic sharia law as criminal code in twelve northern states in the country, and the invigoration of the Economic Community of West African States' ("ECOWAS") Community Court of Justice. Lastly, Part V. identifies and analyzes five practical steps for promoting increased judicial independence in Nigeria, namely: maintaining civilian rule, support from the political branches of the government, contribution of the judiciary to its own independence, building judicial independence with public participation (the theme central to the argument of the article), and judicial reforms on several fronts.

more carefully within [his or her] own case(s) to examine the variations there . . . Looking at different moments in time or in space may allow us to dig deeper into a case to better understand our evidence." *Id.* at 19. These two techniques are present in this article.

19. See CONSTITUTION OF NIGERIA (1979), Art. 5, § 1(a), available at www.constitutionnet.org/files/nig_const_79.pdf (stipulating that the executive powers of the Federation "shall be vested in the President, and may . . . be exercised by him directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation"). Nigeria replaced its parliamentary system of government that the country inherited from the U.K. upon its independence in October 1960. *Id.*

I. DEFINING JUDICIAL INDEPENDENCE

Judicial independence is the ability of a judicial tribunal, qualified by law, to make decisions free of undue pressure from outside sources, especially the executive and legislative branches of the government.²⁰ It is the freedom of judges in a judicial system to “decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”²¹ Judicial independence is present when individual judges have three types of independence: personal, substantive, and internal.²²

Personal independence exists when “the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.”²³ *Substantive independence* exists when “in the discharge of his/her judicial function, a judge is subject to nothing but the law and the commands of his/her conscience.”²⁴ *Internal independence* occurs when “[i]n the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and supporters.”²⁵ Of the three, internal independence is the most difficult to measure empirically, given the secrecy that shrouds judicial decision making. For example, the Basic Principles on the Independence of the Judiciary, endorsed by the United Nations, advises: “The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties.”²⁶

20. LARRY BERMAN & BRUCE ALLEN MURPHY, *APPROACHING DEMOCRACY* 188 (8th ed. 2013).

21. Basic Principles on Judicial Independence, *supra* note 7, § 2.

22. INTERNATIONAL BAR ASSOCIATION MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE (Int'l Bar Assn. 1982), § 1(a), 46 (*reprinted in* JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 388 (Shimon Shetreet & Jules Deschênes, eds. 1985)) [hereinafter IBA MIN. STDS.]. These three types of independence are both non-mutually exclusive and interlinked. *Id.*

23. *Id.* § 1(b).

24. *Id.* § 1(c).

25. *Id.* § 47.

26. Basic Principles on Judicial Independence, *supra* note 7, § 15.

There are two segments to the discussion in this section. The first segment identifies and discusses the key constitutional indicators of judicial independence, drawing on the pertinent documents related to the topic. These include the Basic Principles on the Independence of the Judiciary, referred to in the last paragraph, and the International Bar Association's ("IBA") Minimum Standards of Judicial Independence. The second segment elaborates on three important issues presented by the definition of judicial independence set forth above, and where necessary, uses the United States as baseline. The reference to the U.S. benefits the reader who is unfamiliar with the Nigerian legal and political system. It is also consistent with the comparative import of this article, including recognition of Nigeria's enmity of the U.S. system down to the adoption of the presidential system of government as a replacement for the parliamentary system that it inherited from the U.K. in 1960.

A. Key Indicators of Judicial Independence

The seven key indicators of judicial independence are: the ban against exceptional or military courts, separation of powers, exclusive authority, finality of decisions, enumerated qualifications, guaranteed terms, and fiscal autonomy.²⁷

The first indicator is *the ban against exceptional or military courts*.²⁸ As the name indicates, this measure forbids citizens from being tried in extraordinary tribunals.²⁹ Instead, as the Basic Principles on Judicial Independence put it, "[e]very one shall have the right to be tried by ordinary courts or tribunals using established legal procedures."³⁰ More specifically, "[t]ribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."³¹ International human rights instruments, including the

27. See Basic Principles on Judicial Independence, *supra* note 7; IBA MIN. STDS., *supra* note 22; Keith, *supra* note 3, at 196-97.

28. Keith, *supra* note 3, at 196-97.

29. See *id.*

30. Basic Principles on Judicial Independence, *supra* note 7, § 5.

31. *Id.* (emphasis added) (reciting the right of individuals, under the UDHR, "to a fair and public hearing by a *competent*, independent, and impartial tribunal established by law").

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ones that Nigeria is a party-state to, also provide this right.³² More than any other measure, this indicator is the testament that the people, rather than solely judges, are the ultimate beneficiaries of judicial independence.³³

The second indicator of judicial independence is *separation of powers*, which requires that the authority of the judicial branch be

32. Human rights instruments Nigeria ratified from 1960 to 2012, along with the year each treaty was ratified, include the following: the International Covenant on Economic, Social, and Cultural Rights (1993); the International Covenant on Civil and Political Rights ("ICCPR") (1993); the International Convention on the Elimination of All Forms of Racial Discrimination (1967); Convention on the Elimination of All Forms of Discrimination against Women (1985); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2001); Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2009); International Convention for the Protection of All Persons from Enforced Disappearance (2009); Convention on the Rights of the Child (1991); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (2012); Convention Relating to the Status of Refugees (1967); Protocol Relating to the Status of Refugees (1968); Convention on the Reduction of Statelessness (2011); Convention on the Prevention and Punishment of the Crime of Genocide (2009); all the Geneva Conventions related the law of armed conflict, including protocols (various dates from 1961 to 1988); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1970); Rome Statute establishing the International Criminal Court (2001); among others. *See Ratification of International Human Rights Treaties—Nigeria*, UNIVERSITY OF MINNESOTA, HUMAN RIGHTS LIBRARY, <http://www1.umn.edu/humanrts/research/ratification-nigeria.html> (last visited Dec. 7, 2014). The author illustrates with three instruments: the UDHR, the ICCPR, and the ACHPR. The UDHR provides that "[e]veryone has the right to an effective remedy by the *competent national tribunals* for acts violating the fundamental rights granted him by the constitution or by law." Universal Declaration of Human Rights, G.A. Res. 217 A (III) U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), art. 8 (emphasis added). The ICCPR provides that "[e]veryone shall be entitled to a fair and public hearing by a *competent*, independent, and impartial tribunal established by law." ICCPR, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, art. 14(1) (1966) (emphasis added). Finally, the ACHPR provides that "[e]very individual shall have the right to have his cause heard," including "the right to be presumed innocent until proved guilty by a *competent court or tribunal*." ACHPR, 21 I.L.M. 58, art. 7 (Oct. 21, 1986) (emphasis added).

33. *See infra* Part V.D. (discussing building independence with popular participation). *See also* Shirley S. Abrahamson, *Speech: The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 982 (opining that judicial independence protects the people, not judges).

formally separated from the authority of the executive and legislative branches, who must also refrain from taking any steps likely to endanger the independence of judges.³⁴ This is obviously what the Basic Principles on Judicial Independence meant when it recommended that judicial independence “be guaranteed by the State and enshrined in the Constitution or the law of the country.”³⁵ The idea behind this formal separation is to insulate the judiciary from possible arbitrary abuses by other branches of government through the grant of powers embedded in a constitution that those other branches cannot easily take away.³⁶ The question this indicator invokes is whether courts are housed in a branch separate from the executive and legislative branches.³⁷

The third indicator is *exclusive authority*, which requires that courts have the exclusive authority to decide cases based on their own competence and free from unwarranted pressures of any type.³⁸ In the language of the Basic Principles on Judicial Independence, “[t]he judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”³⁹ This is a measurement related to the fourth indicator, *finality of decision*, designed with a similar purpose in mind: safeguarding the ability of judges to carry out judicial functions free of undue interventions from other state actors.⁴⁰

Fourth, the *finality of decisions* indicator mandates that the decisions of judges not be subject to any revision outside the appeal procedures provided by law.⁴¹ In the language of the Basic Principles on Judicial Independence, “[t]here shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.”⁴² The idea behind this

34. Keith, *supra* note 3, at 197.

35. Basic Principles on Judicial Independence, *supra* note 7, § 1.

36. Keith, *supra* note 3, at 197.

37. *Id.*

38. *Id.* at 196.

39. Basic Principles on Judicial Independence, *supra* note 7, § 3.

40. Keith, *supra* note 3, at 196.

41. *Id.*

42. Basic Principles on Judicial Independence, *supra* note 7, § 4.

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measure, as indicated in the third indicator, is to safeguard the ability of judges to carry out their judicial functions fully and free of undue interventions from other state actors.⁴³

Enumerated qualifications, as the fifth indicator, stands for the idea that the selection of judges should be based on merit factors, such as professional qualifications, ability, and integrity.⁴⁴ Where necessary, it should also be decided by an authority independent of the government.⁴⁵ The IBA Minimum Standards on this issue provide that “[p]articipation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence, provided that appointments and promotions of judges are vested in a judicial body in which members of the judiciary and the legal profession form a majority.”⁴⁶ The idea behind this measure is to produce judges able to perform their functions competently, and who have been socialized to the norms of judicial independence.⁴⁷ This occurrence renders them more able to counter encroachments on citizens’ liberties from other branches.⁴⁸

Under the sixth indicator, *guaranteed terms*, the constitution guarantees judges’ terms of office, governing their appointment, discipline, and removal from office.⁴⁹ This is consistent with the directive of the IBA that “[t]he position of the judges, their independence, their security, and their adequate remuneration shall be

43. Keith, *supra* note 3, at 196.

44. *Id.* at 197.

45. *Id.* The qualifier “where necessary” is added because the IBA Minimum Standards provide that “[a]ppointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence *in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.*” IBA MIN. STDS., *supra* note 22, § 3(b) (emphasis added). However, Nigeria does not rank among these countries with democratic traditions where judicial recruitments operate satisfactorily. *See infra* Part V.A. (commenting on the necessity for continued civilian rule as a step toward increased judicial independence in the country).

46. IBA MIN. STDS., *supra* note 22, § 3(a).

47. Keith, *supra* note 3, at 197.

48. *Id.*

49. *Id.* at 196; Basic Principles on Judicial Independence, *supra* note 7, §§ 10, 11-14, 17-20 (covering the qualifications, selection and training; conditions of service and tenure; and discipline, suspension and removal of judges); IBA MIN. STDS., *supra* note 22, §§ 22-32.

secured by law,"⁵⁰ and judicial salaries not "be decreased during the judges' services, except as a coherent part of an overall public economic measure."⁵¹ The goals of this measure are two-fold: to protect judges from possible personal and professional retribution from the other branches of government, and to minimize other improper influences that might interfere with judicial impartiality.⁵²

Fiscal autonomy is the last of the indicators of judicial independence, and exists when a judiciary is provided with adequate resources allowing it to properly perform its functions while insulating it from possible financial retribution of an abusive regime.⁵³ This indicator is met when the salaries and/or budgets of the judiciary are protected from reduction by the other political branches.⁵⁴

B. Three Extrapolations from the Definition of Judicial Independence in this Article

The goal in this sub-section is to address extrapolations from the preceding definition of judicial independence. There are three of these extrapolations: first, *not* all tribunals are bestowed with independence; second, the feature (or attribute) comes from a "higher" source, such as a constitutional document; and third, some pressures from external sources are constitutionally permissible, provided such pressures are not undue, improper, or impermissible. The first of these extrapolations is that in the United States, only Article III courts, defined as judicial tribunals created under Article III of the U.S. Constitution, are clothe with the attribute of judicial independence.⁵⁵ At the national level, the U.S. courts include the district courts,

50. IBA MIN. STDS., *supra* note 22, § 15(a).

51. *Id.* § 15(b).

52. Keith, *supra* note 3, at 196.

53. Basic Principles on Judicial Independence, *supra* note 7, § 7; Keith, *supra* note 3, at 197.

54. Keith, *supra* note 3, at 197.

55. See U.S. CONST. (1789), art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). The attribute involved, to state it upfront here, is life tenure and protection against diminishment of salary. See *id.* ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

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excluding territorial courts created under Congressional powers of Article I of the U.S. Constitution, circuit courts of appeal, and the U.S. Supreme Court, which is the only court named in the Constitution.⁵⁶ Articles I and II courts are judicial tribunals created under the legislative power of Congress and the executive power of the President (including his power as Commander-in-Chief of the military forces).⁵⁷ As one author noted, “[t]here are different meanings and degrees of judicial independence, different forms of accountability, and different balances between independence and judicial accountability.”⁵⁸ Accordingly, these courts enjoy a reduced level of judicial independence, compared to those of Article III courts.⁵⁹

56. See Vicki C. Jackson, *Packages of Judicial Independence*, 95 GEO L.J. 965, 966-67 (2007) (indicating that Article III judges include U.S. Supreme Court justices, judges of circuit courts of appeal, and judges of federal district courts; all of these judges are nominated by the President and confirmed by the Senate and hold office “during good Behaviour,” among other features). Unlike the Supreme Court, all the other courts are created by Congress. See U.S. CONST., *supra* note 55, art. III, § 1 (stating that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in *such inferior Courts as the Congress may from time to time ordain and establish*”) (emphasis added). The focus here is confined to the national government, and does not include state courts, which in the United States, are separate and independent of the national government. See BERMAN & MURPHY, *supra* note 20, at 189 (observing that the U.S. judicial system “consists of two separate and parallel court systems: an extensive system of state and local courts . . . and a system of national or federal courts”).

57. Article I courts derive their authority from the powers given to Congress under Article I of the U.S. Constitution, on a range of issues that include payment of money owed by the U.S., taxation, regulation of the armed forces, and governance of the District of Columbia and U.S. territories. Loren A. Smith & Gary Lawson, *A Note on Non-Article III Courts*, THE HERITAGE GUIDE TO THE CONSTITUTION, www.heritage.org/constitution/#1/articles/3/essays/106/a-note-on-non-article-iii-courts (last visited on Dec. 7, 2014). These judicial tribunals include the Tax Court, the Court of Federal Claims, and the Court of Veteran Appeals, among others. *Id.* Article I judges lack life tenure and salary guarantees. *Id.* Article II courts, comprising the largest category of federal adjudicators (several thousand organized into hundreds of categories), are career employees of the executive branch. *Id.* Some have special career tenure protection, others have tenure protection limited to the civil service, while yet others are political appointees with no career protection. *Id.* These judicial tribunals include military courts-martials, and military commissions. *Id.*

58. Jackson, *supra* note 56, at 967.

59. See *supra* note 57, and corresponding text.

Unlike the dual federal-state court systems that operate in the U.S., Nigeria has a unified court system. Besides the structural difference between the U.S. and Nigerian court systems, the two are similar in many respects. Although unified, the Nigerian judicial system is bifurcated into federal courts (including election tribunals), and state courts.⁶⁰ The federal courts include the Supreme Court, with both original and appellate jurisdiction, depending on the case; the Court of Appeal, with mostly appellate jurisdiction but also original jurisdiction in certain cases; and the Federal High Court, with exclusive original jurisdiction in many cases.⁶¹ The state courts include the High Court, with unlimited jurisdictions in matters related to the states; the Sharia Court of Appeal, with appellate jurisdiction in matters of Islamic personal law; and the Customary Court of Appeal, with appellate jurisdiction in matters of customary law.⁶² The election tribunals are for disputes regarding elections into the National Assembly, the governorship, and state assemblies.⁶³ In addition, the Federal Capital Territory at Abuja operates as a separate entity, similar to the states; therefore, it is similarly outfitted with the same three courts: High Court, Sharia Court of Appeal, and Customary Court of Appeal.⁶⁴

All of these federal and state courts, created by the Constitution, are recognized as constitutional courts and distinguished from the non-constitutional courts, which include customary courts, magistrate courts, district courts, juvenile courts, and coroners courts.⁶⁵ Some

60. See CONSTITUTION OF NIGERIA (1999), chap. VII, arts. 230-96 [hereinafter CONSTITUTION OF NIGERIA (1999)], available at www.nigeria-law.org/constitutionofthefederalrepublicofnigeria.htm (dealing with the Judicature).

61. *Id.*

62. *Id.*

63. *Id.*

64. See CONSTITUTION OF NIGERIA (1999), *supra* note 60, § 255 (establishing the High Court of the Federal Capital Territory); *id.* § 256 (appointing the judges of the Federal Capital Territory); *id.* § 260 (establishing the Sharia Court of Appeal of the Federal Capital Territory); *id.* § 261 (appointing the judges of the Sharia Court of Appeal of the Federal Capital Territory); *id.* § 265 (establishing the Customary Court of Appeal of the Federal Capital Territory); *id.* § 266 (appointing the judges of the Customary Court of Appeal of the Federal Capital Territory).

65. *Courts and Justice Administration in Nigeria*, NATIONAL OPEN UNIVERSITY OF NIGERIA 15 (2010), www.nou.edu.ng/NOUN_OCL/pdf/pdf2/CSS371.MAIN.pdf [hereinafter *Courts and Justice Admin. in Nigeria*]. In some

writers refer to these latter courts as “inferior” courts.⁶⁶ Without denigrating or neglecting these tribunals, the focus in this article is on the constitutional courts.

A second extrapolation, linked inextricably with the first, regarding the definition of judicial independence in this article, is that judicial independence is an attribute that the constitutional and legal system bestows on a court. This is a point obvious from the foregoing discussion on the organization of the court systems in the U.S. and Nigeria. While recognizing the legal-constitutional element embedded in the definition of judicial independence, one must at the same time keep in view the politics that shape judicial independence. For example, judicial review, a key component of judicial independence and of the U.S.'s democracy, was not a power written into the U.S. Constitution; instead, the Supreme Court recognized judicial review for itself and for the U.S. legal and political system in a court case.⁶⁷ But not all political events are healthy or beneficial for judicial independence in a country. Nigeria is one case of that negative

parts of the country, these inferior courts also include justice of the peace which, although not a court in the strict sense of the term, nevertheless plays an important role in administration of justice. *Id.*

66. See *id.* at 9-20 (analyzing the “machinery of justice” in Nigeria, including a discussion on inferior courts); see also Kehinde Adegbite, *6 Things Every Nigerian Must Know about the Nigerian Law, Part 2*, VANGUARD (Apr. 28, 2012, 9:42 AM), <http://community.vanguardngr.com/profiles/blogs/6-things-that-every-nigerian-must-know-about-the-nigerian-law-1> (discussing legal knowledge, including a categorization of superior and inferior courts).

67. *Marbury v. Madison*, 5 U.S. 137 (1803) (recognizing judicial review by default, by refusing to compel the handover of a commission on the ground that the provision of the Judiciary Act of 1789 enabling the petitioner to bring his claim to the Supreme Court was unconstitutional). In his book on United States constitutional law, John A. Garraty commented on how “constitutional questions of tremendous significance often depend upon the actions of individuals unconcerned with large legal issues.” JOHN A. GARRATY, *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 3 (John A. Garraty ed., rev. ed. 1987). *Marbury* was such a decision and deservedly one of the twenty lawsuits profiled in the book. *Id.* at 7-20 (spotlighting “[t]he Case of the Missing Commissions”). The judicial review role of U.S. courts, especially the Supreme Court's, contradicts the notion of the U.S. Constitution as “written,” i.e., “found in one integrated volume rather than in various, scattered, sources.” Philip C. Aka, *Foreword*, in GLORIA J. BROWNE-MARSHALL, *THE CONSTITUTION: MAJOR CASES AND CONFLICT* xii (3d. ed. 2011). Instead, the U.S. Constitution comprises multiple sources, one of them being the accumulated jurisprudence of U.S. courts, led by the Supreme Court. *Id.*

example. Military rule in Nigeria, involving the exercise of political powers, militated against judicial independence.⁶⁸

The third and final extrapolation from the definition of judicial independence in this article is that only “undue” pressures on the judiciary are constitutionally impermissible.⁶⁹ Pressures related to checks and balances, which prevent the concentration of power in any one official or branch of the government, are not constitutionally “undue.”⁷⁰ In other words, judicial independence does not mean that the judiciary is “completely shielded from outside influences.”⁷¹ To use the U.S. again as an example, Congress may impact the independence of the judiciary through several means, including: passing laws that overturn a Supreme Court’s decision; abolishing some or all lower federal courts or refusing to create new courts; refusing to raise judicial salaries; removing certain classes of cases from the appellate docket, in effect leaving lower-court rulings in force; changing the number of justices on the Supreme Court; impeaching a sitting justice; attacking the Court in speeches; and filibustering judicial appointments.⁷² Similarly, presidents can change the direction of the Supreme Court with new appointments.⁷³

68. See *infra* Part V.A. (arguing for the maintenance of civilian rule as a step for promoting increased judicial independence in Nigeria). See also Peter P. Ekeh, *Theory and Curse of Military Rule and the Transition Program*, ASSOCIATION OF NIGERIAN SCHOLARS FOR DIALOGUE (Aug. 1, 1998), www.waado.org/nigerian_scholars/archive/opinion/theory.htm (listing the “curse” or negative consequences of military rule in the country to include the negation of constitutionalism and federalism).

69. See BERMAN & MURPHY, *supra* note 20, at 188.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* *Direction* denotes the ability of the president to shape the composition and the ideological coloration of the Supreme Court and other courts in the federal judiciary, using his nomination powers under the U.S. Constitution. See BERMAN & MURPHY, *supra* note 20, at 197-98 (analyzing the impact of presidential appointments on the Supreme Court). See also *Presidential Powers*, THISNATION.COM, www.thisnation.com/textbook/executive-power.html (last visited Dec. 12, 2014) (stating that through his appointment powers, the President “plays a significant role in shaping the composition of the” federal judiciary, and that by selecting appointees “with whom they share similar perspectives, Presidents can influence the direction of judicial decisions far beyond their tenure in office”).

II. BRIEF BACKGROUND HISTORY OF JUDICIAL INDEPENDENCE IN NIGERIA

Present-day Nigeria is a multinational state with over 250 ethnic groups, and with language groups that more than double that number.⁷⁴ Three of the most numerous groups, which constitute about two-thirds of the country's population, are the Igbo in the East, the Yoruba in the West, and the Hausa-Fulani in the North.⁷⁵ Each of these groups has a population that runs into tens of millions.⁷⁶ Similar to groups in other parts of Africa, many of the ethnic groups in Nigeria had institutions that performed judicial functions.⁷⁷ The Hausa-Fulani had a highly centralized system centered on Emirs who combined political and religious powers in a system characterized by few checks and balances.⁷⁸ In contrast, Igbo societies were

74. See *Nigeria*, ETHNOLOGUE: LANGUAGES OF THE WORLD, <http://www.ethnologue.com/country/NG> (last visited Nov. 17, 2014) (listing the number of individual languages in the country as 527, of which 514 are living and only eleven extinct). The numbers bear comparison to the United States, with a population double the size of Nigeria, but that only has 227 individual languages, of which 215 are living and twelve extinct. See *United States of America*, ETHNOLOGUE, <https://www.ethnologue.com/country/us> (last visited Nov. 17, 2014).

75. See A. Carl LeVan & Oladimeji Aborisade, *Politics in Nigeria*, in *COMPARATIVE POLITICS TODAY: A WORLD VIEW* 631, 633-34 (G. Bingham Powell, Jr. et al., eds., 11th ed. 2015) (describing "[t]he [e]ffect of [h]istory" in the evolution of Nigeria); Diamond, *supra* note 2, at 33-34 (providing a "historical review" of the country in the period before independence).

76. See Diamond, *supra* note 2, at 35 (citing census figures in the period before and soon after independence).

77. See Samuel O. Manteaw, *Legal Education in Africa: What Type of Lawyer Does Africa Need?*, 39 MCGEORGE L. REV. 903, 911 (2008) (internal quotation marks omitted) ("[T]raditional legal systems and customary laws in African polyethnic societies formed part of a functioning, coherent, and consistent totality of the African way of life."); Mojeed Olujinmi A. Alabi, *Law Making in Pre-Colonial Yorubaland*, in *THE YORUBA IN TRANSITION: HISTORY, VALUES, AND MODERNITY* 111, 112 (Toyin Falola & Ann Genova, eds., 2006) (stating that pre-colonial Africa was never in short supply of well-developed political institutions that promoted stability for hundreds, if not thousands of years).

78. Oyediji O. Babatunde, *Hausa/Fulani Pre-Colonial Political System in Nigeria*, WORDPRESS (Mar. 30, 2014), <http://www.profseunoyediji.wordpress.com/2014/03/30/hausafulani-pre-colonial-political-system-in-nigeria> (characterizing the Emir as an "absolute ruler" who exercised his authority unrestrained by any "principle of checks and balance").

acephalous, or kingless communities, who organized themselves into over two thousand villages, which were marked by decentralized political powers.⁷⁹ “[M]onarchical and hierarchically structured and centralized with some measure of republicanism,” the Yoruba represented a midpoint between the Hausa-Fulani and the Igbo.⁸⁰

The main focus of this article is on the post-colonial period, starting in 1999 up to present time, but historical context that predates the Fourth Republic is essential to understanding the main focus of this article. Thus, the discussion that follows is conveniently divided into three periods: pre-colonial, colonial, and post-colonial.

A. Pre-Colonial Period

The expression *pre-colonial* supposes a unified entity, which is lacking in the case of Nigeria because of the multi-ethnic character of the country, as described above. As a result, the story of judicial independence told in this subsection centers conveniently around the three major ethnic groups in the country. Within these groups, as in many African communities, conception of law and justice focused heavily and ineluctably on religion and ethics.⁸¹

More specifically, contrasted from the western judicial system, in these and other societies, judicial proceedings were a tool of social control geared toward dispute reconciliation and maintaining peace, order, and stability in the community.⁸² And in these communities, different entities performed judicial functions. Among the Hausa-Fulani, it was the Emirs, who applied Islamic law with the assistance of Alkalis, experts in Islamic law;⁸³ among the Igbo, it was the elders

79. See ELIZABETH ISICHEL, *THE IGBO PEOPLE AND THE EUROPEANS: THE GENESIS OF A RELATIONSHIP—TO 1906* 47 (1973); ELIZABETH ISICHEI, *A HISTORY OF CHRISTIANITY IN AFRICA* 155 (1995).

80. Alabi, *supra* note 77, at 112, 122.

81. MICHAEL NUKUZI NNAM, *ANGLO AMERICAN AND NIGERIAN JURISPRUDENCE: A COMPARISON AND CONTRAST IN LEGAL REASONING AND CONCEPT OF LAW* vii (1989).

82. Alabi, *supra* note 77, at 118.

83. Philip Ostien & Albert Dekker, *Sharia and National Law in Nigeria*, in *SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT* 555, 559 (Jan Michiel Otto, ed. 2010).

in council or age-grades, who applied Igbo customary laws;⁸⁴ and among the Yoruba, the Oba in Council applied Yoruba customary law.⁸⁵ Given these features, it is fair to say that in many African societies during the precolonial period, including the communities that British colonial authorities banded together to form modern-day Nigeria, the judiciary remained an inchoate part of the political system in a manner that makes it hard to ascribe independence to whatever institutions in these societies that performed the judicial role.

B. Colonial Period

During the colonial period in Nigeria, like in many African societies, the judiciary was not a tool of social change.⁸⁶ To the contrary, it was one of the institutions the colonial authorities used to maintain foreign rule. “[M]any colonial administrators had no better understanding of the judicial function than to assist the administration in ensuring peace, law, and order.”⁸⁷ Thus, in Nigeria, the judiciary served as an executive tool “in the maintenance of law and order, the creation of a conducive atmosphere for the development of commerce, and the promotion of unequal economic relationship between the

84. See Manteaw, *supra* note 77, at 911; Alabi, *supra* note 77, at 112. Age-grades are a key feature of Igbo kingless communities. See Cyril A. Onwumechili, *The 2000 Ahiajoku Lecture, Igbo Enwe Eze: The Igbo Have no Kings*, IGBONET, ahiajoku.igbonet.com/2000/ (last visited Dec. 8, 2014). They are groups of men, of a particular age group, usually a few years apart, “who function like standing committees of the village assembly” to provide a range of social services that include settlement of land and other disputes. *Id.*

85. See Alabi, *supra* note 77, *passim*. Customary laws are unwritten (meaning un-codified) bodies of law, accepted norms of behavior, that evolved from the custom of a particular people. *Courts and Justice Admin. in Nigeria*, *supra* note 65, at 4. Many African ethnicity groups, including the Yoruba and the Igbo, have these laws. See Manteaw, *supra* note 77, at 911.

86. See Akin Alao, *Colonial Rule and Judicial Reforms, 1900-1960*, in *THE FOUNDATIONS OF NIGERIA: ESSAYS IN HONOR OF TOYIN FALOLA* 201, 205 (Adebayo Oyeade ed., 2003) (depicting provincial courts as “instrument[s] of legal control”). See also David Killingray, *The Maintenance of Law and Order in British Colonial Africa*, 85 AFR. AFFAIRS 411, 415 (1986) (explaining that “Colonial governments had an interest in maintaining a framework of law and order within which the basic tasks of colonial administration could be carried out”).

87. Alao, *supra* note 86, at 213.

colony and Britain.”⁸⁸ The semblance of judicial reforms that took place in the later period of colonial rule “emphasize[d] executive justice rather than social justice.”⁸⁹ Before 1914, in southern Nigeria, during the colonial period, the entities that performed the judicial function included, from lowest to highest tribunal: district courts, divisional courts, and a supreme court.⁹⁰ Following the “amalgamation” or unification of the northern and southern protectorates in 1914, the judicial structure consisted, in order from lowest to highest tribunal: native courts, provincial courts, the supreme court, and the West African court of appeal.⁹¹

Whether judicial independence existed in the colonial period is more complicated than in the pre-colonial era. Although there was no true democracy, incipient structures for judicial independence evident in traditional Western adjudicative tribunals evolved in Nigeria; however, those structures lacked independence in the substantive sense. As Akin Alao points out in his study of judicial reforms in colonial Nigeria,⁹² “the incessant intervention of the executive in the process of judicial administration and its control of the purse were potent enough to frustrate the judiciary.”⁹³ Examples of these interventions include that the attorney-general office assumed a supervising role over the chief justice, and that “[o]n many occasions, the governor, acting on the advice of the attorney general, bypassed the chief justice in recommending applications for judicial appointments to the Colonial Office in London.”⁹⁴ There were moments when, without question, the judiciary was turned into a handmaid of the executive. For example, prior to 1914, as *ex-officio* commissioners of the Supreme Court, the district officers participated in the judicial work of district courts.⁹⁵ Thus, although during the

88. *Id.* at 212.

89. *Id.* at 213.

90. *Courts and Justice Admin. in Nigeria*, *supra* note 65, at 5-6 (discussing courts during the colonial era).

91. Alao, *supra* note 86, at 206; *Courts and Justice Admin. in Nigeria*, *supra* note 65, at 6.

92. *See* Alao, *supra* note 86, at 201-15.

93. *Id.* at 209.

94. *Id.*

95. *Courts and Justice Admin. in Nigeria*, *supra* note 65, at 6. *Ex officio* means authority “without any other warrant or appointment than that resulting from the

colonial period tribunals evolved capable of assuming judicial functions in the sense we know it today in the political system, the judiciary was almost indistinguishably linked to the executive branch in an environment practically devoid of legislative oversight.⁹⁶ This made it difficult to ascribe independence to the judiciary in any real sense of the word.

C. Post-Colonial Period

The potentials for judicial independence increased substantially during the post-colonial period. For one thing, the political independence and the freedom from foreign rule that came with it presaged a new-dawn opportunity for the construction of autonomous national institutions,⁹⁷ including independent judiciaries. The one downside, however, was repeated military interventions into the political system.⁹⁸ Soon after independence, dictatorial military rule perverted democracy in Nigeria, with severely deleterious consequences for many institutions of the political system, including the judiciary.⁹⁹ By the time the scourge of military dictatorships ran its

holding of a particular office.” BLACK’S LAW DICTIONARY 399 (abridged 6th ed. 1991). It is powers “exercised by an officer which are not specifically conferred upon [that officer], but are necessarily implied in [the] office.” *Id.* In this case, the district officers who participated in Supreme Court work “achieved” that office by virtue of their position as district officers, rather than because of any formal appointment to the high court.

96. See Alao, *supra* note 86, at 211 (pointing out that despite the simulacrum of judicial reforms unveiled during this era, “the on-the-spot agents of colonial administration still believed in the supremacy of the executive over the judiciary,” to the detriment of judicial independence).

97. See, e.g., MARTIN MEREDITH, *THE FATE OF AFRICA: A HISTORY OF THE CONTINENT SINCE INDEPENDENCE* 141-61 (revised and updated ed. 2011) (documenting the prospects for development, later mostly unrealized, that political independence portended in many African countries); ROLAND OLIVER, *THE AFRICAN EXPERIENCE: MAJOR THEMES IN AFRICAN HISTORY FROM EARLIEST TIMES TO THE PRESENT* 227-40 (1991) (same).

98. See, e.g., CHARLES HAUSS & MELISSA HAUSSMAN, *COMPARATIVE POLITICS: DOMESTIC RESPONSES TO GLOBAL CHALLENGES* 435, 440-53 (8th ed. 2013) (discussing the evolution of the Nigerian state, including the periods of military rule); TOYIN FALOLA ET. AL., *THE MILITARY FACTOR IN NIGERIA, 1966-1985*, 1-18 (1994) (covering the period up until 1985).

99. See, e.g., FALOLA ET. AL., *supra* note 98, at 33-205 (covering the effect of military rule on numerous institutions that include the economy, the press, and

course in 1999, the country had lived through nearly three decades of these brutal regimes, the first from 1966 to 1979 and the second from 1983 to 1999.¹⁰⁰ During these periods, military dictators disbanded the legislature and ruled by military decrees, as well as suspended many sections of the constitution, including those dealing with fundamental freedoms.¹⁰¹ With specific reference to the court system, military rulers restricted the judicial review powers of the judiciary, removed judges from office arbitrarily, and operated military tribunals to whom they transferred some of the functions of the regular courts.¹⁰² Given these severe restrictions, the climate of judicial independence during military regimes resembled the colonial period, where the executive powers so loomed wholesale over the political system that even the judiciary operated like an extension of an unchecked executive branch.¹⁰³ No wonder that a Constitutional Conference the military regime set up in 1994 found that the operation of the Nigerian governments at the federal and state levels lacked separation of powers, "particularly with reference to the judiciary."¹⁰⁴

Outside the military regime eras, two different types of democratic systems existed in the post-colonial era with equally different implications for judicial independence. The first was the parliamentary system of government, inherited from the U.K. and

conduct of foreign affairs); ISIKILU BAYO OLOYEDE, *THE PRESS UNDER MILITARY RULE IN NIGERIA (1966-1993): AN HISTORICAL AND LEGAL NARRATIVE* (2004) (focusing on the press); Ekeh, *supra* note 68 (listing the "curse" of military rule in Nigeria to include the negation of constitutionalism and federalism). *See also infra* Part V.A. (commenting on the necessity for civilian rule in any strategy for promoting increased judicial independence in Nigeria).

100. *See* HAUSS & HAUSSMAN, *supra* note 98, at 448-49 (first period of military rule); *id.* at 451-52 (second period of military rule up until 1999); FALOLA ET. AL., *supra* note 98, at 1-18 (straddling both periods but ending the narrative in 1985).

101. *See* Ostien & Dekker, *supra* note 83, at 572 (referring to the action of General Muhammadu Buhari, Head of State from 1983 to 1985).

102. *See* FALOLA ET. AL., *supra* note 98, at 159-60.

103. *See id.* at 160 (pointing out that under military rule, "[t]he states and their organs were no more than administrative units of the federal government," unchecked by constitutional, legislative, and judicial restraints, or by public opinion).

104. *Cited in* Oko, *supra* note 12, at 73 n.322.

practiced in Nigeria from 1960 to 1966.¹⁰⁵ The second was the presidential system of government, initially from 1979 to 1983 and subsequently from 1999 to the present period.¹⁰⁶ Because legislative or parliamentary supremacy is the norm under a parliamentary system, the expectation, theoretically, is that little room exists for judicial review under such a political arrangement.¹⁰⁷ In contrast, a presidential system affords more room for judicial review, and with it increased opportunity for judicial independence.¹⁰⁸ To what extent this is true of Nigeria is an issue determined in Part III. of this article, which analyzes the *reality* of judicial independence under the Fourth Republic.

III. JUDICIAL INDEPENDENCE UNDER THE FOURTH REPUBLIC

Part I. of this article provided a definition of judicial independence that included a highlight of the key indicators of judicial independence drawn from the literature on the topic. Part II. laid out a historical background necessary for understanding judicial independence in Nigeria. This section, Part III., discusses in precise terms the *extent* of the gap that exists between the theory and practice of judicial independence in Nigeria since 1999. There are two interrelated aspects to the discussion that follows: the first is an application of the seven indicators of judicial independence distilled in Part I. to the provisions relating to judicial independence under the

105. See HAUSS & HAUSSMAN, *supra* note 98, at 446-48 (analyzing the First Republic).

106. See *id.* at 449-51 (analyzing the period of the Second Republic); *id.* at 452-54 (covering the period since 1999).

107. Under the British system that Nigeria inherited upon independence in 1960, parliamentary supremacy dictates "that Parliament—not the crown, the courts, or any other institution—is the supreme authority" within the political system. SODARO, *supra* note 9, at 401.

108. An independent judiciary with judicial review powers is an essential feature of a presidential system of government. See *id.* at 195-96 (listing the characteristic features of a presidential system of government, exemplified by the U.S., as including a president and legislature elected separately; lawmaking authority based on a balance of legislative and presidential powers; the powers of judicial review; and the authority of the president, the legislature, and subnational governments to override decisions of the judiciary, especially the highest court of the land).

Nigerian constitution; the second is an alternative measurement of the gap between theory and practice in judicial independence based on the U.S. State Department's *Country Reports on Human Rights Practice*.¹⁰⁹ The use of these two tools of evidence conduces with the comparative checking technique in comparative political analysis, which mandates the researcher to test his or her argument against multiple cases, rather than limit examination to just one case.¹¹⁰

A. Weighing Nigeria's Constitutional Provisions for Judicial Independence against the Seven Key Indicators Developed in Part I.

Nigeria's 1999 Constitution contains ample provisions relating to judicial independence. These include:

- that judges be appointed through a process that is relatively insulated from politics;¹¹¹
- that they enjoy security of tenure and serve until they attain the age of retirement,¹¹² within which period their

109. The *Country Reports on Human Rights Practices* is a human rights monitoring tool prepared by the U.S. State Department and released in the Spring of every year to facilitate the conduct of U.S. foreign relations in other countries, including economic and military assistance. See Philip C. Aka, *The Country Reports on Human Rights Practices and U.S. Human Rights Policy in a Changing World*, 14 *PERSP. ON GLOBAL DEV. & TECH.* 238, 243-245 (2015) (describing the features of the *Country Reports*).

110. DICKOVICK & EASTWOOD, *supra* note 18, at 17-18.

111. See CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 231, §§ (1)-(2) (providing that the Chief Justice and the justices of the Supreme Court should be appointed by the President on the recommendation of the National Judicial Council ("NJC"), subject to confirmation by the Senate); *id.* art. 238, § (1) (providing that the president of the Court of Appeal should be appointed by the President on the recommendation of the NJC, subject to confirmation by the Senate); *id.* art. 238, § (2) (providing that other judges of the Court of Appeal should be appointed by the President on the recommendation of the NJC); *id.* art. 250, § (1) (providing that the chief judge of the Federal High Court should be appointed by the President on the recommendation of the NJC, subject to confirmation by the Senate); see also *id.* art. 271, § (1) (providing that the chief judge should be appointed by the state governor on the recommendation of the NJC, subject to confirmation by the State House of Assembly); *id.* art. 271, § (2) (providing that other state high court judges should be appointed by the state governors on the recommendation of the NJC).

112. *Id.* art. 291, § (1) (providing that justices of the Supreme Court and the Court of Appeal may retire voluntarily at 65 and mandatorily at 70); *id.* art. 291, §

salaries and conditions of service may not be altered to their disadvantage;¹¹³

- that they may not be removed from office before their retirement, except in clearly-specified circumstances.¹¹⁴
- Article 6 of the 1999 Constitution articulates and defines the “judicial powers of the Federation,” thus unambiguously creating the judiciary as the third arm of the Nigerian government.¹¹⁵
- Nigeria, like the United States, has a presidential system of government that is based on the separation of the powers into three branches of government, wherein each branch checks the other under a check-and-balance arrangement integral to that system.¹¹⁶

Entrenchment of these provisions in the constitution as ground norm or basic law of the land signifies that an independent judiciary is a value that Nigerians cherish, consistent with the presidential system

(2) (stipulating that other non-Supreme Court judges may retire voluntarily at 60 and mandatorily at 65).

113. *Id.* art. 84, §§ 2, 4 (including Judicial officers among office holders whose remuneration, salaries, and allowances are “a charge upon the Consolidated Revenue Fund” of the country, meaning that the remuneration, salaries, and their conditions of service, excepting allowances, “shall not be altered to their disadvantage after their appointment”).

114. *Id.* art. 292, § (1).

115. *Id.* art. 6 (stipulating that the powers established for the Federation are vested in the courts). These powers are then spelled out fully under articles 230-96, forming Chapter IV, “Judicature,” and comprising four main parts: federal courts, state courts, election tribunals, and miscellaneous issues (mostly conditions of service), denominated “supplemental.” *See id.* art. 230-96.

116. *See generally id.* Like the 1979 one that preceded it, Nigeria’s 1999 Constitution is modeled on the U.S. presidential system of government. *See* Diamond, *supra* note 2, at 47 (noting that “[c]losely modeled after the U.S. system,” Nigeria’s Second Republic constitution “provided for an elected president and vice-president . . . a bicameral National Assembly . . . an independent judiciary, headed by a Supreme Court and State High Courts . . . and a detailed chapter on fundamental human rights”). *See also* GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989: A GLOBAL PERSPECTIVE 350 (2001) (commenting on the influence of U.S. constitutionalism abroad); Andrzej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 405, 452-53 (Albert J. Rosenthal & Louis Henkin, eds. 1990) (commenting similarly).

of government they adopted back to the Second Republic, in a constitutional engineering attempt to revamp their political system and correct the problems of the past that included a bloody civil war.¹¹⁷

To what extent do the provisions of Nigeria's 1999 Constitution meet the seven indicators of judicial independence under the IBA's Minimum Standards developed in Part I. of this article? The outcomes are summarized in Table 1 with comments on each indicator.

TABLE 1: NIGERIA'S RANKINGS ON THE INDICATORS OF JUDICIAL INDEPENDENCE¹¹⁸

Measure	Whether condition is met?
Ban against exceptional or military courts	Yes
Separation of powers	Yes
Exclusive authority	Yes
Finality of decisions	Yes
Enumerated qualifications	Yes
Guaranteed terms	Yes
Fiscal autonomy	No

Nigeria meets the first indicator, which is the *ban against exceptional or military courts*. The 1999 Constitution provides that "[i]n the determination of his civil rights . . . a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its

117. See Diamond, *supra* note 2, at 47 (commenting on innovations in "institutional architecture" designed to promote "a more durable political foundation"); see also C.S. Whitaker, Jr., *Second Beginnings: The New Political Framework*, 11 ISSUE 2-13 (1981); Claude S. Phillips, *Nigeria's New Political Institutions, 1975-79*, 18 J. MODERN AFR. STUD. 1-22 (1980). Constitutional engineering is the design of political institutions in a society in an attempt to realize some desired political ends. See, e.g., GIOVANNI SATORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES, AND OUTCOMES* (2d ed. 1997) (applying the concept of constitutional engineering to countries in various parts of the world); DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* (1991) (discussing constitutional engineering in South Africa).

118. Table created by author.

independence and impartiality."¹¹⁹ A court with the aforementioned features is more likely than not to be an ordinary rather than an exceptional or military court. The second indicator, *separation of powers*, is equally met. The provision that insulates the judiciary from the political sphere applies here, as do provisions in the constitution relating to judicial powers, separation of powers, and checks and balances, all features integral to Nigeria's presidential system of government.¹²⁰

The third and fourth indicators concerning *exclusive authority* and *finality of decisions* respectively are closely related and mirror the second indicator dealing with separated powers. Consequently, one can infer that the Nigerian constitution also meets the third and fourth indicators. Further, with regard to *finality of decisions*, the Nigerian constitution states that "[w]ithout prejudice to the powers of the President or of the Governor of a State with respect to prerogatives of mercy, no appeal shall lie to any other body or person from any determination of" the Supreme Court.¹²¹

Regarding the fifth and sixth indicators, *enumerated qualifications* and *guaranteed terms* respectively, careful review of the provision on tenure of security and related matters reveals that Nigeria's 1999 Constitution also meets these two indicators. Unlike their Article III counterparts in the U.S., Nigerian constitutional judges do not enjoy lifetime tenure. Instead, under the 1999 Constitution, Supreme Court judges face mandatory retirement when they turn seventy years old, while non-Supreme Court judges do so when they reach sixty-five years of age.¹²² Mandatory retirement in Nigeria's judicial system differs starkly from the U.S., where federal judges serve a life tenure on the bench.¹²³ However, U.S. Supreme Court justices may be

119. CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 36, § 1 (emphasis added).

120. *See supra* notes 111, 115-16, and corresponding texts.

121. CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 235.

122. *Compare id.* art. 291, § 1 (retirement age for Supreme Court judges and judges of the Court of Appeal), *with id.* art. 291, § 2 (retirement age for judges other than those of the Supreme Court and Court of Appeal).

123. *See* U.S. CONST., *supra* note 55, art. III, § 1 (providing that federal judges "shall hold their Offices during good Behaviour").

discharged through impeachment, for multiple reasons.¹²⁴ The Nigerian notion of *guaranteed terms*, therefore, clearly diverges from the U.S. judicial system. In the light of this divergence, there remains a question as to whether it is appropriate to assign a “yes” value to the *guaranteed terms* indicator.

This divergence of *guaranteed terms* from the U.S. is a major point of contention by some Nigerian commentators who have argued that Nigeria should follow the U.S. practice.¹²⁵ One typical argument on this matter is by one critic, Nathaniel Ukoima, who opined that mandatory retirement at seventy years old for Supreme Court justices “is breeding ground for insecurity and judicial incapacity,” capable of militating against judicial independence.¹²⁶ “A judge who is burdened with financial considerations of retirement years is not an independent judge. A judge who is burdened with the politics of advancement or succession is not a free judge.”¹²⁷ According to this critic, in order for the Nigerian judiciary to “act as a safeguard against . . . governmental encroachment” while increasing the chance of Nigerian Supreme Court justices to “give . . . bold and honest decision,” these justices should have lifetime appointments, subject to certain impeachment and removal conditions.¹²⁸

Although the observation of this critic contributes some useful insight to the discussion, Nigeria appears to meet the *guaranteed*

124. Compare U.S. CONST., *supra* note 55, art. III, § 1 (permitting federal judges to hold offices “during good Behaviour”), with *id.* art. II (stipulating that “all civil Officers of the United States,” seemingly including judges, may be impeached and removed from office upon conviction for “Treason, Bribery, or other high Crimes and Misdemeanors”).

125. See, e.g., Nathaniel Ukoima, *Nigeria: Concept of Federalism*, *BLOGGER*, <http://www.ukoima.blogspot.com/p/Nigeria-concept-of-federalism.html> (last visited Dec. 11, 2014).

126. Ukoima, *supra* note 125.

127. *Id.* The author opined that “[a] recent petition against the Chief Justice of Nigerian Supreme Court alleged that he had been honest before now, but due to his impending retirement, he has started amassing wealth through the abuse of his office.” *Id.*

128. *Id.*; cf. A.N.C. Ikoru, *A Case for Elongation of Tenure of Nigerian Judges*, *CHANNELKOOS* (Nov. 3, 2011), www.channelkoos.com/index.php/features/301-a-case-for-elongation-of-tenure-of-nigerian-judges (“Since we make bold to copy so many things from America [sic] why do we foot-drag when it comes to copying better things from that country?”).

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terms requirement. The IBA's Minimum Standards state that "[j]udicial appointments should generally be for life, subject to removal for cause and *compulsory retirement* at an age fixed by law at the date of appointment."¹²⁹ Similarly, the Basic Principles on Judicial Independence stipulate that "[t]he term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."¹³⁰ More specifically, the Basic Principles state that judges "shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."¹³¹ The provisions in Nigeria's 1999 Constitution meet these standards.

Fiscal autonomy is the only condition in Table 1 that is not met. As one author noted, "[b]oth the appearance and reality of independence demand that the judiciary should have complete control over its funds."¹³² Although the provision for judicial independence recounted above suggests fiscal autonomy for the judiciary, in practice, that autonomy does not exist. Instead, under the Fourth Republic, the President controls funds allocated to the judiciary, impelling judges to "depend on the goodwill of the executive branch for funding."¹³³ This occurrence undermines the protections for judicial independence in the Nigerian constitution.

An unfortunate history, one laced in missed opportunities to fix a nagging problem, underlies the Nigerian judiciary's lack of fiscal autonomy. The draft of the 1979 constitution, dusted up with minor changes and adopted as the 1999 Constitution,¹³⁴ included a provision in the document that stated: "[I]n respect of the Capital and Recurrent

129. IBA MIN. STDS., *supra* note 22, § 22 (addressing the terms and nature of judicial appointments). This provision confusedly conflates lifetime appointment and compulsory retirement. *See id.*

130. Basic Principles on Judicial Independence, *supra* note 7, § 11 (addressing the conditions of service and tenure of judges).

131. *Id.* § 12 (discussing the conditions of service and tenure of judges).

132. Oko, *supra* note 12, at 77.

133. *Id.* at 76. *See id.* at 77, for a quote attributed to a former President of the Court of Appeals, where he stated that "[i]t is . . . no use speaking of the judiciary as the third arm of the government if that arm has wittingly or unwittingly been consigned to the role of beggar, living at the mercy of the other two powerful arms."

134. *See* Ostien & Dekker, *supra* note 83, at 574 (portraying the 1999 Constitution as "essentially the 1979 constitution reinstated").

Expenditure of the Judicial Service of the Federation, [resources] shall be withdrawn from the Fund and paid into a special account of the Federation under the control of the judiciary of the Federation.”¹³⁵ However, the departing military government under General Olusegun Obasanjo deleted this provision from the final document that he later signed into law.¹³⁶ Another missed opportunity turned up in 1994 when a constitutional conference set up by another military government proposed an amendment that would have empowered the judiciary to

prepare its own annual budget and defend same. The approved budgetary allocation of the [J]udiciary should be disbursed directly to the Judiciary as in the case of Local Governments. The Judiciary should have its own accounting administration with the Director-General as the Chief Accounting Officer who should be responsible directly to the Chief Justice or Head of Superior Courts of Record, as the case may be.¹³⁷

But, like the proposal in 1979, this one too did not become law. The lack of fiscal autonomy has led to “gross underfunding,”¹³⁸ which complicates the ability of Nigerian courts, especially at the non-federal levels, to secure the infrastructure that judges and other court officials need to do their jobs well.¹³⁹

135. Cited in Oko, *supra* note 12, at 78.

136. *Id.*

137. *Id.* at 79 n.351 (quoting the report of a Constitutional Conference Committee created by the military government in 1994-1995).

138. See, e.g., Okey Wali, *Problems Facing Judiciary, Justice Delivery, are Multi-Dimensional*, NEWSWATCH TIMES (Nov. 25, 2013), <http://www.mydailynewswatchng.com/problems-facing-judiciary-justice-delivery-multi-dimensional-okey-wali> (bemoaning several problems that Nigerian courts face, including inadequate funding).

139. See Adam Adedimeji, *Nigerian Judges are Poorly Equipped, Boma Ozobia*, DAILY INDEPENDENT, <http://www.dailyindependentnig.com/2013/01/Nigerian-judges-are-poorly-equipped-boma-ozobia/> (last visited Nov. 23, 2014). At the time of this interview, Ozobia was the president of the Nigerian Bar Association. *Id.* Tools Nigerian judges and other court officials need to do their jobs that they don't have include spacious courtrooms, law libraries, research assistants, secretarial and stenographic services, steady power supply, computers and visual aid equipment, photocopiers, stationery, and transcript services. See Oko, *supra* note 12, at 43-44. To illustrate the direness of the situation, due to inadequate access to

*B. Weighing the Extent of Judicial Independence in Nigeria,
Using the U.S. State Department's Country
Reports on Human Rights Practices*

This subsection examines four samples of the *Country Reports on Human Rights Practices* for Nigeria, germane to the period under review. The four samples are: the 1999 *Report* from the beginning of the Fourth Republic, the 2003 *Report* from midway into the Fourth Republic, and the 2012 *Report* and 2013 *Report*, the nearest to the present period. These reports do *not* suggest that the source of information is the most objective on judicial independence; nor do they dismiss the political coloration embedded in a tool designed mostly to promote U.S. foreign policy abroad and provide a gauge for the disbursement of military and economic assistance.¹⁴⁰ Instead, the data are used to complement and complicate this analysis in a manner that additionally amplifies the connection between judicial independence and human rights.

While one would expect improvements in judicial independence under the Fourth Republic from 1999 to the present period, this is not the case over the fourteen years covered by the four samples. Most discouragingly, these reports are strikingly similar, down to language, demonstrating little to no improvement over time. The quotations below demonstrate the similarities between the four sample reports and showcase this discouraging situation:

The Constitution provides for an independent judiciary; however, in practice, the judicial branch remains susceptible to executive and legislative branch pressure, influence by political leaders at both the

stenographic services, judges are impelled to write their notes in longhand during their bench trial proceedings, where they must also gauge the demeanor of witnesses for truthfulness. *Id.* at 43. The situation is especially dire in state courts, where many litigants “are required to bring their own stationery for their cases.” Chinonye Obiagwu & Chidi Anselem Odinkalu, *Nigeria: Combating Legacies of Colonialism and Militarism*, in HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES 211, 237 (Abdullahi A. An-Na'im, ed., 2003). The scarcity of work tools creates an environment susceptible to corruption by unprincipled public officials. Oko, *supra* note 12, at 43.

140. Aka, *supra* note 109, at 238-260 (appraising the role of the *Country Reports* in the conduct of U.S. foreign policy with suggestions for improving the effectiveness of the reporting and monitoring system).

state and federal levels, and suffers from corruption and inefficiency.¹⁴¹

The Constitution provides for an independent judiciary; however, the judicial branch remained susceptible to executive and legislative branch pressure. Decisions at the federal level were indicative of greater independence. The judiciary was influenced by political leaders[,] particularly at the state and local levels.¹⁴²

Although the constitution and law provide for an independent judiciary, the judicial branch remained susceptible to pressure from the executive and legislative branches and the business sector. Political leaders influenced the judiciary, particularly at the state and local levels.¹⁴³

The constitution and law provide for an independent judiciary in civil matters. The executive, legislature, and business interests, however, exerted undue influence and pressure in civil cases. Official corruption and lack of will to implement court decisions also interfered with the process. While the law provides for access to the courts for redress of grievances, and courts can award

141. U.S. DEP'T OF STATE, 1999, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NIGERIA (2000), <http://www.state.gov/j/drl/rls/hrrpt/1999/65.htm>.

142. U.S. DEP'T OF STATE 2003, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NIGERIA (2004), <http://www.state.gov/j/drl/rls/hrrpt/2003/27743.htm> [hereinafter COUNTRY REPORT 2003: NIGERIA]. Section e. of the Report deals with the denial of fair public trial. *Id.* The opening summary of the *Report* indicates that:

Although the judicial branch remained susceptible to executive and legislative branch pressures, the performance of the Supreme Court and decisions at the federal appellate level were indicative of growing independence. State and local judiciary were significantly influenced by political leaders and suffered from corruption and inefficiency more than the federal court system.

Id. The author is indebted to the editorial staff of *California Western International Law Journal* for their keen observation leading to this more nuanced analysis.

143. U.S. DEP'T OF STATE 2012, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NIGERIA (2013), <http://www.state.gov/documents/organization/204365.pdf> [hereinafter COUNTRY REPORT 2012: NIGERIA].

damages and issue injunctions to stop or prevent a human rights violation, the decisions of civil courts were difficult to enforce.¹⁴⁴

C. Recapitulating Judicial Independence in Nigeria, Based on the Seven Indicators and the U.S. State Department's Country Reports on Human Rights Practices

This assessment of judicial independence under the Fourth Republic, based on the indicators of judicial independence distilled in Part I. and the four samples of the *Country Reports on Human Rights Practices* for the periods germane to this work, showed mixed results. Nigeria's 1999 Constitution included impressive provisions regarding judicial independence, and the application of the seven indicators of constitutional measures showed that Nigeria has performed well on every measure, except *fiscal autonomy*. Furthermore, legal scholars who have studied this matter acknowledge the measure of progress. For example, Professor Okechukwu Oko observed that the National Judicial Council's ("NJC") "insistence on probity and accountability has made a lasting impression on judges who now operate with a heightened awareness of their limitations."¹⁴⁵ Professor Oko's assessment of the National Judicial Institute ("NJI") was equally glowing.¹⁴⁶ He noted that the Institute "has significantly and positively affected the overall performance of the judiciary."¹⁴⁷ Through its seminars, conferences, and workshops, it has provided judges "with an enhanced understanding and greater appreciation of the ethical and intellectual underpinnings of their positions."¹⁴⁸ Finally, Professor Oko indicated that "through lectures and the grant of scholarships, the Institute has helped judges to ponder and reflect

144. U.S. DEP'T OF STATE 2013, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NIGERIA (2014), <http://www.state.gov/documents/organization/220358.pdf> [hereinafter COUNTRY REPORT 2013: NIGERIA].

145. Oko, *supra* note 12, at 59.

146. Established in 1991, the NJI promotes efficiency, uniformity, and effectiveness of judicial services in the country, including continuing education for judges. See Appendix B. (spotlighting various agencies, including the NJI, connected with judicial independence in Nigeria).

147. Oko, *supra* note 12, at 67.

148. *Id.*

on their position and the best way to approach their role as adjudicators.”¹⁴⁹

Even so, several problems still remain that suggest a gap between theory and actual practice. Besides the *Country Reports*' longitudinal accounts suggesting little movement towards judicial independence, there are also other unresolved ills afflicting the Nigerian judiciary. Some of those ills are externally driven, others self-imposed, but all have ramifications for judicial independence. Professor Oko identified a number of these ills: corruption; interference with the judicial process through physical and nonphysical means by individuals or government entities interested in the judicial outcome; and institutional problems, such as lack of infrastructure, and long delays.¹⁵⁰ These problems led Professor Oko to conclude that “[i]n practice . . . judicial independence remains extremely fragile, implacably assaulted by politicians and corrupt judges.”¹⁵¹ Review of samples of the *Country Reports* for various years pertinent to this article, including those from 2012 to 2013 postdating Professor Oko's research, leads to a similar conclusion. Finally, to complete these assessments, in 2014, Human Rights Watch portrayed the Nigerian judiciary as “weak and overburdened.”¹⁵²

Having analyzed judicial independence in Nigeria under the Fourth Republic, or the lack thereof, the real challenge now is to change that predicament. Many writers, like Professor Oko, place the burden and responsibility for changing the lack of judicial independence on the governmental branches, including the judiciary.¹⁵³ This study takes a more calibrated and consolidated

149. *Id.*

150. *See* Oko, *supra* note 12, at 11-82.

151. *Id.* at 72.

152. HUMAN RIGHTS WATCH, WORLD REPORT 2014: NIGERIA (2014), http://www.hrw.org/sites/default/files/related_material/nigeria_3.pdf.

153. *See* Oko, *supra* note 12, at 72-73. Professor Oko indicates:

The experience in Nigeria reveals that intolerance, contempt for the judiciary and the desire to control and manipulate the judiciary continually swirl within the executive. Elected officials and politicians often push or prod judges to forfeit their impartiality and independence. The judiciary, on its part, has some judges who either lack or fail to demonstrate the integrity needed to resist pressures and overtures on them to deviate from acceptable judicial behavior.

Id.

approach by integrating the contribution of the masses to the public good of judicial independence and precept of the rule of law linked with it. That is the purpose of the final part of this article, which outlines several steps for promoting increased judicial independence in Nigeria. Before then, it is necessary to pause to reflect on some forces in the changing landscape of politics in the country with possible ramifications for judicial independence.

IV. TWO FACTORS OF NIGERIAN POLITICS WITH POTENTIAL IMPLICATIONS FOR JUDICIAL INDEPENDENCE

Two factors from Nigerian politics under the Second Republic since 1999 with potential implications for judicial independence are the adoption of sharia code in the twelve northern states, and the invigoration of the ECOWAS Community Court of Justice. The first seems negative while the second is potentially positive.

The first of these developments is the adoption of sharia law as criminal code in twelve northern states,¹⁵⁴ beginning in January 2000,¹⁵⁵ almost from the onset of the Fourth Republic. The effects of the adoption and implementation of sharia law were magnified by the introduction of private sharia instruments, known as Independent Sharia Panels ("ISPs"), in non-northern cities with sizable Muslim populations, such as Ijebu-Ode, Ibadan, and Lagos in Western Nigeria.¹⁵⁶ Going further, Nigeria's sharia states created *hisbah* organization, or sharia police, charged with responsibility for prosecuting a range of offenses, including "social vices" like

154. See *Analysis: Nigeria's Sharia Split*, BBC NEWS (Jan. 7, 2003), news.bbc.co.uk/2/hi/Africa/2632939.stm; see also Philip C. Aka, *Nigeria Since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations under President Olusegun Obasanjo*, 4 SAN DIEGO INT'L L.J. 209, 240-46 (2003). The twelve sharia states are Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara. *Id.* at 240 n.190; *Nigeria's Sharia Split*, *supra* (including a map of Nigeria showing the twelve sharia states).

155. See *Nigerian Muslims Welcome Sharia Law*, BBC NEWS (Jan. 27, 2000), news.bbc.co.uk/2/hi/Africa/620058.stm (reporting on the adoption of sharia law in Zamfara, the first state in the country to embrace this law).

156. Ostien & Dekker, *supra* note 83, at 577. Under ISPs, private parties embark on a private arrangement, not supported by the government, to apply Islamic law to settle disputes, whose jurisdiction they consent to and judgment they agree to abide by. *Id.*

prostitution, mixing of the sexes, and drinking in public places.¹⁵⁷ Taken together, these actions had the effect of restoring sharia law in Northern Nigeria “to a state of completeness and a degree of autonomy” never seen before in the country “for over a century.”¹⁵⁸

This introduction of sharia law upset the agreement on the eve of independence, which confined the application of sharia law to issues of family and personal status law, such as marriage, divorce, child custody, and inheritance.¹⁵⁹ It also ended the former practice under which the entire nation, including the North, was governed by one criminal code that provided punishments for criminal offenses throughout the nation.¹⁶⁰ Subsequently, contrary to the letter and spirit of the Settlement of 1960,¹⁶¹ some Northern leaders worked furtively yet diligently to expand the role of sharia law in the public square. These attempts took place under successive military regimes,

157. See *Sharia Police Smash 240,000 Bottles of Beer in Kano*, VANGUARD (Nov. 27, 2013), www.vanguardngr.com/2013/11/sharia-police-smash-240000-bottles-beer-kano (enforcing alcohol prohibition in Kano); Rasheed Olaniyi, *Hisba and Sharia Law Enforcement in Metropolitan Kano*, 57 AFR. TODAY 70-96 (2011) (analyzing the operation of this police in a major northern Nigerian city); *Nigeria's Religious Police: Out of Patrol*, THE ECONOMIST (June 11, 2010), www.economist.com/node/6311947 (discussing Islamic police searches for cheats and hoarders to ensure “just prices” in Kano open marketplaces); SHARIA IMPLEMENTATION IN NORTHERN NIGERIA 1999-2006: A SOURCEBOOK (Philip Ostien, compiler and ed. 2007). The enforcements create an environment reminiscent of the U.S. from 1920 to 1933, during Prohibition. See, e.g., EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA (1996) (providing a history of the U.S. government's failed attempt to prohibit the making, selling, or transportation of intoxicating liquors); JOHN KOBLER, ARDENT SPIRITS: THE RISE AND FALL OF PROHIBITION (1973) (documenting the full range of the temperance movement in the U.S. from the 17th century to the prohibition years).

158. Ostien & Dekker, *supra* note 83, at 576.

159. *Id.* at 567 (commenting on “the Settlement of 1960”). Supported by the departing British colonial authorities, the settlement was necessary to protect basic rights for all citizens and to promote economic relations in the new nation. *Id.* at 566-67. The French administrative approach in neighboring countries was one where religious leaders were stripped of power; this is in contrast to British practice that left control to the Emirs, who held sway as religious and political leaders. Brenda Koerner, *How Did Sharia Get to Nigeria?*, SLATE (Aug. 22, 2003, 4:48 PM), http://www.slate.com/articles/news_and_politics/explainer/2003/08/how_did_sharia_get_to_nigeria.html.

160. See Ostien & Dekker, *supra* note 83, at 555-612.

161. See *supra* note 159.

beginning in 1979, when northern Muslims staged a walk-out during the drafting of the Second Republic constitution, following the defeat of their proposal to include a Federal Sharia Court of Appeal in the constitution.¹⁶² The impasse was resolved in 1979, during the rule of General Olusegun Obasanjo, a Christian, only following agreement by the Constituent Assembly, which wrote into the new constitution provisions for State Sharia Courts of Appeal “for any state that requires it,” and, in the same manner, Customary Courts of Appeal, “for any state that requires it.”¹⁶³ Successive military rulers, all of whom were Muslims, did not approach the sharia issue with the same even-handedness. For example, in 1986, General Ibrahim Babangida (Head of State from 1985 to 1993), clandestinely enrolled the country into the Organization of the Islamic Conference, backing off only following a deafening public outcry from Christians in all parts of the country.¹⁶⁴

162. See David D. Laitin, *The Sharia Debate and the Origins of Nigeria's Second Republic*, 20 J. MODERN AFR. STUD. 411-30 (1982); Ostien & Dekker, *supra* note 83, at 571-72.

163. Ostien & Dekker, *supra* note 83, at 572. The Constituent Assembly was the political body that reviewed the draft constitution that the Constitutional Drafting Committee, a group of fifty experts, many of them experienced legal practitioners, put together for the country. See Diamond, *supra* note 2, at 46 (analyzing the transition to the Second Republic in 1979).

164. Charles T. Powers, *Nigeria Divided Over Close Islamic Ties: Christians in South Decry Move to Join Key Muslim Organization*, L.A. TIMES (Feb. 15, 1986), http://www.articles.latimes.com/1986-02-15/news/mn-8172_1_nigerian-press. Since 1967, Nigeria participated in IOC meetings as an observer, but in 1986, on the eve of the controversy, the Babangida military government sent a delegation led by a cabinet minister, Rilwanu Lukman, himself a Muslim. *Id.* The year 1967 is significant because it was when the 1967 to 1970 civil war started. See FALOLA ET. AL., *supra* note 98, at 19-32 (discussing the forces leading to war and the military regime's conduct of the war). Eastern Nigeria, which declared independence from Nigeria as Biafra, is singularly the most Christian portion of the country, compared, for example, to Western Nigeria, which is divided almost equally between Christians and Muslims. See Philip C. Aka, *The "Dividend of Democracy": Analyzing U.S. Support for Nigerian Democratization*, 22 BOSTON COLLEGE THIRD WORLD L.J. 225, 233 (pointing out that “[a]lthough adherents of Christianity and Islam, Nigeria's two major religions, can be found in all parts of the country, most Hausa-Fulanis are Muslim, and most Igbos are Christian,” with Yorubas “divided about equally between these two religions”). One possible reading of Nigeria's entrance in 1967 as an IOC observer would be that with Eastern Nigeria focused on secession, the northern-dominated Nigerian government, driven by a desire to spread

The solicitude for sharia law in northern Nigeria reached an all-time high with the adoption and implementation of this law in the twelve states in the region beginning, as indicated before, with Zamfara State in the Northwestern portion of the country, in 2000.¹⁶⁵ Though the Nigerian constitution forbids the adoption of a state religion,¹⁶⁶ none of Nigeria's three presidents under the Fourth Republic, all of them members of the dominant People's Democratic Party ("PDP"), have seen it fit to seek a ruling by the Nigerian Supreme Court regarding the constitutionality of the twelve northern states' adoption of sharia law as criminal code, contrary to the settlement of 1960.¹⁶⁷ Although enthusiasm for aggressive

Islam to non-northern portions of the country, saw it fit to expand relations with the Muslim world. It is also possible that the government used its IOC observer status as a ploy to seek military and diplomatic assistance that it needed to terminate the Biafran secession, particularly support from the Muslim world. *See, e.g.,* Chris Chidebe, *Nigeria and the Arab States*, 2 AM. J. ISLAMIC SOC. SCIENCES 115-23 (1985) (maintaining that during the war, Israeli support for Biafra "was countered by general Arab support for the federal government" and that, fearing the possibility that Nigeria "was about to be dismembered through the chicanery of Israel," some Arab countries made it a point to offer at least diplomatic support to the federal government). This was not the only attempt by Babangida to expand the role of sharia law in the Nigerian public square. He also worked hard to change the provisions in the constitution relating to Islamic sharia law. *See* Ostien & Dekker, *supra* note 83, at 574-75 (noting that in 1986, General Babangida "deleted the word *personal* wherever it occurred after the word *Islamic* in the sections of the 1979 constitution touching on Sharia Court of Appeal jurisdiction").

165. *See Nigerian Muslims Welcome Sharia Law*, *supra* note 155.

166. *See* CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 10 (providing that "[t]he Government of the Federation or of a State shall not adopt any religion as State Religion"). Consistent with this provision, two high courts in the sharia states have ruled the attempt by Borno State in 2002 and that of Niger State in 2003 to expand their criminal laws, unconstitutional. Ostien & Dekker, *supra* note 83, at 607-08 n.15. Intriguingly, advocates for extension of sharia law into the criminal code find part of the basis for their position in the Nigerian constitution, specifically, article 38 (2) of the document, which provides for freedom of religion. *See* CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 38 (2).

167. Part of the reason is because Nigeria is a country where, as Human Rights Watch indicated in its 2004 report on the sharia issue, "religious divisions run deep." "Political Sharia"? *Human Rights and Islamic Law in Northern Nigeria*, HUMAN RIGHTS WATCH 1 (Sept. 2004), www.hrw.org/reports/2004/nigeria0904/. In the language of one Nigerian banker in Kano in 1986: "Anytime you start talking about religion in this country, you are playing with fire. At its most extreme, what you're talking about is Christians and Muslims fighting each other in the streets." Powers,

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implementation of sharia law appeared to wane with the passage of time,¹⁶⁸ the adoption of sharia law as criminal code remains an issue with possible negative implication for judicial independence.¹⁶⁹ If

supra note 164. Predictably, sporadic outbreaks of violence followed the introduction of criminal sharia law in many northern states, including Kano where the banker lived. *Id.* In one such incident in Kaduna, another major northern city, in February 2000, more than 2,000 people died in street protests that the Nigerian army finally brought under control. Dan Isaacs, *Islam in Nigeria: Simmering Tensions*, BBC NEWS (Sept. 24, 2003), <http://www.news.bbc.co.uk/2/hi/Africa/3155279.stm>; see also Ostien & Dekker, *supra* note 83, at 577 (estimating the number of the dead as “hundreds, perhaps thousands”).

168. See Ostien & Dekker, *supra* note 83, at 602 (pointing out that “[a]lthough it continues as an official program of a number of northern state governments, and is still advancing on various fronts, sharia implementation has nevertheless become largely irrelevant to the national discourse”). Several reasons account for the reduced ardor. First is the draconian nature of sharia justice, “sentences shocking to modern sensibilities.” *Id.* at 592. These sentences include amputation of limbs for theft, and other forms of mutilation as retaliation for inflicted injuries; dire forms of execution (such as stoning to death for adultery); stabbing to death of a person with the same knife the offender had used to kill his victims; and flogging for possessing alcohol—all of which can draw negative attention domestically and internationally to those sentences. See *id.* Second, application of sharia law in “northern Nigeria is still often contaminated by local custom antithetical to women,” *id.* at 588, complete with archaic rules of evidence that are weighted against women defendants but do not apply against men. See *id.* at 589.

169. The piece by Ostien and Dekker is a thoughtful one by individuals familiar with the Nigerian legal system, one of whom, Philip Ostien, taught law for many years at the University of Jos in the middle belt of Nigeria close to the northern region. See *id.* at 606 n.1 (bio statement of Philip Ostien). The authors surveyed three possibilities in the conclusion of their article. See *id.* at 604-06. The first is that, pressed by their ardent supporters, the governors of northern sharia states will carry out the backlog of pending sentences and even allow the imposition of new sentences. *Id.* at 603. They ruled the probability of this occurrence as “practically nil.” *Id.* The second is that “[t]he sharia states will continue to muddle along under the penal legislation now in place, finding various ways to limit and mitigate the damage.” *Id.* The authors ruled the probability of this second occurrence “high over the near to medium term.” *Id.* The third possibility the authors surveyed was that

[t]he federal courts will rule that the penal legislation now in place is unconstitutional. The penal law of all sharia states will revert to what it was before sharia implementation started. All persons still in prison under sentence of *hudud* [Arabic for punishment for serious crime] or *qisas* [Arabic law of retaliation] will be released and no more such cases will arise.

nothing else, it adds a layer of complexity to a judicial system that before 1999 remained nearly secular.¹⁷⁰

Id. at 604. The authors ruled this probability “quite high in the not too distant future.” *Id.* The authors’ assessment regarding the second possibility is the reason why this article considers the adoption of sharia law as spelling a negative implication for a Nigerian legal system that until 2000 remained mostly secular. There is nothing to add to their first possibility since the probability of that occurrence is “practically nil.” *Id.* at 603. The same too for the third, since the probability of that occurrence is “quite high in the not too distant future.” *Id.* at 604. However, for the second possibility, the projection is a high probability “over the near to medium term” that the sharia states—and the Nigerian state—“will continue to muddle along” over the sharia issue, just finding ways “to limit and mitigate the damage.” *Id.* at 603. To make matters worse, all these projections are speculative, especially given their observation that “Nigeria’s troubles are legion, and, along with the North’s most sincere Muslims, it will also take the sustained and cooperative efforts of many other people of all religious and ethnic persuasions all over the country to even begin to address them.” *Id.* at 606. Another point that makes this issue worrisome for judicial independence is the authors’ observation that not only does sharia law “continue[] as an official program of a number of northern state governments,” this law “is still advancing on various fronts.” *Id.* at 602.

170. *See id.* A much broader occurrence looming beyond the court system, which amplifies the upgrading of sharia into legal code in Northern Nigeria, is the bloody campaign since 2009 by Boko Haram. *See* Farouk Chothia, *Who are Nigeria’s Boko Haram Islamists?* BBC NEWS (May 20, 2014), www.bbc.com/news/world-africa-13809501. Boko Haram is an Islamic insurgency organization whose mission is to eliminate the supposedly “evil” influence of Western education through the imposition of sharia law in Nigeria. *See* LAUREN PLOCH BLANCHARD, CONG. RESEARCH SERV., R43558, NIGERIA’S BOKO HARAM: FREQUENTLY ASKED QUESTIONS 1-3 (2014). “More than five thousand people have been killed in Boko Haram-related violence”; additionally, “more than six million people have been affected and more than 300,000 displaced.” *Id.* at 3 (citation omitted). Prodded by the Nigerian government and human rights groups, the U.S. government under President Barack Obama, declared the group a terrorist organization in November of 2013. *Id.* at 10. On April 15, 2014, the terrorist organization kidnapped more than three hundred girls from their school dormitory in Chibok, a remote town in northeastern Nigeria, in an action that drew the attention of the international community. *See* Ishaan Tharoor, *8 Questions You Want Answered about Nigeria’s Missing Schoolgirls*, WASH. POST (May 6, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/05/06/8-questions-you-want-answered-about-nigerias-missing-schoolgirls/>. One Nigerian commentator tied the kidnapping to the adoption of sharia law in Nigeria. *See* Sefi Atta, *Too Many of Nigeria’s Women Are Targets—Not Just the Kidnapped Girls*, TIME (May 19, 2014), <http://time.com/103531/Nigeria-boko-haram-sharia-law> (opining that “[w]hen Nigerian states adopt sharia laws that are in their application blatantly unfavorable to women, it creates an environment in which a terrorist group like Boko Haram

A second factor of Nigerian politics, this one potentially positive, is the invigoration of the ECOWAS Community Court of Justice.¹⁷¹ This is an event of sub-regional dimension not confined to the national borders of Nigeria. Nigeria played a critical leadership role in founding ECOWAS in 1975.¹⁷² Nearly forty years later, its support is still key to the maintenance of the organization.¹⁷³ The Community

believes it has a right to do as it pleases with girls without prosecution"). At the very least, these two events have re-kindled concerns regarding the role of religion in the Nigerian public square.

171. See generally Karen J. Alter et al., *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT'L L. 737 (2013) (applauding the pleasantly unexpected emergence of the ECOWAS Court as a key human rights court).

172. See *Economic Community of West African States*, INTERNATIONAL DEMOCRACY WATCH, <http://www.internationaldemocracywatch.org/index.php/economic-community-of-west-african-states-> (last visited Dec. 17, 2014) (describing the history and institutions of the organization). The organization was formed to promote economic integration in "all fields of economic activity, particularly industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions, [and] social and cultural matters" among member-States. *ECOWAS in Brief*, ECONOMIC COMMUNITY OF WEST AFRICAN STATES, http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en (last visited Dec. 17, 2014). There are fifteen such members. See *ECOWAS Member States*, ECONOMIC COMMUNITY OF WEST AFRICAN STATES, <http://www.ecowas.int/?lang=en> (last visited Dec. 17, 2014). Besides Nigeria, the members are: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger Republic, Senegal, Sierra Leone, and Togo. *Id.* ECOWAS comprises four institutions: a Secretariat upgraded in 2006 into a Commission; a Community Parliament; a financial institution, formerly the ECOWAS Fund, now renamed the Bank for Investment and Development; and a Community Court of Justice. *Id.*; *ECOWAS Commission at a Glance*, ECONOMIC COMMUNITY OF WEST AFRICAN STATES, http://www.comm.ecowas.int/dept/index.php?id=p_p1_commission&lang=en (last visited Dec. 17, 2014).

173. Femi Aribisala, *ECOWAS Imperative for Nigeria*, NIGERIAN DEVELOPMENT & FINANCE FORUM, <http://www.nigeriadevelopmentandfinanceforum.org/PolicyDialogue/Dialogue.aspx?Edition=63> (last visited Nov. 24, 2014). Nigeria comprises over fifty percent of the community's population, has a gross domestic product ("GDP") larger than the combined GDP of all the other ECOWAS states put together, and contributes nearly one-third of the community's annual budget. *Id.* This is testament to Nigeria's endowments and reflective of Nigeria's influence in the organization. The organization's headquarters, as well as that of the Court, is located in Abuja, Nigeria's capital. See *Economic Community of West African States*, INTERNATIONAL DEMOCRACY WATCH, *supra* note 172

Court of Justice was established in 1991 as a permanent institution, rather than an ad hoc tribunal, to “address complaints from member states and institutions of ECOWAS, as well as issues relating to defaulting nations.”¹⁷⁴ The Community Court comprised a president, chief registrar, and seven judges.¹⁷⁵ In 2005, ECOWAS broadened the Court’s judicial jurisdiction to address the cases of human rights violations “that occur in any member state.”¹⁷⁶ The Community Court has since assumed a level of activity in the adjudication of human rights issues second to none in Africa, which legal scholars have praised.¹⁷⁷ ECOWAS’ peacekeeping initiatives, designed to minimize the regional impacts of the crises in Liberia and Sierra Leone during the 1990s, led to human rights abuses by peacekeeping forces.¹⁷⁸ These violations highlighted the need in ECOWAS member-States, including Nigeria, for conflict resolution procedures, and the necessity for human rights as a guarantor of regional security.¹⁷⁹

Nigerian Fourth Republic leaders also played an instrumental role in the increase of judicial jurisdiction,¹⁸⁰ and have shown no

(chronicling the history and institutions of the organization, including their locations); Alter et al., *supra* note 171, at 748 n.69.

174. *Id.* See also Alter et al., *supra* note 171, at 745-48 (describing the factors that impelled ECOWAS member-States to create the Community Court of Justice).

175. *Economic Community of West African States*, INTERNATIONAL DEMOCRACY WATCH, *supra* note 172.

176. See Alter et al., *supra* note 171, at 748-58. See also Supplementary Protocol amending the Preamble and Articles 1, 2, 9 and 30 of Protocol Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol, Jan. 19, 2005, A/SP1/01/05, A/P.1/7/91, http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf (giving the ECOWAS Community Court power over human rights issues).

177. See Alter et al., *supra* note 171, at 737-79. What sets this Court apart from other sub-regional judicial tribunals, such as the East African Court of Justice, the Tribunal of the South African Development Community, and the continent-based African Court of Human and Peoples’ Rights, are its three distinctive features of direct access for private parties, an unrestricted human rights jurisdiction, and no requirement for a litigant to first exhaust domestic remedies. *Id.* at 753-56.

178. *Id.* at 772 (noting that these abuses include looting, expropriation, theft, and sexual exploitation of women and children by peacekeepers).

179. *Id.*

180. See *id.* at 747 (stating that after taking office in 1999, Olusegun Obasanjo (1999-2007) “increased the country’s international profile, in part by reviving its leadership of” ECOWAS).

disapproval of Nigeria's active human rights jurisprudence.¹⁸¹ Nigerian politicians under the Fourth Republic calculated that it was in the country's national interest to support a permanent court charged with responsibility for adjudicating the trade and related disputes of economic integration, while simultaneously dealing with human rights issues within national borders with potential to militate against regional security, if left unaddressed.¹⁸² This is a matter in which both human rights non-government organizations ("NGOs"), many of whose advocacy led to the broadened role of the Court in human rights within the region,¹⁸³ and the Nigerian government, appear to uncommonly agree.¹⁸⁴ Part of the argument of the NGOs in supporting an enlarged role for the Community Court of Justice in human rights is that the Court's work is precisely necessary in a sub-region like West Africa "where the judiciary is an arm of the executive."¹⁸⁵ A sub-regional outfit yet located right inside Nigeria, the Community Court of Justice provides an alternative adjudicative point for litigants, especially on human rights issues, while putting pressure on Nigerian domestic courts in a manner that represents a boon to judicial independence.

181. *See id.* at 758-61 (analyzing the Court's controversial intervention in a Nigerian election dispute).

182. *See id.* at 772-75 (offering an explanation as to why the ECOWAS Community Court of Justice's decisions on human rights issues have come to eclipse economic issues).

183. *See id.* at 750-53.

184. *See id.* at 761-65 (discussing Gambia's unsuccessful attempt to restrict the ECOWAS Court's human rights jurisdiction).

185. *Id.* at 763.

V. WHERE DO WE GO FROM HERE?:¹⁸⁶ FIVE PRACTICAL STEPS FOR PROMOTING INCREASED JUDICIAL INDEPENDENCE IN NIGERIA

There are five practical steps to the public good of judicial independence or a truly independent judiciary, which this section analyzes. These five steps are:

- maintaining civilian rule as an indispensable canvas for any talk about progress on judicial independence;¹⁸⁷
- supporting judicial independence from the non-judicial branches of government;¹⁸⁸
- the judiciary's doing everything within its capacity to promote judicial independence ("physician, heal thyself!");¹⁸⁹
- relentless pursuit of judicial reforms on a broad range of issues; and
- building judicial independence with public participation, a theme central to this article.¹⁹⁰

These components are illustrative, and are not meant to exhaust all the possibilities for a complex country like Nigeria.¹⁹¹ Further, without

186. See MARTIN LUTHER KING JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (2010), for a poignant statement in civil rights, where this civil rights icon laid out his thoughts, plans, and dreams for America's future on a range of topics from the need for better jobs and higher wages to decent housing and quality education. Dr. King's where-do-we-go-from-here expression applies here because, like African Americans during the era of the Civil Rights Movement, Nigerians find themselves at a crossroads, impelling them to choose between the "chaos" of a dependent judiciary and the "community" signified in an *independent* judiciary, with no option to straddle these two options.

187. See *infra* Part V.A. (commenting on the necessity to maintain civilian rule as necessary step in growing judicial independence).

188. See *infra* Part V.B. (the non-judicial branches of the government consisting of the President and his ministers, the National Assembly, and ruling political parties).

189. See *infra* Part V.C. (showing how the judiciary can contribute to its own independence by eschewing corruption and producing the public good of speedy trials).

190. See, e.g., the discussion in *infra* V.D. (analyzing the strategy of building judicial independence with public participation).

191. See *Nigeria*, *ETHNOLOGUE: LANUGUAGES OF THE WORLD*, *supra* note 74 (explaining that Nigeria has one of the highest numbers of spoken languages of any state in the world: over 527 languages, more than double the number for the U.S.).

dismissing the role of the state judiciaries and their possible impact on judicial independence, the focus in this study is limited to the Nigerian national government.¹⁹²

A. Maintaining Civilian Rule

Maintaining civilian rule is the first strategy in building judicial independence and promoting the rule of law in Nigeria. It is the foundation for any sustained progress in judicial independence. True, many of Nigeria's political institutions, such as the thirty-six-state structure,¹⁹³ transfer of the country's national capital from Lagos to Abuja,¹⁹⁴ and adoption of the presidential system of government in place of the parliamentary system,¹⁹⁵ occurred during the years of military rule. However, these changes were arguably a testament to military domination of the political system. Prolonged military rule had a severely negative effect on many political values necessary for

with nearly double the population of Nigeria). In fact, 7% of the world's languages are spoken in Nigeria, the highest number of languages in any one country. Aka, *supra* note 164, at 228-29.

192. The reference to the states is important for two reasons. First, the discussion in *supra* Part III.B. (measuring judicial independence based on the *Country Reports on Human Rights Practices*), indicated the particular problem that the states and local governments pose on this issue. Second, and more positively, under the Fourth Republic, some states led by "especially dynamic governors" are "develop[ing] reputations for effective governance." DICKOVICK & EASTWOOD, *supra* note 18, at 584 (citing Cross River State and Lagos State, in Southern Nigeria, as examples). While conceding these variegated occurrences, focus on national authority is justified by the capacity of the national government to set the tone on many issues in many systems, especially in a still-centralized system like Nigeria. See, e.g., AUGUSTINE A. IKEIN ET. AL., OIL, DEMOCRACY, AND THE PROMISE OF TRUE FEDERALISM IN NIGERIA vii, x (2008) (pointing out that under Nigeria's federal system, the national government "holds more power over the state and local governments and also controls larger share of the federal revenues").

193. See TOYIN FALOLA & MATTHEW M. HEATON, A HISTORY OF NIGERIA 192-93 (2008) (portraying the evolution of the country's thirty-six states and their locations).

194. *Federal Capital Abuja*, ONLINE NIGERIA, <http://www.onlinenigeria.com/links/abujaadv.asp?blurb=387> (last visited Dec. 13, 2014) (providing background information on the logic behind the relocation to Abuja as well as the personalities that planned the movement).

195. See Diamond, *supra* note 2, at 45-49 (discussing the transition to the Second Republic from 1975 to 1979).

the growth of the rule of law, including judicial independence. Political corruption, symptomatic of the absence of the rule of law, reached new heights during the two long stretches of military rule for nearly thirty years.¹⁹⁶

Additionally, Nigerian military rulers were dictatorial leaders who brook no restrictions on their political control, no matter the sources those restrictions came from, whether from the constitution, statute, the legislature, political parties, public opinion, or sometimes even the judiciary.¹⁹⁷ Accordingly, they seldom enforced any court order that they did not like. Instead, "executive lawlessness," marked by utter disrespect of judicial institutions and contempt for judicial rulings, took root during the period of military rule in Nigeria.¹⁹⁸ Concededly, the quality of democratic rule under the Fourth Republic has been distinctively low.¹⁹⁹ Even so, civilian regimes are preferable because

196. See James Rupert, *Corruption Flourished in Abacha's Regime*, WASH. POST A01 (June 9, 1998), <http://www.washingtonpost.com/wp-srv/inatl/longterm/nigeria/stories/corrupt060998.htm> (reporting on the magnitude of corruption that marked the military government under General Sani Abacha from 1993 to 1998); see also CHINUA ACHEBE, *THE TROUBLE WITH NIGERIA* 42 (1983) (pointing out that "from fairly timid manifestations in the 1960s, corruption has grown bold and ravenous as, with each succeeding regime, our public servants have become more reckless and blatant").

197. See JOHN MCCORMICK, *COMPARATIVE POLITICS IN TRANSITION* 417 (2013) (observing that "[m]ilitary governments typically suspend political parties, abolish civilian political institutions, and sometimes use military tribunals"). See also FALOLA ET. AL., *supra* note 98, at 151-61 (describing the militarization of federal institutions, including the judiciary, which occurred during military regimes).

198. See, e.g., Mike A. A. Ozekhome, *The Nigerian Judiciary – 15 Years of Democracy*, POINTBLACKNEWS.COM, <http://pointblanknews.com/pbn/articles-opinions/the-nigerian-judiciary-15-years-of-democracy/> (last visited Nov. 24, 2014). The term "executive lawlessness" originated from the case *Ojukwu v. Governor of Lagos State*, [1986] NWLR (Nigeria), where the Supreme Court viewed the action of the Lagos State Government in forcibly ejecting a Nigerian citizen from his residence while his suit against the State government was still pending as amounting to "executive lawlessness."

199. See, e.g., Aka, *Nigeria Since May 1999*, *supra* note 154, at 209-76 (assessing the first four years of the Obasanjo government); Aka, *supra* note 164, at 225-79 (stressing U.S. support for Nigerian democracy). One citizen under Nigeria's Fourth Republic made the following observation: "When we were in the military regime, we didn't get anything from the government but we had peace. Now we are in a democracy, we don't get anything from the government and we do not get peace." MEREDITH, *supra* note 97, at 582. For the foregoing reasons, in this article,

of the opportunity they afford, compared to repressive military regimes, for experimentation in self-governance necessary for the possible growth of judicial independence and entrenchment of a rule of law culture. To play on Winston Churchill's famous dictum about democracy as the worst form of government,²⁰⁰ for judicial independence and the rule of law, the worst civilian government in Nigeria is better than the most benevolent military rule. Nigerians are notable for their "profound commitment to personal freedom and political participation."²⁰¹ Perception of military rule in Nigeria as aberrational is so widespread that such rule is often justified on the grounds that the military is cleaning up the mess in the political system to clear the ground for a timely return to civilian rule.²⁰² The challenge today "is to translate this strong attachment among the population to the idea of democracy into prolonged democratic rule."²⁰³

B. Support from the Non-Judicial Branches of the Government

Assuming the existence of civilian rule, Nigeria next needs support of the non-judicial branches of government to achieve increased judicial independence. Under the country's presidential system of government, these non-judicial or political wings of the government are the executive branch, which consists of the President

the author has deliberately refrained from denominating the Nigerian political system under the Fourth Republic as a true democracy.

200. See WINSTON CHURCHILL, CHURCHILL BY HIMSELF: THE DEFINITIVE COLLECTION OF QUOTATIONS 574 (Richard M. Langworth, ed. 2008) (emphasis added) ("Many forms of Government have been tried and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed it has been said that *democracy is the worst form of Government except for all those other forms that have been tried from time to time.*").

201. Diamond, *supra* note 2, at 33. Diamond noted that even during military misrules, the "social infrastructure of democracy" embedded in "a free press, a rapidly expanding education system, a sophisticated legal system, and a diverse array of autonomous social, cultural, and economic organizations," grew quietly and steadily. *Id.* Moreover, Nigeria "represents an irrepressible social pluralism that cannot be effectively managed by authoritarian means." *Id.*

202. Philip C. Aka, *Nigeria: The Need for an Effective Policy of Ethnic Reconciliation in the New Century*, 14 TEMPLE INT'L & COMP. L. J. 327, 352 (2000).

203. *Id.*

and his ministers, and the legislative branch, which consists of the National Assembly and its 469 members.²⁰⁴ There is some suspicion in some quarters that many politicians in Nigeria and other African countries find it “convenient to have a crooked and malleable judiciary than an independent one.”²⁰⁵ Yet, individually and collectively, these members of the political branches have a legal and moral obligation to support judicial independence as a complement to the rule of law and democratic practice. Politicians must eschew the tendency to view the judiciary as an extension of the government, rather than as an independent branch. Politicians “have a duty to provide for the execut[ion] of judgment of the Court.”²⁰⁶ Given the important role that an independent judiciary plays in deepening democracy and generating stability in a multi-ethnic society like Nigeria, all public officials must check their impulse to control judges, and demonstrate a commitment to judicial independence that goes beyond verbal assertions.²⁰⁷ The next question is how? To answer that question, this article analyzes the individual role of the executive

204. See *Africa: Nigeria*, in CENTRAL INTELLIGENCE AGENCY WORLD FACTBOOK (2014), <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> [hereinafter CIA WORLD FACTBOOK]. The National Assembly comprises two chambers: a Senate made up of 109 members, with three members each from the thirty-six states, and one member representing the capital, Abuja. *Id.* The House of Representatives is made up of 360 members elected based on proportional representation. *Id.* Kano and Lagos States have the most representation, each with twenty-four members, while the Federal Capital Territory has the least representation in the chamber with two members. *Id.*

205. ROBERT CALDERISI, *THE TROUBLE WITH AFRICA: WHY FOREIGN AID ISN'T WORKING* 89 (2006) (identifying this factor as a reason why many of the efforts to clean up the judicial system in Africa “have borne little fruit”). Similarly, one renowned Nigerian lawyer commented ruefully that there was a time

when a lawyer could predict the likely outcome of a case because of the facts, the law and the brilliance of the lawyers that handled the case. Today, things have changed and nobody can be sure. Nowadays, politicians would text the outcome of the judgment to their party men before the judgment is delivered and prepare their supporters ahead of time for celebration.

Nwokeoma, *supra* note 12 (emphasis added) (quoting Abe Balolala, a distinguished legal practitioner in Nigeria).

206. IBA MIN. STDS., *supra* note 22, § 7.

207. See Oko, *supra* note 12, at 75-76.

and legislative branches of government in generating judicial independence.

1. *The Executive Branch*

The IBA's Minimum Standards advised that "the judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive."²⁰⁸ The President and his ministers²⁰⁹ can lead the way in the journey to increased independence and enthronement of a culture based on the rule of law by faithfully enforcing the law and resisting the temptation of the arbitrariness embedded in "executive lawlessness."²¹⁰ Along with his ministers, the President should also refrain from piling up undue pressure on the judiciary for favorable judicial outcome, whether overtly or covertly.²¹¹ More than constitutional provisions or platitudinous assurances of politicians, "it is the attitude of the executive and its willingness to respect the integrity of the judicial process and refrain from interfering with the judiciary that nurtures the independence of the judiciary."²¹² Judges

208. IBA MIN. STDS., *supra* note 22, § 2.

209. CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 5, § 1 (providing that the executive powers of the federation shall be vested in the President and may be exercised by him either directly or through the Vice-President and Ministers of the Federation or officers in the public service of the Federation).

210. *See supra* note 198, and corresponding text for the origin of the term *executive lawlessness*.

211. *See* IBA MIN. STDS., *supra* note 22, § 16 ("The ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole."); Oko, *supra* note 12 (utilizing the terms *intimidation* and *manipulation*). *See also* ELLEN GRIGSBY, ANALYZING POLITICS: AN INTRODUCTION TO POLITICAL SCIENCE 43-57 (5th ed. 2012) (identifying four types of power in political science: force, persuasion, manipulation, and exchange). Overt pressures, involving physical means (such as intimidation) are more likely to create problems for judicial independence than covert ones (such as manipulation). *See id.* at 55 (defining manipulation as present where power is cloaked, adding that "[i]f you are persuaded, you feel it; if you are manipulated, you do not feel it because you do not know anything has happened. The implication is disturbing: How can you resist something if you do not know it exists?"). Between intimidation and manipulation, *intimidation* (which could include threat to the lives of disagreeable judges) would be the pressure that would pose more headaches for judicial independence.

212. Oko, *supra* note 12, at 73.

must not “sacrifice[] the dictates of justice in an attempt to appease the executive,” or be made “to choose between commitment to justice and risking the ire of the executive.”²¹³ Judges who are “fearful of the executive” will be unable to muster and “exercise the level of independence needed for them” to resolve impartially and dispassionately the disputes before them.²¹⁴

2. *The National Assembly*

Some of the counsel or recommendations above to the executive branch apply with equal force to the legislators. Members of the National Assembly must refrain from putting undue pressure on the judiciary. Additionally, as the branch of the government that holds the “purse” of the people,²¹⁵ the National Assembly could take the lead in solving problems with funding. Inadequate funding and inadequate remuneration of judges rank among the many problems confronting the Nigerian judiciary.²¹⁶ Commentators familiar with the Nigerian legal system decry the “gross underfund[ing]” the judiciary has faced and still faces under the Fourth Republic since 1999.²¹⁷

Working with the president, the National Assembly has a duty “to provide adequate financial resources to allow for the due administration of justice,”²¹⁸ as well as to ensure that “judicial salaries

213. *Id.* at 74.

214. *Id.* at 73. Oko points out that “[t]he climate of intimidation, manipulation[,] and control of the judiciary by the executive often forces judges to engage in a cost-benefit analysis with potentially disastrous consequences for the integrity and independence of the judiciary.” *Id.*

215. See THE FEDERALIST No. 78 (Alexander Hamilton) (stating the Executive holds “the sword of the community,” and the legislature “the purse,” whereas the judiciary, having neither “force nor will,” is left with “merely judgment” which, key for the purpose here, it must depend on the assistance of the Executive to enforce).

216. See Foluso Ogunmodede, *F[ederal] G[overnment]’s Underfunding of Judiciary is a Threat to Justice Delivery System—Adekoya*, NEW TELEGRAPH (Feb. 10, 2014) <http://newtelegraphonline.com/fgs-underfunding-of-judiciary-is-threat-to-justice-delivery-system-adekoya/> (interviewing Funke Adekoya, then newly-elected president of the Nigerian Bar Association, who lamented the national government’s underfunding of the judiciary as a threat to the justice delivery system).

217. *Id.*; see also Adedimeji, *supra* note 139.

218. IBA MIN. STDS., *supra* note 22, § 10. See also *id.* § 13 (stating that “[c]ourt services should be adequately financed by the relevant government”).

and pensions shall be adequate and . . . regularly adjusted to account for price increases, independent of executive control.”²¹⁹ The members of the National Assembly, along with their political parties, should lead the way, in partnership with the President, in streamlining the constitutional protections relating to judicial independence. The most important single service the executive and legislative branches can render to judicial independence in the Fourth Republic is to change the constitution to provide for the fiscal autonomy of the judiciary along the lines suggested in Part III.A. of this article.²²⁰

3. *Political Parties*

Political parties in Nigeria are “private [institutions] in the public service”²²¹ that must “conform with the provisions of Chapter II of this [1999] Constitution.”²²² Some of the admonitions above with

219. *Id.* § 14.

220. *See supra* Part III.A. While some of the changes arguably will be exacting, others are much less so. One such non-onerous change relates to the names of two agencies in Appendix B.: the National Judicial Council and the National Judicial Institute. *See infra* Appendix B. The first exercises disciplinary control over judges, while the second is charged with the responsibility of improving and rationalizing judicial services and products. *Id.* Only one word in the full names (*Council* and *Institute*) and one letter in the acronyms (*C* and *I*) separate the two organizations. *Id.* This occurrence is potentially confusing and the two will need more distinct names. The uninitiated reader will have to make a conscious mental effort each time he or she comes across one of the two organizations to tell them apart. The only legislative action needed here is to give these two organizations with important functions two dissimilar names that are less likely to confuse readers, both those versed with Nigerian legal events as well as those less familiar with those events.

221. *New York University Presents 175 Facts About NYU*, NYU, <http://www.nyu.edu/library/bobst/research/arch/175/pages/motto2.htm> (last visited Dec. 16, 2014) (motto of New York University in New York). The Nigerian Constitution inelegantly defines *political parties* to include “any association whose activities include canvassing for votes in support of a candidate for election to the office of President, Vice-President, Governor, Deputy Governor or membership of a legislative house or of a local government council.” CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 229.

222. CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 224 (stipulating that “[t]he programme as well as the aims and objects of a political party shall conform with the provisions of Chapter II of this Constitution”). Chapter II of the Constitution embodies the “fundamental objectives and directive principles of state

respect to the executive and legislative branches of government can go as well to political parties. For one thing, these parties provide the platform and support that make possible the election of the officeholders who form the executive and political branches. This is particularly the case with the PDP.²²³ The PDP has held the presidency since the re-start of civilian rule in 1999, has held the majority of seats in the National Assembly, and controls many of the state governorships and legislatures in most of the thirty-six states.²²⁴

C. *Physician, Heal Thyself!*

As an equal branch with the executive and legislative branches of the government, judges individually and the judiciary collectively are responsible for judicial independence and its complementary ethics of the rule of law.²²⁵ There are two means through which judges can contribute to their own independence. The first is via the devices of self-restraint embedded in the doctrines of standing, mootness, ripeness, and the command to abjure advisory opinions.²²⁶ The

policy,” consisting of twelve articles, 13-24, covering a wide range of issues, including fundamental obligations of the government, economic objectives, political objectives, educational objectives, environmental objectives, foreign policy objectives, social objectives (including support for judicial independence), obligations of the mass media, national ethics, directives on Nigerian cultures, and duties of citizens. *See id.* arts. 13-24. However, the provisions are aspirational, rather than justiciable mandates in the sense that citizens cannot sue for remedies in the event of violations of any of these provisions. *See Aka, supra* note 154, at 216 (describing human rights in the Nigerian context).

223. *See* Oarhe Osumah & Augustine Ikelegbe, *The Peoples Democratic Party and Governance in Nigeria, 1997-2007*, 3 J. SOCIAL SCI. 185-99 (2009), available at <http://www.krepublishers.com/02-Journals/JSS/JSS-19-0-000-09-Web/JSS-19-3-000-09-Abst-PDF/JSS-19-3-185-2009-777-Osumah-O/JSS-19-3-185-2009-777-Osumah-O-Tt.pdf> (examining the governance role of the party from 1999 to 2007).

224. CIA WORLD FACTBOOK, *supra* note 204.

225. *See* IBA MIN. STDS., *supra* note 22, § 43 (enjoining judges to “take collective action to protect their judicial independence and to uphold their positions”).

226. DOUG LINDER, *Exploring Constitutional Conflicts: Constitutional Limitations on the Judicial Power*, U. MO.-KAN. CITY SCH. L. (2004), <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/caseorcontroversy.htm> (examining the limitations stemming from the “cases or controversies” requirements under art. III, § 2 of the U.S. Constitution). The judiciary uses these devices to take measures in a manner that no other branch of the government can, both to promote

second, the focus of the ensuing discussion, is by eschewing corruption as well as facilitating fair and speedy trials for litigants who appear before them. The judiciary is only as good as the men and women who run it. In other words, “[n]o matter how well structured, properly staffed, and adequately funded the Judiciary may be, and no matter how good the rules governing its operation and practice are,” judicial independence will remain mere talk if the persons who run the judiciary lack integrity.²²⁷ The discussion that follows is devoted to this second means.

1. Corruption

Corruption consists of a range of antisocial practices, from bribery to embezzlement to theft of all sizes, which occurs when public officials use their public offices for personal gains.²²⁸ For the purpose

its own independence and to benefit society, without threatening the executive and legislative branches of government. *See, e.g.,* Marbury v. Madison, 5 U.S. 137 (1803). In *Marbury v. Madison*, the U.S. Supreme Court gained power that reduced its fragility as the least dangerous branch of government, by self-restraint indicated by the refusal to compel the handover of a commission via the writ of mandamus that it knew the incoming president would not enforce, on the ground that the law enabling the petitioner to bring his claim to the Court exceeded the judiciary’s powers! *See id.*; *see also* THE FEDERALIST NO. 78, *supra* note 215 (Alexander Hamilton) (noting that the judiciary “may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments”).

227. Ogunye, *supra* note 12, at 1; *see also* Oko, *supra* note 12, at 48 (stating that “however sound its structure may be on paper,” a judicial system will “function poorly in practice,” if judges are not “competent and upright and free to judge without fear or favor”); Chukwudifu A. Oputa, *Judicial Ethics and Canons of Judicial Conduct*, in JUSTICE IN THE JUDICIAL PROCESS: ESSAYS IN HONOR OF JUSTICE EUGENE UBAEZONU 203 (C. C. Nweze, ed. 2002) (opining that both the Bar and the public at large have “nothing but contempt for an incompetent judge”).

228. NAOMI CHAZAN ET AL., POLITICS AND SOCIETY IN CONTEMPORARY AFRICA 187-88 (3d ed. 1999) (commenting on the downsides of patron-client relationships in Africa). *See also* JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS (2010) (discussing the symptoms and remedies for corruption in Africa). Robert Calderisi equated corrupt judges to the one-party and military dictators from the post-independence era who wreaked havoc on the political and economic system in African countries. *See* CALDERISI, *supra* 205, at 89 (emphasis added) (“A corrupt judicial system is another millstone around Africa’s neck. In fact, *dishonest judges are as bad as the dictators.*”).

of this article, corruption is divisible into *criminal* and *ethical* (or *judicial*) categories. *Criminal corruption* is corruption forbidden by the criminal code.²²⁹ It is the omnibus category of corruption that afflicts all sections of the Nigerian population, including the judiciary.²³⁰ It is corruption as an “engine of activity,” without which even ordinary business transactions grind to a complete halt.²³¹ The most common form of criminal corruption among judges is bribery, and the most common form since the formation of the Fourth Republic is bribery in election tribunal cases.²³² *Ethical corruption* or *judicial corruption* occurs when a judge violates the code of judicial

229. See DANIEL JORDAN SMITH, A CULTURE OF CORRUPTION: EVERYDAY DECEPTION AND POPULAR DISCONTENT IN NIGERIA (2008) (portraying the widespread nature of corruption in the daily lives of many Nigerians). The Nigerian journalist Peter Enahoro once painted a portrait of “the complete Nigerian” bureaucrat gently soaked in corruption:

The Complete Nigerian civil servant, unlike his predecessor, is not self-effacing behind an array of codes titles. You meet him here, you see him there, and you talk to him yonder. He is eager to make your acquaintance. He takes you into little corners to confide in you. For instance, *he tells you how much it would cost you to have your file speeded up*, which I think is very nice.

PETER ENAHORO, THE COMPLETE NIGERIAN 121 (1992) (emphasis added). Regulations aimed at combatting criminal corruption in Nigeria include the Nigerian Criminal Code Act (1990), Cap. 77, § 98; and Corrupt Practices and Other Related Offenses Act (2000) (Nigeria), §§ 8-9. Additionally, the Nigerian Constitution declares that “the state shall abolish all corrupt practices and abuse of office.” CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 15, § 5.

230. See SMITH, *supra* note 229.

231. JULIUS O. IHONVBERE & TIMOTHY SHAW, ILLUSIONS OF POWER: NIGERIA IN TRANSITION 151 (1998).

232. See Nwokeoma, *supra* note 12 (citing a statement attributed to former Supreme Court Justice Kayode Eso, to the effect that due to corruption in election petition cases, many of the judges who try these cases “are not just millionaires as we were told but billionaires” in Nigerian currency). Nigeria’s 1999 Constitution creates separate tribunals for election cases. See CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 285, § 1 (vesting election tribunals with “original jurisdiction to hear and determine petition” regarding elections into the National Assembly, State Governorships, and elections into state legislative assemblies). Thus, the focus here is *not* on electoral fraud, although the author does not minimize the problem this form of behavior poses for the judiciary and the society at large, as the just-quoted statement of Justice Eso indicates.

ethics.²³³ Another example occurs when a judge injects arbitrariness into the judicial process²³⁴ by “assum[ing] jurisdiction where there is none,” “declin[ing] jurisdiction where there is,”²³⁵ or abuses or misuses the issuance of *ex parte* orders.²³⁶ *Ethical corruption* is an endemic problem in the Nigerian judiciary.²³⁷

233. Nigerian judges are bound by a code of conduct or set of ethical norms. See Code of Conduct for Judicial Officers (1998) (Nigeria), *available at* <http://www.nigeria-law.org/CodeOfConductForJudicialOfficers.htm>. Additionally, upon appointment, a judge also takes an oath to “discharge my duties, and perform my functions honestly, to the best of my ability and faithfully in accordance with [Nigeria’s Constitution] and the law . . . that I will not allow my personal interest to influence my official conduct or official decision.” CONSTITUTION OF NIGERIA (1999), 7th sched. (embodying a template of this judicial oath). See Oko, *supra* note 12, at 25 (referring to ethical corruption as “a vicious dynamic in which judges trade in justice for favors and persons”).

234. Niki Tobi, *Code of Conduct and Professional Ethics for Judicial Officers in Nigeria*, in JUDICIAL EXCELLENCE: ESSAYS IN HONOR OF HON. JUSTICE ANTHONY I. IGUH 82, 83 (J. O. Iruku & I. A. Umezulike, eds. 2004). In the memorable language of one Nigerian judge:

[A corrupt judge] is the greatest enemy of the judicial process. A corrupt judge is blind to the truth. He is incapable of searching for the truth in the judicial process. His mind is diseased and he is incapable of doing justice in the matter before him. He likes the party who has given him the bribe. He hates the party who has not given him the bribe. He therefore gives judgment to the party he likes and gives judgment against the party he hates.

Id. In contrast, a good judge exhibits a sound exposition of the law and is able to resolve the issues in controversy before him impartially, little influenced by extraneous considerations, such as bias and prejudice. Oko, *supra* note 12, at 19 n.47 (citing retired Nigerian Supreme Court Justice Nnaemeka-Agu). Honest judges “inspire the confidence of [Nigerians] in the court system and retain the respect of even those who lost in [a] lawsuit in their courts.” Chukwudifu A. Oputa, *Toward Greater Efficiency in the Dispensation of Justice in Nigeria*, in LAW, JUSTICE, AND STABILITY IN NIGERIA: ESSAYS IN HONOR OF JUSTICE KAYODE ESQ. 1, 30 (Yemi Akinseye-George, ed. 1993).

235. Oko, *supra* note 12, at 28 (quoting Justice Muhammed M. Akanbi, a retired President of the Court of Appeal).

236. *Id.* at 31. An *ex parte* order is a legitimate tool used in many court systems to preserve the right of the parties in a lawsuit pending the hearing of the case. See BLACK’S LAW DICTIONARY 399 (abridged 6th ed. 1991) (defining such order as one “granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested”). However, in Nigeria many judges have used this product of legal emergency to award judgment arbitrarily behind the back of the defendant, effectively converting this judicial

Whether criminal or ethical, corruption leads to inefficient use of judicial resources.²³⁸ As the U.N. Office on Drugs and Crime indicated in 2004, "Corruption in the judiciary may turn out to be more harmful [than corruption in other branches of government] because it could undermine the credibility, *efficiency*, *productivity*, trust, and confidence of the public in the judiciary as the epitome of integrity."²³⁹ During the period of military rule before 1999, the Nigerian government set up several commissions of inquiry designed to reduce corruption and promote efficiency within the judiciary.²⁴⁰

technique into, as one former Nigerian Chief Justice regretfully observed, "a bulldozer for the demolition of substantive justice." Oko, *supra* note 12, at 31 (quoting former Chief Justice Mohammed Bello). The misuse of *ex parte* orders goes back to the days of military rule in Nigeria. See Basil Ugochukwu, *The Pathology of Judicialization: Politics, Corruption, and the Courts in Nigeria*, 4 LAW & DEV. REV. 58, 76 (2011). General Babangida, military dictator from 1985 to 1993, annulled the presidential election of June 12, 1993 ostensibly to "protect our legal system and the judiciary from being ridiculed, both nationally and internationally." *Id.* Before Babangida's announcement, no fewer than six courts from different parts of the country issued *ex parte* orders, mostly contradictory, with respect to the conduct of the election. *Id.*

237. PETER O.E. BASSEY, *THE NIGERIAN JUDICIARY: THE DEPARTING GLORY* 38 (2000). Bassey, a former high court judge, identified two types of corruption:

People who accept money to give justice to the highest bidder The other type of corruption is when you have a case against the government. This is where the greatest danger lies. Most of the judges will find 'grounds' to give judgment in favor of the government.

Id.; see also Oko, *supra* note 12, at 73 (observing that "[m]ost judges have succumbed to the notion that career development depends on how they rule, especially in high-profile cases involving the government").

238. *Efficiency* is defined in public administration as the ability to maximize output for a given input of scarce resources or to minimize input for a given output. MICHAEL E. MILAKOVICH & GEORGE J. GORDON, *PUBLIC ADMINISTRATION IN AMERICA* 197 (11th ed. 2013). Put simply, it is the ability to "obtain[] the maximum benefit or gain possible from a given investment of resources." *Id.* at 149.

239. U.N. OFFICE ON DRUGS AND CRIME, *ASSESSMENT OF JUSTICE SYSTEM INTEGRITY AND CAPACITY IN THREE NIGERIAN STATES* 57 (May 2004), http://www.unodc.org/pdf/crime/corruption/corruption_nigeria_justice_sector_assessment_2004-05.pdf.

240. Oluyemi Osinbajo, *Sub-National Reform Efforts: The Lagos State Experience*, in TRANSPARENCY INT'L., *GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS* 146 (2007). In 1994, the military regime under General Sani Abacha (1993-1998) set up a panel of inquiry headed by Kayode Eso, a retired justice of the Nigerian Supreme Court, to look into the activities of the

The NJI was born in 1991 in the heyday of military rule.²⁴¹ The NJI devised the 1998 Code of Judicial Officers,²⁴² and was charged with the responsibility for streamlining and rationalizing judicial resources in the country.²⁴³

A 2007 survey of nearly 3,000 businesses conducted by the Economic and Financial Crimes Commission ("EFCC"),²⁴⁴ and the National Bureau of Statistics, revealed "Nigerian courts of law receive the biggest bribes [per transaction] from citizens among all institutions in which corruption is rampant."²⁴⁵ Public knowledge of widespread

judiciary and make recommendations to the government. *Id.* The panel recommended a series of reforms aimed at minimizing corruption within the judiciary, including the indictment of 47 judges for alleged corruption, incompetence, dereliction of duty, lack of productivity, and corrupt use of *ex parte* orders. *Id.* The military regime failed to implement the recommendations. *Id.* Following the return to civilian rule on May 29, 1999, the government set up another panel to review the work of the Eso panel. *Id.* Based on the report of this second panel, some of the indicted judges were either dismissed or mandatorily retired. *Id.*

241. See Nat'l Jud. Institute Decree No. 28 (1991), § 3(2) (a), (b) (Nigeria) (establishing the organization). See also Appendix B. (listing the agencies tied to judicial independence in Nigeria).

242. See Code of Conduct for Judicial Officers, *supra* note 233.

243. Nat'l Jud. Institute Decree No. 28 (1991) (Nigeria), *supra* note 241. The functions of the organization include to: conduct courses for all categories of judicial officers and their supporting staff with a view to expanding and improving their overall knowledge and performance in their different sections of service, as well as provide continuing education for all categories of judicial officers by undertaking, organizing, conducting, and facilitating study courses, lecturers, seminars, workshops, conferences, and other programs related to judicial education. *Id.*

244. The EFCC is an anti-corruption agency, established in 2004. See *The Establishment Act*, ECONOMIC AND FINANCIAL CRIMES COMMISSION, <https://efccnigeria.org/efcc/index.php/about-efcc/the-establishment-act> (last visited Dec. 17, 2014). The governing law, which established the Commission, mandates it to combat financial and economic crimes, specifically to prevent, investigate, prosecute, and penalize economic and financial crimes. *Id.*

245. Nwokeoma, *supra* note 12. The other corruption-infested institutions mentioned in the report, all of which the judiciary bested, were the police, revenue officials, and customs officials. *Id.* At any rate, Nigerians generally have low trust for the "cleanliness" or integrity of their governments. See *Global States of Mind: New Metrics for World Leaders*, GALLUP 6 (Oct. 2012), <http://www.gallup.com/services/176381/global-states-mind-new-metrics-world-leaders.aspx>. To the contrary, a Gallup Poll in 2012 of countries in the world showed that 94% of Nigerians perceived their government to be corrupt. *Id.* Nigeria was bested only by Kenya, where 96% of the citizens believed their government to be

abuse by judges of their judicial offices can undermine public confidence in the judiciary as the “epitome of integrity.”²⁴⁶ A judiciary tainted by corruption as much as other bywords of corruption, such as the Nigerian police, discourages commentators, such as Joel Nwokeoma, who expressed dismay that the only institution in the society that should be “the last hope of the common man” and a “bulwark” in the fight against corruption is also part of the problem.²⁴⁷

A final issue related to this topic of judicial corruption is the balance between judicial independence and accountability that can arise when meting out punishment for corruption by judges. Judicial independence and accountability constitute “the twin goals of the judiciary,”²⁴⁸ but tension exists between the two; just as judges need independence, they are also accountable for the power or authority that they use. “Judicial independence does not render the judge free from public accountability.”²⁴⁹ This is because corruption threatens judicial independence in that it results in “final decisions based on

corrupt. *Id.* The country with the most trust regarding the cleanliness of their government was Singapore, where only a single-digit 5% believed their government to be corrupt. *Id.*

246. U.N. OFFICE ON DRUGS AND CRIME, *supra* note 239, at 57; *see also* Chukwudifu A. Oputa, *In Search of a Disciplined Society Through Law* (Feb. 16, 1986) (unpublished manuscript), *quoted in* Okechukwu Oko, *Problems and Challenges of Lawyering in Developing Societies*, 35 RUTGERS L. J. 569, 637 n.366 (2004) (stating that corruption “snap[s] the brittle bond of confidence uniting our people to the court system”). Perception of judicial corruption is so deeply rooted in Nigeria that certain litigants even “ascribe corrupt motives to honest judges who render decisions [these litigants] find objectionable.” Oko, *supra* note 12, at 31. Although regrettable, the occurrence is understandable. As Professor Oko posits, “[i]n an atmosphere rendered already paranoid by stories of corruption, citizens believe every allegation of judicial corruption, however baseless or unfounded.” *Id.*

247. *See* Nwokeoma, *supra* note 12.

248. Alex B. Long, “*Stop Me Before I Vote For This Judge Again*”: *Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 WEST VA. L. REV. 1, 5 (2003).

249. IBA MIN. STDS., *supra* note 22, § 33; *see also* Emily Fied van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice 1789-1992*, 142 UNIV. PENN. L. REV. 333, 334 (1993) (pointing out that “judicial independence was probably not intended to trump judicial accountability for misbehavior”).

considerations other than proper application of legal principles.”²⁵⁰ The challenge therefore is how to “resolve[] judicial corruption while preserving judicial independence”²⁵¹ or how to “balanc[e] judicial independence and accountability.”²⁵² Thus, judges who engage in criminal or ethical corruption must be punished and held accountable for their illegitimate use of power. This can also deter other judges who would otherwise engage in the same behavior. In Nigeria, the NJC, established under the 1999 Constitution, is the body that makes recommendations relating to the discipline of judges.²⁵³

Holding judges accountable for corrupt acts without compromising judicial independence demands that the NJC proceed with “utmost care” when the Council investigates allegations of judicial misconduct.²⁵⁴ Many citizens expect the government to act speedily and vigorously to punish judicial corruption, but many also want investigations of alleged acts of judicial corruption to be conducted fairly and respectfully, with due sensitiveness for judicial independence.²⁵⁵ Maintaining a balance between the two values ensures, for example, that legal errors or a different reading of the law would not be equated with corruption. “It is not unethical to be imperfect, and it would be unfair to sanction a judge for not being infallible while making hundreds of decisions often under pressure.”²⁵⁶ To the contrary, “[j]udges should always be free to state

250. Jon Mills, *Principles for Constitutions and Institutions in Promoting the Rule of Law*, 16 FL. J. INT'L L. 127 (2003).

251. J. Clifford Wallace, *Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives*, 28 CAL. W. INT'L L.J. 341 (1998).

252. Cynthia Gray, *The Line Between Legal Errors and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245 (2004).

253. See Appendix B. (spotlighting the agencies tied to judicial independence in Nigeria). See also CONSTITUTION OF NIGERIA (1999), *supra* note 60, arts. 21(b), (d).

254. Oko, *supra* note 12, at 59. As Professor Oko puts it, the NJC must “be careful not to allow unsatisfied litigants and mischievous lawyers to use the judicial disciplinary process to harass and intimidate judges.” *Id.* at 62.

255. *Id.* at 59-60.

256. Gray, *supra* note 252, at 1246-47.

their good-faith understanding of the law without fear of sanctions or repercussions.”²⁵⁷

Applying these concepts to judicial independence in Nigeria, the NJC “must maintain a delicate balance between enforcing disciplinary standards so that judges do not violate their judicial oath and allowing judges sufficient autonomy and independence.”²⁵⁸ In more practical terms, it may not “act in ways that compromise judicial independence and stifle creativity.”²⁵⁹ Given the nature of the adjudication process and the understanding that judges sometimes reach wrong conclusion or unknowingly misinterpret the law, the NJC should not equate misreading of the law with corruption.²⁶⁰ Instead, “[j]udges should always be free to state their good-faith understanding of the law without fear of sanctions or repercussions,” and erroneous decisions should be corrected through the appeals process, not via the judicial disciplinary process.²⁶¹

257. Oko, *supra* note 12, at 61. See also Steven Lubet, *Judicial Discipline and Judicial Independence*, 61 L. & CONTEMP. PROBLEMS 59 (1998) (stating that judicial independence “[i]s most gravely threatened when judges face sanctions . . . based upon the merits of a ruling”). As the U.S. Supreme Court advised in *Pierson v. Ray*, 386 U.S. 547, 554 (1967), a judge’s “[e]rror may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption.” *Id.* The Court reasoned that “[i]mposing such a burden on judges would contribute not to principled and fearless decision making, but to intimidation.” *Id.* See also Jeffrey M. Sharman, *Judicial Ethics: Independence, Impartiality, and Integrity*, INTER-AM. DEV. BANK (1996), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=991625> (“So long as judicial rulings are made in good faith and in an effort to follow the law as the judge understands it, the usual safeguard against legal error is appellate review.”); Randy J. Holland & Cynthia Gray, *Judicial Discipline: Independence with Accountability*, 5 WIDENER L. SYMP. J. 117, 129 (2000) (“[A]n erroneous legal ruling that is made in good faith is not unethical judicial conduct.”).

258. Oko, *supra* note 12, at 60-61. Sometimes, even a reprimand, the mildest level of judicial sanction, can threaten the integrity and moral standing of a judge. See, e.g., *Ruffo v. Conseil de la Magistrature* [1995] S.C.R. 267, 341 (Can.) (Sopinka, J., dissenting) (“A reprimand is an extremely serious punishment for a judge. A reprimanded judge is a weakened judge: such a judge will find it difficult to perform judicial duties and will be faced with a loss of confidence on the part of the public and litigants.”).

259. Oko, *supra* note 12, at 61.

260. *Id.*

261. *Id.* at 61-62. Professor Oko observed that the prospect of dragging judges before the NJC for decisional errors will undermine judicial independence, driving

In sum, the IBA's Minimum Standards advise that "[a] judge should always behave in such a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary,"²⁶² by, for example, "not sit[ting] in a case where there is a reasonable suspicion of bias or potential bias,"²⁶³ and "avoid[ing] any course of conduct which might give rise to an appearance of partiality."²⁶⁴ Judges who engage in any of these behaviors violate the norms of judicial independence. Irrespective of which shape of misconduct a judge engages in,²⁶⁵ corrupt acts by judges are an affront to the rule of law.²⁶⁶

Additionally, the lack of jury trials in Nigeria means that issues such as witness credibility, testimonial evidence, and evidentiary relevance, typically exercised by jurors in jury systems, reside exclusively within the power of the judges.²⁶⁷ The enormous power granted to Nigerian judges makes them "the ultimate protector" in

judges to become timid and less creative in their reasoning. *Id.* at 62. He advised that the NJC's disciplinary mechanisms be "limited to violations of the Code of Conduct for Judicial Officers [i.e., ethical misconducts] and criminal offenses." *Id.* at 62.

262. IBA MIN. STDS., *supra* note 22, § 40.

263. *Id.* § 44.

264. *Id.* § 45.

265. See *supra* notes 229-237 and corresponding texts (distinguishing between criminal and ethical corruptions). What might motivate a judge to engage in corrupt behavior varies from judge to judge, but may generally involve any one or more of the following: "prospects of quick but unmerited career advancement; political appointment of a nominee of the judge; immediate financial gains; fear of job insecurity; or even membership of the same secret society with one of the parties to the dispute." Deson Abali, *Nigeria: Corruption in the Judiciary*, THISDAY (Lagos) (June 23, 2003), *quoted in* Oko, *supra* note 12, at 30 n.99. Whatever the justification, corrupt practices come with negative consequences for judicial independence as analyzed above. See *supra* notes 238-43 and corresponding texts (discussing the factors that make corruption inefficient).

266. See Zou Keyuan, *Judicial Reform in China: Recent Developments and Future Prospects*, 36 INT'L L. 1039, 1057 (2002) (stating that judicial corruption has the capacity of "turn[ing] the rule of law [in]to a rule of individuals pursuing their private interests," among a range of other negative consequences, down to destabilization of the social order).

267. See Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges*, 32 FLA. ST. U. L. REV. 469, 469-509 (2005) (comparing and contrasting the jury trial and bench systems in the United States).

cases involving protection of rights,²⁶⁸ and places them in a position “to influence the outcome of cases,”²⁶⁹ which can be detrimental to litigants who are not powerful or politically connected.

2. (Un)Speedy Trials

Nigeria's constitution provides for a fair trial within a reasonable time.²⁷⁰ It explicitly requires judges to deliver judgment within ninety days after conclusion of evidence and final address by counsel.²⁷¹ Despite these requirements, speedy trials remain a rare judicial occurrence in Nigeria. Instead, “there is hardly any case which is heard with any real degree of urgency or desire to comply with the provisions of the Constitution.”²⁷² Undue delay remains an obstacle for parties who seek to do business with or via Nigerian courts.²⁷³

Nigerian courts should be given the tools they need to conduct speedy trials within the time frame under the constitution. This includes adding spacious courtrooms, maintaining a steady power supply, hiring properly-trained interpreters, and providing adequate law libraries and access to computers, photocopiers, stationeries, stenographic services, transcript services, audio, slide, and other visual equipment. These tools should also include opportunities for continuing education for judges and judicial staff. Armed with these

268. Oko, *supra* note 12, at 29 n.96 (quoting former Nigerian Supreme Court Justice Philip Nnaemeka-Agu).

269. *Id.* at 29.

270. CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 36, § 1 (“In the determination of his civil rights and obligations, . . . a person shall be entitled to a fair hearing within a reasonable time by the court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.”).

271. *Id.* art. 291, § 1 (stipulating that “[e]very court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses”). The Nigerian Supreme Court interpreted this provision in *Egbo v. Agbara* [1997], 1 N.W.L.R. 293 (Nigeria). In that case, the court decided that failure to deliver a judgment within the 90-day period is not fatal where the case is entirely documentary or rests mainly on interpretation of some document and the credibility or demeanor of witnesses is not at issue. *Id.* For a complaint to succeed in these cases, the complainant must “establish that the delay occasioned a miscarriage of justice.” *Id.* at 316.

272. Oko, *supra* note 12, at 40.

273. *See id.* at 39-40.

basic facilities, Nigerian courts will be more able to provide litigants who use their services fair and speedy trials. As the famous aphorism goes, justice delayed is justice denied. Just as the post office in Nigeria has a notoriety for uninviting face, as far as one can remember, Nigerian courts have an equally dubious reputation for their “come today, come tomorrow” syndrome, wrapped in a culture of repeated adjournments.²⁷⁴

D. Building Judicial Independence with Public Participation

Public participation in building judicial independence is at the heart of this article and is a measure that builds logically and imperceptibly on the preceding four steps. Given the willing support of the political branches and contributions of the judicial branch that staves off corruption and eschews un-speedy judgment, is there anything else left to ensure judicial independence and promote the rule of law? The answer is unequivocally yes. The missing element is public participation. Because judicial independence and the rule of law are a collective good, the public must contribute its part to help bring them about.²⁷⁵ More specifically, public participation here

274. See Alewo M. Agbonika, *Delay in the Administration of Criminal Justice in Nigeria: Issues from a Nigerian Viewpoint*, 26 J. L., POL'Y, & GLOBALIZATION 130, 134 (2014) (indicating that some judges “even adjourn cases arbitrarily to go and pick children from school”). See Iruoma O. Obiokoye, *Eradicating Delay in the Administration of Justice in African Courts: A Comparative Analysis of South African and Nigerian Courts* (Oct. 31, 2005) (unpublished LL.M. dissertation, University of Pretoria), <http://www.repository.up.ac.za/handle/2263/942>, for a comparative study of South African and Nigerian courts, integrating proposals on how to minimize delay in the administration of justice in the two court systems.

275. Shirley S. Abrahamson, *Court with a View: Building Judicial Independence with Public Participation*, 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 13 (2000) (arguing that the basic, underlying safeguard for judicial independence is popular support of the concept). The *public* is defined here to include *civil society*, the non-governmental portion of society, such as non-government-controlled mass media, labor groups, human rights groups, environmental organizations, religious organizations and the like. See JOHN EHRENBURG, *CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA* (1999) (examining the historical, political, and theoretical evolution regarding the understanding of civil society going back to the second half of the eighteenth century). See also MARK E. EGBE, *THE STATE AND CIVIL SOCIETY IN NIGERIA: A CASE STUDY OF THE MOVEMENT FOR THE SURVIVAL OF THE OGONI PEOPLE (MOSOP)* (2004) (applying the term in its intersection with the government, using a Nigerian self-determination group as case study).

stands for what one U.S. jurist called “building judicial independence with public participation,”²⁷⁶ a notion different from and more deep-seated than merely adding the contribution of the public in the struggle for judicial independence. Building judicial independence with public participation refers to “the public’s willingness to support and fight for judicial independence.”²⁷⁷ It is a willingness that hinges on the public’s “understanding of, and trust and confidence in the judicial system.”²⁷⁸ The greater the understanding and confidence, the more likely it is that the public will fight for judicial independence. Contrarily, “a public that does not trust its judges to exercise even-handed judgment” is less likely to fight for judicial independence.²⁷⁹ Instead, it “will look upon judicial independence as a problem to be eradicated.”²⁸⁰

The deduction from this understanding is that progress on the road to judicial independence in Nigeria and elsewhere is paved by two means: first, increased public *understanding* of the judicial system; and second, increased public *confidence* in the judicial system. One way to achieve the first is through education, both formally in schools and informally through enlightenment campaigns on the utility of judicial independence. It is probably this goal of enlightenment that the drafters of the Ugandan constitution sought to achieve when they wrote in the document that “[j]udicial power is derived from the people,”²⁸¹ and that the people shall participate “in the administration

276. Abrahamson, *supra* note 275 (maintaining that judicial independence must be underpinned by popular support of the concept).

277. *Id.* at 24. See also Abrahamson, *supra* note 33, at 982 (arguing that judicial independence protects the people, not judges); Bobby R. Baldock et al., *Feature: Judicial Independence: A Discussion of Judicial Independence with Judges of the United States Court of Appeals for the Tenth Circuit*, 74 DENV. U. L. REV. 355, 362 (1997) (pointing out that “[w]hile a judge must follow and adhere to the law, judges, like everyone else, watch the news and are aware of public sentiment”).

278. Abrahamson, *supra* note 275, at 24.

279. See *id.*

280. *Id.* at 24.

281. CONSTITUTION OF THE REPUBLIC OF UGANDA (2005), art. 126, <http://www.opm.go.ug/assets/media/resources/6/Constitution.pdf>.

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of justice by the courts.”²⁸² At the opposite end, Nigeria's constitution contains no equivalent language.²⁸³

Similar to the Uganda constitution, it is the same imperative that Professors Berman and Murphy had in mind when, regarding the U.S., they stated, “[i]n the end, the [judiciary's] greatest protection from political threats to its independence has always come from the people themselves,” cognizant of the instrumentalist value of judicial independence for securing their civil rights and liberties as well as a parameter of true democracy.²⁸⁴ Justice Stephen G. Breyer of the U.S. Supreme Court expressed a similar opinion, stating, “[t]he greatest threat to an independent judicial branch is citizens who are unaware of what judges do or *why [judges] should be independent*.”²⁸⁵ If the public is aware of the duties judges have and if they are aware of why judges should be independent, he said, “[t]hey're likely to protect [judicial independence for them].”²⁸⁶

In addition to increasing the public's understanding of judicial independence, the public must also have *increased confidence* in the judiciary. Such increased confidence comes about when the public

282. *Id.* art. 127.

283. Unlike the Ugandan Constitution, the most Nigeria's 1999 Constitution did was vest judicial powers on the constitutional courts the document enumerated in article 6, section 5. *See* CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 6, § 1, art. 6, § 5.

284. BERMAN & MURPHY, *supra* note 20, at 188. The condition attached to this public support, Berman and Murphy indicated, is that the justices must be “careful not to outpace public opinion in their decisions.” *Id.* *Civil rights* are guarantees “derive[d] largely from the equal protection clause of the Fourteenth Amendment[,]” that protect citizens “against discrimination because of characteristics, such as gender, race, ethnicity, or disability.” *Id.* at 446. *Civil liberties* are guarantees “to every U.S. citizen by the Bill of Rights and the due process clause of the Fourteenth Amendment[,]” such as freedom of speech and religion, and safeguards for accused persons, such as the right to a speedy and public trial by an impartial jury. *See id.* at 446 (defining civil liberties); *id.* at 424-34 (discussing the rights of defendants under the Fourth, Fifth, Sixth, Seventh, and Eight Amendments to the U.S. Constitution).

285. DVD: A Conversation on the Constitution: Judicial Branch, Sunnylands Seminar—The Judicial Branch (Stephen G. Breyer, The Annenberg Foundation Trust at Sunnylands, 2006), www.AnnenbergClassroom.org [hereinafter Conversation on the U.S. Constitution] (emphasis added).

286. *Id.* (emphasis added).

perceives that judges are able to “exercise even-handed judgment,”²⁸⁷ by administering justice fairly and impartially.²⁸⁸ It does *not* mandate that all judicial decisions be wise or that all judicial behavior be impeccable; instead what it requires is that “within the limits of ordinary human frailty,” the judicial system pursues faithfully values like impartiality, integrity, and professionalism.²⁸⁹ Whichever form that confidence manifests itself, the Nigerian public does not currently have it. To the contrary, there is a widespread perception in the country that “judges are easily bribed,”²⁹⁰ as well as that “the judiciary is unable to constrain abuse of power and administer justice fairly and impartially.”²⁹¹

After General Babangida annulled the presidential election in 1993, which would have ushered in the Third Republic, the Nigerian masses organized a resistance movement against military rule in the country.²⁹² Made up of pro-democracy and human rights activist groups, this resistance movement led to the downfall of Babangida's regime, and ultimately paved the way for the Fourth Republic after General Abacha's death in 1998.²⁹³ Fifteen years into the Fourth Republic, Nigerians need a mass movement of equal proportion to install judicial independence and its attendant culture of the rule of law in the country. One commentator has poignantly observed that many of the efforts to clean up the judicial system in many African countries “have borne little fruit because the politicians have found it

287. Abrahamson, *supra* note 275, at 24.

288. See *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (stating that the Supreme Court's authority “ultimately rests on sustained public confidence in its moral sanction”).

289. Murray Gleeson, Chief Justice of Australia, Address at the Judicial Conference of Australia in Launceston: “Public Confidence in the Judiciary” (Apr. 27, 2002), http://www.hcourt.gov.au/speeches/cj/cj_ica.htm.

290. COUNTRY REPORT 2003: NIGERIA, *supra* note 142.

291. Oko, *supra* note 12, at 46. At the very least, Nigerians have a tendency “to view with caution the role of the courts as impartial dispensers of justice.” *Id.* at 30.

292. See RITA KIKI EDOZIE, *PEOPLE POWER AND DEMOCRACY: THE POPULAR MOVEMENT AGAINST MILITARY DESPOTISM IN NIGERIA, 1989-1999* (2002) (analyzing the activities of various groups within the Nigerian pre-democracy movement from 1989 to 1999 that resisted the annulment of the 1993 presidential election).

293. See *id.*

more convenient to have a crooked and malleable judiciary than an independent one.”²⁹⁴ In similar fashion and using their popular power,²⁹⁵ the masses should insist on political office holders pushing through the reforms that are necessary to bring about judicial independence in Nigeria.²⁹⁶

Unfortunately, ordinary citizens are an integral part of the “culture of corruption” which marks daily life in many parts of Nigeria.²⁹⁷ The public should see that the only good judgments (or lawsuits) are the ones *not* purchased through acts of corruption, such as bribing judges. Given the negative outcome corrupt acts impose on society,²⁹⁸ they should see that judgments secured through foul means are not judgments at all. For litigants who fail to get the message, the government should increase the cost of devious judgments secured via corrupt means through more vigorous enforcement of anti-corruption laws that for long have sat dormant and mostly unenforced. Judges should also be compensated adequately to minimize the temptation of resorting to corrupt means using their judicial offices.

294. CALDERISI, *supra* note 205, at 89.

295. See UDHR, *supra* note 32, art. 21(3) (stating that “[t]he will of the people,” “expressed in periodic and genuine elections” shall form the basis of governmental authority).

296. Similar popular commitment is necessary in a political system to maintain practices that promote judicial independence, such as constitutional democracy. Professor Sodaro indicated that the *people* must want democracy and be willing to make sacrifices to bring it about, and must agree to make democracy “the only game in town,” rather than, for example, imagine replacing democracy with authoritarianism. SODARO, *supra* note 9, at 221 (commenting on the conditions for democracy). In the same vein, Justice Anthony Kennedy of the U.S. Supreme Court asserted: “The Constitution is not automatic. It doesn’t go on automatic pilot. It runs because *you* believe in it, because *you* understand it, because *you* support it, because *you* want it. That’s the only thing that makes it work.” Anthony M. Kennedy, *in* Conversation on the U.S. Constitution, *supra* note 285.

297. SMITH, *supra* note 229 (portraying a society riddled with the scourge of corruption in which ordinary citizens are willing or unwilling participants at every turn).

298. See *supra* notes 238-43 and corresponding texts (analyzing the factors that make corruption inefficient).

E. Judicial Reforms on Several Fronts

Insanity is defined as the repeated engagement of the same activity and expecting different results.²⁹⁹ To avoid the same practices that lead to the same negative results in the judicial branch, Nigeria needs bold and persistent experimentation coupled with a willingness to adapt with respect to judicial reforms.³⁰⁰ It is necessary to define *judicial reforms* broadly, mindful of the World Bank's advice that, to be helpful, reform should be comprehensive rather than piecemeal palliatives that do not go far enough.³⁰¹ So defined, *judicial reforms* are changes for society that emanate from the judicial system. With these guidelines in mind, the list that follows illustrates, but does not exhaust, the numerous possibilities.³⁰²

299. See Cara Santa Maria, *Insanity: The Real Definition*, HUFF. POST (Dec. 20, 2011), www.huffingtonpost.com/2011/12/20/insanity-definition_n_1159927.html (attributing the statement to the U.S. physicist Albert Einstein (1879-1955)).

300. The inspiration for this thought came from a commentary by Fareed Zakaria regarding the seeming decline of U.S. global power. See Fareed Zakaria, *Are America's Best Days Behind Us?*, TIME (Mar. 3, 2011), <http://content.time.com/time/magazine/article/0,9171,2056723-1,00.html>. (last visited Dec. 15, 2014). Zakaria decried the "kind of unreflective ancestor worship" that appears to have taken hold of the American mind. *Id.* Those who wrote the U.S. Constitution, he said, were individuals who "constantly adapt[ed] their views"; they were versed in the favorite American pastime of "contemplating decay" and thinking "a great deal about decline" when things are still going well. *Id.* He opined that this state of mind stimulated the type of innovative reforms that had kept the U.S. globally competitive. *Id.* In short, the framers of the U.S. Constitution were individuals who advised "bold, persistent experimentation," always aware that America "was a work in progress, an unfinished enterprise that would constantly be in need of change, adjustment, and repair." *Id.* Nigeria needs the same "bold, persistent experimentation" in pursuing reforms in the judicial branch and other areas of its national life.

301. See Douglas Webb, *Legal and Institutional Reform Strategy and Implementation: A World Bank Perspective*, 30 LAW. & POL'Y INT'L BUS. 161, 161-62 (1999).

302. Much of the discussion that follows is inspired by Ogunye, *supra* note 12. Ogunye is a private legal practitioner in Lagos, Nigeria, who proposed that the Nigerian National Assembly establish a five-member Judicial Reform Commission composed of five eminent jurists who will sit for four months. *Id.* at 3. The Commission would be tasked with the responsibility of reviewing all the different steps taken over the years of the Fourth Republic to reform the judiciary at both the federal and state levels—specifically challenges, such as structural, operational,

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The first is *fiscal autonomy* discussed earlier in this article.³⁰³ Unlike Nigeria's 1979 constitution, the 1999 Constitution introduced centralized control of the Nigerian judiciary.³⁰⁴ The second reform therefore would be to decentralize judicial control by transferring back to state courts responsibilities improperly and inappropriately concentrated in the federal judiciary.³⁰⁵ One such power needing devolution is the high court's unlimited jurisdiction, which belonged to the states under the 1979 constitution, but under the 1999 Constitution is assigned to the federal high court.³⁰⁶

A third judicial reform focuses on the need to minimize the negative effect of "federal character" to change the manner in which this principle has been applied in the federal judiciary.³⁰⁷ Distorted application of this principle has resulted in the appointment to the bench of some individuals "demonstrably ill-qualified to serve as

ethical, funding, and staffing of the judiciary. *Id.* The Commission would then make recommendations to the National Assembly on steps needed to increase the efficiency of the Nigerian Judiciary. *Id.* at 2, 5-6.

303. *See supra* Part III.A.

304. Obiagwu & Odinkalu, *supra* note 139, at 250 n.93.

305. Ogunye, *supra* note 12, at 4.

306. *Id.*

307. One of the important innovations of the 1979 constitution is the "federal character" doctrine, which mandates that the composition of the national government or any of its constituent agencies "shall reflect the federal character of Nigeria," such that "there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups" in that government or agency. *See* CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 14, § 3. The same principle applies at the other two levels in the Nigerian federal system, namely: states and local governments. *See id.* art. 14, § 4. The principle is a noble idea that, unfortunately, has been *implemented* in a manner that promotes "quota," or, as the U.S. Supreme Court would say in its affirmative action jurisprudence, not narrowly tailored to achieve a compelling government interest. *See, e.g.,* Philip C. Aka, *Affirmative Action and the Black Experience in America*, 36 HUM. RTS. 8 (2009) (discussing the experience of African Americans regarding affirmative action programs); Philip C. Aka, *The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases*, 2006 B.Y.U. EDUC. & L. J. 1 (2006) (analyzing affirmative action, focusing on two cases in 2003 involving the University of Michigan); Philip C. Aka, *Assessing the Impact of the Supreme Court Decision in Grutter on the Use of Race in Law School Admissions*, 42 CAL. W. L. REV. 1 (2005) (confining the assessment of affirmative action to law school admissions).

judges.”³⁰⁸ The challenge is to create a more “credible appointment and promotion system” where “cronyism and dynastic succession” are not the norm.³⁰⁹

Under the 1999 Constitution, the Supreme Court is comprised of a panel of five or more justices, out of the complement of twenty-one justices.³¹⁰ As a fourth reform, this practice needs to give way to a system that allows for the full court to determine each and every matter that comes before it,³¹¹ or at least nine justices, as is the practice in the U.S. The idea behind this change is to make the Court's decisions more meaningful while increasing the public's respect for a judiciary that, due to corruption concerns, the public tends to view with caution.³¹²

Fifth, 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 matters.³¹³ 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.³¹⁴ 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.

Sixth, since the NJC is charged with the responsibility of disciplining judges, it may need to be re-composed or re-configured so that there are no active judicial officers on it. Instead, the Council

308. Oko, *supra* note 12, at 50.

309. Ogunye, *supra* note 12, at 4.

310. CONSTITUTION OF NIGERIA (1999), *supra* note 60, art. 234.

311. Ogunye, *supra* note 12, at 6.

312. Oko, *supra* note 12, at 30.

313. Ogunye, *supra* note 12, at 6.

314. See THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005* (2013). On the jurisprudence of the court, see *THE DIGNITY JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA: CASES AND MATERIALS* (Drucilla Cornell et al., eds., vols. 1 and 2 2013).

should comprise only retired judicial officers.³¹⁵ This would allow the Council to perform its duties more competently and credibly.

Last but not least, there is need to reduce the expansive role of the Chief Justice of Nigeria ("CJN") in the judicial system. Under the 1999 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").³¹⁶ As one Nigerian legal practitioner thoughtfully points out, these powers may be "too enormous" in a manner that makes them "prone to despotic abuse."³¹⁷ 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.³¹⁸ Furthermore, the CJN has the exclusive power under the Nigerian Constitution to appoint fourteen out of the nineteen members of the Council.³¹⁹ This occurrence raises the troubling question of whether such a body "so dictatorially composed" can be independent of the Chief Justice.³²⁰

CONCLUSION

Under the checkered years of its Fourth Republic,³²¹ 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.

315. See Ogunye, *supra* note 12, at 6.

316. *Id.* at 5. The LPPC makes the decision regarding who has the distinction of Senior Advocate of Nigeria ("SAN"), considered the equivalent of the Queen's Counsel in the U.K., and the CJN appoints eleven out of the fifteen total members of this SAN-award Committee. *Id.*

317. *Id.*

318. *Id.* at 8.

319. *Id.* at 9.

320. *Id.*

321. See *supra* Part IV. (analyzing two factors of Nigerian politics under the Fourth Republic since 1999 with possible implications for judicial independence).

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.³²² 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.³²³

There are two questions addressed in this conclusion: first, whether Nigeria should prioritize the factors in Part V. or pursue those factors simultaneously; and second, the comparative value of this article. As to the first question, the main point against prioritization is that given the complexity of the country and unpredictability or enigma of its leaders, one does not know which strategy would work for Nigeria's long-suffering citizenry. The idea for this prioritization was inspired by an arguably far-fetched source with little relationship

322. See generally Obiagwu & Odinkalu, *supra* note 139, at 235-36 (ranking military rule as one of two obstacles impeding human rights in Nigeria).

323. See, e.g., JOHN MCCORMICK, *COMPARATIVE POLITICS IN TRANSITION* 417 (7th ed. 2013) (observing that "[m]ilitary governments typically suspend political parties, abolish civilian political institutions, and sometimes use military tribunals, but they usually allow the courts to continue functioning, and even use them to underpin the return to civilian rule"). This is an insight inspired by Rotimi Suberu's article on the Supreme Court and federalism in Nigeria. See Suberu, *supra* note 12, at 451-85. Suberu analyzed fifteen federal-state cases over off-shore oil resources, revenue allocation, local governance, and public order, that the court decided between March 2002 and March 2007. See *id.* at 60-61, Table 1 (names of these cases). My take from the cases is of a court so cautious in its jurisprudence, it can be justifiably called "free but timid": coming out of its shell, taking advantage of the freer atmosphere made possible by civilian rule, yet psychologically withdrawn as in the days of military rule. Suberu observed that "[a] remarkable feature" of the Nigerian experiment with civilian rule in the eight years from 1999 to 2007 that it reviewed "was the independent and relatively balanced role of the Supreme Court in arbitrating a succession of inter-governmental conflicts in the federation." *Id.* at 482. "Essentially, the Court validated the country's highly centralized, military-inspired, federal Constitution." *Id.* at 483. But Suberu appeared to set the bar low, stating that "[m]ost remarkably, in most of its decisions, the Court did not fracture internally along ethnic, regional or sectarian lines." *Id.*

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to judicial independence.³²⁴ For optimum results, judicial reforms in Nigeria need to be synergized with several factors occurring simultaneously. This also fits in with the advice of the World Bank that, in order to be effective, legal reforms need to be comprehensive rather than piecemeal.³²⁵

Turning to the second question, this work has the comparative utility adverted to in the introduction.³²⁶ Nigeria is a microcosm of Africa that reflects the cleavages of every dimension—ethnic, religious, regional, and class—with ramifications for conflicts that rile the continent.³²⁷ Judicial independence offers one way out of the problem and Nigeria, as the largest society in Africa, provides a valuable comparative lesson for many countries in the region, especially those with similar history that are riven by conflicts.³²⁸ A second factor that lends this article comparative merit, a point easily glossed over in the literature, is the attention that it draws to judicial independence as a tool for conflict management in Africa.³²⁹ Moreover, governmental accountability has little meaning where the

324. See M. NIGHT SHYAMALAN, *I GOT SCHOOLED: THE UNLIKELY STORY OF HOW A MOONLIGHTING MOVIE MAKER LEARNED THE FIVE KEYS TO CLOSING AMERICA'S EDUCATION GAP 197-98* (2013) (discussing America's education gap between white and non-white children that worsens during the summer holidays).

325. See Webb, *supra* note 301, at 161-62.

326. See *supra* note 18 and accompanying text.

327. See OLADIMEJI ABORISADE & ROBERT J. MUNDT, *POLITICS IN NIGERIA* xi-xii (2d ed. 2002) (explaining that “[n]either Nigeria nor any other country can stand for all of Africa, for Africa is marked by great diversity. Still, if to know Nigeria is not necessarily to know Africa, it is a good place to begin, for there will be little that is surprising in politics elsewhere on the continent to one who is well acquainted with the Nigerian experience.”).

328. See *id.*

329. See, e.g., Philip C. Aka, *Human Rights as Conflict Resolution in Africa in the New Century*, 11 *TULSA J. COMP. & INT'L L.* 179 (2003) (focusing on improved human rights as tool for lasting conflict resolution in Africa). But the condition of inadequate treatment in the literature on the role of judicial independence in conflict management is changing. See, e.g., *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* (Andreas Schedler et al., eds. 1999) (including judicial independence among factors that help to restrain the state and produce accountability for the use of power in new democracies that include those in Africa).

judiciary lacks independence, hence the attention to “building judicial independence” as an accountability tool in some African countries.³³⁰

330. Jennifer Widner, *Building Judicial Independence in Commonwealth Africa in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* 177-93 (focusing on Tanzania).

APPENDICES

A. NIGERIAN CHIEF JUSTICES FROM 1958 TO THE PRESENT³³¹

Name	Period in office
Adetokunbo Ademola	1958-1972
Taslim O. Elias	1972-1975
Darnley A. Alexander	1975-1979
Atanda F. Williams	1979-1983
George S. Sowemimo	1983-1985
Ayo G. Irikefe	1985-1987
Mohammed Bello	1987-1995
Muhammad L. Uwais	1995-2006
Salihu M.A. Belgore	2006-2007
Idris L. Kutigi	2007-2009
Aloysius I. Katsina-Alu	2009-2011
Dahiru Musdapher	2011-2012
Aloma M. Mukhtar	2012-2014
Mahmud Mohammed	2014-present

331. See *List of Chief Justices of Nigeria*, FEDERAL JUDICIAL SERVICE COMMISSION, http://fjsconline.gov.ng/list_of_chife.html (last visited Jan. 10, 2015); *Mahmud Mohammed: The new Chief Justice of Nigeria*, DAILY INDEPENDENT (Nov. 26, 2014), <http://dailyindependentnig.com/2014/11/mahmud-mohammed-new-chief-justice-nigeria/>.

B. AGENCIES TIED TO JUDICIAL INDEPENDENCE IN NIGERIA³³²

Agency	Foundational Instrument	Function
Federal Judicial Service Commission	1999 Constitution	Makes recommendations on issues relating to the appointment and removal of national judges
National Judicial Council	1999 Constitution	Makes recommendations relating to the discipline of judges
National Judicial Institute	1991 Military Order	Promotes efficiency, uniformity, and effectiveness of judicial services in the country, including continuing education for judges

332. See *About Us*, FEDERAL JUDICIAL SERVICE COMMISSION, <http://www.fjsconline.gov.ng/aboutus.html> (last visited Jan. 10, 2015); *About the Council*, NATIONAL JUDICIAL COUNCIL NIGERIA, <http://njc.gov.ng/about.php> (last visited Jan. 10, 2015); *National Judicial Institute*, NATIONAL JUDICIAL INSTITUTE, <http://nji.gov.ng/index.php/about-us/profile> (last visited Jan. 10, 2015).