A Comparative Analysis of the Court Structures in Nigeria and South Africa

By

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Research Summary

This research is centered on carrying out a comparison between the current court systems (with particular reference to structures) in Nigeria and South Africa. A pertinent question that comes to bear in relation to court systems, is whether the current court structure in South Africa should be adopted by Nigeria? The response to this question is vital for the avoidance of the adoption of a court structure by Nigeria basically for the reason of its seeming successful implementation in South Africa without giving credence to other factors like the salient distinctiveness of their experiences and the legal systems that operate in both countries which I addressed in the dissertation.

In this dissertation, I specifically concentrated on the various courts currently adopted by each country. In chapters three and four, I indentified and examined all the courts in the current court structure of each country, their composition, role, jurisdictions, operations, and other related means of adjudication vis a vis tribunals, arbitrations and even the Truth and Reconciliation Commission. I carried out a comparative analysis in chapter five between the Nigerian and South African court systems with particular reference to the structures of the courts to indentify the strengths and weaknesses of each structure and the indirect and direct threatened reorganizations i.e the proposed reforms in the two countries and their likely effects and repercussions in the enhancement of justice delivery.

Prior to looking at the structures of the courts, I generally looked at the role of the judiciary in both countries and their application of judicial concepts like independence of the judiciary, doctrine of judicial precedents and principles of natural justice. I briefly looked at the history of both legal systems and the evolution of their court structures, the current make up of each legal system, which includes their form of government, democratic set ups and the interrelatedness of each organ of government with the judiciary. The relevance of looking at these legal conceptions is merely to create a background understanding and the appreciation of the makeup

and contents of the courts in both countries on which the research is centered. In carrying out a comparative analysis of the courts of these two countries I identified their similarities and differences and concluded by making findings and proposals towards a more effective court system for Nigeria.

In my conclusion in chapter six, I made observations, suggestions and proffered solutions for the way forward towards achieving a more viable court structure for Nigeria by adopting some strong points from South African court structure.

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List of Abbreviations

ADR	Alternate Dispute Resolution
AFWLR	All Federation Weekly Law Report
CCJON	Code of Conduct for Judicial Officers of the Federal Republic of Nigeria
CJN	Chief Justice of Nigeria
FCT	Federal Capital Territory
FCTJSC	Federal Capital Territory Judicial Service Committee
FJSC	Federal Judicial Service Commission
JSC	Judicial Service Commission
LFN	Laws of the Federation of Nigeria
LNN	Laws of Northern Nigeria
NBA	Nigerian Bar Association
NJC	National Judicial Council
RNJCGPR	The Revised National Judicial Council Guidelines and Procedural Rules
RNJCGPR	Revised National Judicial Council Guidelines and Procedural Rules
SADC	South African Development Community
SJSC	State Judicial Service Commission
SJSC	State Judicial Service Commission
SSS	State Security Service
UN	United Nations

Chapter One

1.1 Background to the Research

The study of court structures in the Nigerian and South African legal systems is not innovative. However, the materials that abound on court systems in these two jurisdictions are usually mere statements of the courts' composition, jurisdictions, and the applicable laws. They are usually devoid of an analysis of the strengths and weaknesses of the court systems adopted in each of these countries, and how these enhance justice delivery.

Social, political and legal scholars are agreed on the vital functions performed by the judiciary in a democratic setup. These judicial functions are performed through the courts whose functions are basically intertwined and centered on the resolution of conflicts, law making and social control.[1] The judiciary is said to have *"… developed from a mere dispute resolution authority to a central institution in society and a significant constitutional branch of government…"*[2] The importance of the role of the courts was reiterated by Justice Ismail Mohamed, the former Chief Justice of South Africa in the following statement-

> *The new constitution of our nation restores the legitimacy and the majesty of the law and gives to the judiciary a very crucial and independent role in the protection of the humbliest citizen from injustice however mighty and powerful be the agency from which it emanates and indeed however formidable be the popularity which that agency might claim"*[3]

[1] Shapiro M *Courts: A Comparative and Political Analysis* (1981) Vii & 17.
[2] "The Role of Courts in Society" (ed. Shetreet & Martinus) (1988) 1.
[3] In his speech to the participants at the World Jurist Association Seminar in Cape Town South Africa which held on 12-14 January, 1997 on "The Role of the Judiciary in Changing Africa" in *The Judiciary in Africa"* (ed. Bola Ajibola & Deon Van) (1990) Xvii.

Judges through courts, also decide vital issues on public policy a domain usually reserved for elected representatives of the people.[4] According to S. E. Oxner, in recognizing the economic importance of courts states that investors, mindful of protecting their investments, are more likely to invest in countries with well functioning judiciaries. This opinion emphasizes the importance of courts in stabilizing democracy and growing the economy. Not surprisingly, the World Bank will readily support judicial reforms by readily providing financial assistance toward judicial reforms.[5] It is also apparent that there is increasing appreciation of how the type of court systems adopted in a jurisdiction may enhance or impede the creation of the suitable environment for the exercise of judicial functions. This may explain the frequent reorganization of court structures by some governments. This certainly creates a deserving basis for a study of this nature.

There subsists a move towards the reorganization and restructuring of legal systems and court structures in a good number of countries over the years.[6] These developments occur in response to the need for such improvements that will enhance a smooth dispensation of justice. These developments cannot be down played. So far there have been marked alterations in the court structures of Eastern, Western[5] and Central Europe,[6] Asian, South American, and African countries via their respective constitutions.

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[4] Norman R "Judges as Instruments of Democracy" in Shetreet, Shimon (ed) *The Role of Courts in Society* (1988) 149-157.
[5] Oxner S E "Judicial Education and Judicial Reform" in *The Judiciary in Africa"* (ed. Bola Ajibola & Deon Van) (1990).
[6] Stone A "The Birth of Judicial Politics in France: Western European Constitutional Courts in Comparative Perspective" (1992) 226.
Favoreu L "Comparative Private International Law: American and European Models of Constitutional Justice" (1990) 105.
[5] Stone A 226.
[6] Shieve S W "Law and Policy in International Business: Central and Eastern European Constitutional Courts and the Antimajoritarian Objection of Judicial Review" (1995) Vol. 22 at 120.

Change is an inevitable process in government and when it occurs, it precipitates sometimes of necessity, structural changes in public institutions – including courts.[7] To illustrate, Columbia's adoption of its thirteenth post-independence constitution, fundamentally altered its existing court structure by introducing a centralised constitutional court system. In some real sense, the dynamics of globalization are driving many of these changes. These changes however have not been without their challenges. Changing court systems is a growing global phenomenon for both developed and developing countries. In the developing countries of Africa especially, evidence of significant transformation in court structures are emerging as these countries try to reinvent public institutions to meet their needs and respond to globalization.

Beyond responding to globalization however, it is equally becoming evident that these countries are reinventing their court systems in ways that project their peculiar requirements, after all, globalization need not mean a uniform system of courts across national boundaries. A pertinent question that comes to bear in relation to changing court systems for instance, is whether the successful operation of a particular court structure in one country presupposes its successful implementation in another, which operates a different legal system? Specifically put, should the current court structure in South Africa be adopted in Nigeria? The response to this question is important because the idea of a constitutional court has also been mooted in Nigeria. However, what may be succeeding in South Africa may not succeed in Nigeria if the unique contexts operative in both jurisdictions are taken into careful consideration. Importing concepts without regard to the unique local context may in fact reverse existing gains. In other words the adoption of the court structure of South Africa by Nigeria without giving credence to other factors like the salient distinctiveness of

[7] Finer S E, Bagdonnor, V & Rudden,B *Comparative Constitutions* (2nd ed. (1995) 21.

the legal systems that operate in both countries will achieve the reverse of improving the already existing court structure in Nigeria.

The key challenges to a well-functioning court structure in a polity are delay in the dispensation of justice, cost of litigation, jurisdictional spread of the courts, qualifications of the officers of the courts particularly judicial officers and availability of mechanisms for the enhancement of the administration of justice. The delays in the cases in courts and the eroding confidence of the Nigerian population towards access to justice,[8] warrants an in-depth study that will examine the problems of the current court system to discover a blueprint court structure that will enhance the smooth dispensation of justice in the country. Nigeria's colonial legal heritage is Common law.[9]

As far back as colonial times when British rule and laws were applied in the colonies that became Nigeria in 1914[10], through nearly five decades of self rule,[11] Nigeria has undergone major constitutional changes and consequential institutional reorganizations that saw to the introduction of new court structures.[12] Thus, from the time the first court was established in 1862[13] readjustments continue to be made to court systems. For instance, under Nigeria's pre-independence 1954 constitution, appeal from her Supreme Court to the West African Court of Appeal was abolished. With the 1963 post independence constitution however, the Supreme Court was reconstituted as the final arbiter, thereby terminating appeals to the Privy Council. The process of judicial reconstitution expressed the nation's desire to bequeath a judicial legacy that affirms Nigeria's political independence from colonial Britain, and to make

[8] Taiwo, L "Democracy, Courts and the Rule of Law in Nigeria: Problems and Prospects". (2007) 270 – 293.
[9] Obilade A *The Nigerian Legal System* (1979).
[10] The formal adoption of British laws in Nigeria was in 1861.
[11] After it's independence in 1960.
[12] *Ibid*.
[13] Omoniyi O *The Legal Profession in Nigeria 1865-1962*, (1977).

justice more accessible to its citizens. Some commonwealth countries such as the Bahamas[14] and Kiribati[15] however have found it "politically" convenient to maintain judicial relations with the Privy Council.

Indeed, persistent capacity shortages, incessant delays in justice administration and crowded dockets make a good case for structural reforms in court systems. To redress these problems, a few states in Nigeria have taken the path of innovation. One such state is Lagos State, Nigeria's economic capital with a population of over 10 million. In a bid to decongest court dockets, which were arguably the largest in the country, the state adopted specialized courts similar to those practiced in countries like Germany, France and a host of other European countries.[16] To provide a sufficiently business-friendly and time efficient legal environment that will attract foreign investments, the state introduced a multi-door court house system, a dispute resolution procedure that adopts ADR options, and is built into the conventional court system[17] which soon became the model for alternative dispute resolution in Nigeria. This is a totally novel arrangement in the country. This multi door court system was also recently replicated in the Federal Capital Territory. These changes, no doubt call for concern as to whether proper structural realignments are being taken, or whether they offer the most suitable range of options for the country.

Assailed by a staggering spate of trade disputes, Nigeria's federal government has also taken measures to remodel what had become a comatose National Industrial Court, elevating it to a superior court of record and establishing its autonomy and exclusive jurisdiction over labour disputes. The National

[14] 'Overview of the Bahamian Legal System' http:/www.lexbahamas.com/ Overview_ of_ the_ Bahamian_ Legal_ s.htm (accessed on 11th of April, 2012).
[15] "Freedom in the world 2009 – Kiribati".
http:/www.unhcr.org/refworld/publisher,FREEHOU,,KIR4a6452a828,0.html (accessed on 11th April, 2012)
[16] Lagos State High Court Civil Procedure Rules, 2004.
[17] *Ibid.*

Industrial Court Act 2006 was enacted to resuscitate the activities of the National Industrial Court which was established in 1976 by the Trade Dispute Act.

As a developing nation with immense economic potentials and daunting developmental challenges, Nigeria will doubtless continue to be faced with the need to undertake structural reforms of its court systems to strengthen their capacity to respond to the challenges of a developing economy and provide better access to justice. There were indeed proposals for a new court structure for the country during the constitutional conferences that held in different parts of the country from February, 2005.[18] The conferences were subsequently jettisoned due to a controversial attempt to introduce a third term clause to extend the sitting president's tenure. The proposals contained in the draft constitution included the amendment of the current court structure. About a decade earlier, the 1995 draft constitution contained provisions for a constitutional court system that would have necessitated a major alteration of the existing court structure.[19] The basis for the proposal was its adoption in South Africa.

South Africa a mixed system of both the Common Law and the Roman-Dutch Law (Civil Law)[20] currently practices constitutional supremacy.[21] The country has also experienced major changes in its court structure. In 1950, appeals to the Privy Council were abolished and in 1994, pursuant to the new constitution of the Republic of South African the Constitutional Court was introduced.[22] The honourable Mr. Justice C. G. Weeramantry of the International Court of Justice

[18] Nigeria: "Obasanjo Opens Constitutional Debate, Rules Out Secession" http/www.irinnews.org/report/53118/ Nigeria;-Obasanjo Opens Constitutional debate, Rules out Secession (accessed on 11th of April, 2012).
[19] Section 6 (5c) 1995 Draft Constitution of the Federal Republic of Nigeria and "Report of the Constitutional Conference Containing the Resolutions and Recommendations" Federal Republic of Nigeria Vol. 11 (1995) 93.
[20] Hahlo and Kahn, *The South African Legal System and its Background* (1973).
[21] *The Judicial Institution in Southern Africa* (ed Van De Vijver) 2006.
[22] Interim Constitution of South Africa, 1993.

did restate the inevitable need for the reconstructions of legal structures under the Apartheid regime since they could not maintain its legitimacy.[23] Indeed a commission of enquiry into the structure and functioning of courts under the chairmanship of Mr. Justice G. G. Hoexter was set up in South Africa. Its object was-

> *To inquire into the structure and functioning of the courts of law in the Republic of South Africa and to report and make recommendations on the efficacy of that structure and functioning and on the desirability of changes which may lead to the more efficient and expeditious administration of justice and a reduction in the cost of litigation ….*[24]

The committee sat and made recommendations that altered the court structure of South Africa. It recommended the alteration of the jurisdictional limits of the existing courts, the establishment of the family court and the abolishment of the blacks divorce court etc. At the moment is the Superior Court Bill before the parliament with proposals for major alterations in the current court structure. Outside the direct path of regular courts are other forms of adjudication. Tribunals have found operation in South Africa. Alternate dispute resolution methods, one of the innovations in the adjudication of justice is formally applicable in South Africa. Another innovation is the truth and reconciliation commission.

Jon Qwelane at a conference organized by the National Association of Democratic Lawyers towards "Reshaping the Structures of Justice for a Democratic South Africa" presented a background paper titled "How our

[23] In his message to the conference of the National Association of Democratic Lawyers in *Reshaping the Structures of Justice for a Democratic South Africa* (1994).
[24] 'Fifth and Final Report Part A Commission of Enquiry into the Structure and Functioning of Courts' Vol. 1RP 78/(1983) .

Communities Perceive our Legal System." He stated a lack of confidence in the judicial structure under Apartheid on the ground of racial bias, a highly limited knowledge of the cultural milieu of majority of South Africans and a system that upheld and fostered the operations of the Apartheid government. He argued that the court system was in dire need of restructuring in order to sustain its legitimacy and relevance in the new democratic dispensation.[25] The reconstruction proposed for the judiciary at the conference extended beyond the court forms to include the reconstitution of bench to reflect the diversity of the South African people. This was necessary since the judiciary will be taking up the new role of enforcing the democratic values enshrined in the constitution as opposed to its former role of enforcing apartheid laws.[26] The eroded confidence of the majority of the people occasioned the proposal for the establishment of a separate constitutional court at the apex of the South African judiciary which must ascertain its own distinctiveness and legitimacy.[27] The Constitutional Court was therefore established through legislation.[28]

The South African Constitutional Court is stated to be a hybrid since South Africa is essentially a Common Law country with a Civil Law background and, among the countries that form part of the Anglo American legal tradition that chose the decentralized model of judicial review. Interestingly, this Constitutional Court with almost two decades of existence appears to be making positive impact in sustaining its democratic government through upholding the fundamental rights of the citizens as contained in the constitution. It is also pertinent to mention the body of jurisprudence its Constitutional Court is

[25] Qwelane J 'How our Communities Perceive our Legal System' in *Reshaping the Structures of Justice for a Democratic South Africa* (1994) 1-12.
[26] Chaskalson, Arthur in his keynote address at the conference. See *Reshaping the Structures of Justice for a Democratic South Africa* (1994) 13-24.
[27] Ibid, p. 17.
[28] Patfield F & White R (ed) *The Changing Law* (1996).

developing to assert the justicability of socio-economic rights. [29] Despite its measure of success, does it follow that Nigeria should adopt the same structure of constitutional review? I think not for the reasons that the Nigerian judiciary operates differently and, ordinarily fulfills the functions for which the South African Constitutional Court was created to discharge in South Africa.

The challenges that are prompting court changes in Nigeria are replicated in other African countries, with the result that similar changes are underway in those countries, or may soon be expected. Indeed, judicial or para-judicial institutions have emerged that put forward novel notions/approaches to doing justice, and concepts that diverge from the traditional notions of Civil or Common Law, such as the concept of reconciliatory justice reflected by the South Africa's Truth and Reconciliation Commission of the 1990s – an ideal Nigeria tried to replicate through its "Oputa Panel"[30]

A conducive environment necessary for courts in Nigeria and South Africa to perform their constitutional roles is the application of the vital principles of justice reflected in the legal concepts of the doctrine of judicial precedent, the principles of natural justice and the independence of the judiciary.

1.2 Literature Review

On the historical accounts of courts in South Africa, the works of these authors Cossie C T S & Nstaluba T M titled "A Brief History of the Eastern Cape High

[29] Corder H & Maluwa T *Administrative Justice in Southern Africa* (1997).
[30] A panel set up to *'establish the causes, nature, and extent of human rights violations - in particular the assassinations and attempted killings - between January 15, 1966 and May 28, 1999, to identify perpetrators (individuals or institutions), determine the role of the state in the violations, and to recommend means to pursue justice and prevent future abuses.'* See http://www.usip.org/publications/truth-commission-nigeria (accessed 10th November, 2011)

Court, Bhisho South African judiciary 100 Years Old",[31] Pat Ellis S C titled "A Short History of the North and South Gauteng High Courts South African Judiciary 100 Years Old",[32] Sishuba M titled "Eastern Cape High Court: Mthath South African Judiciary 100 Years Old",[33] Stander J titled "North West High Court, Mafikeng South African judiciary 100 Years Old"[34] and Van Neikerk, L. Titled "Northern Cape High Court Kimberly' South African judiciary 100 Years Old"[35] provide only skeletal information on a few courts of South Africa. For the historical accounts of courts in Nigeria, the works of these authors Adewoye O titled *The Judicial System in Southern Nigeria 1854 – 1954*[36] and *The Legal Profession in Nigeria 1865 – 1962*[37] Fawehinmi G titled *Court Systems in Nigeria: A guide,*[38] Nwabueze B O titled *A Constitutional History of Nigeria*[39] and Ume F E titled *The Courts and Administration of Law in Nigeria*[40] put together, provide some details for the research but are devoid on information on the current court system in Nigeria. A few materials that are centered on the subject of court systems like Abugu J E in his work titled "Court System in Nigeria"[41] and Fawehinmi G in his work titled *Court Systems in Nigeria: A guide* even though are detailed do not completely address the dept required in this research and are not up to date to include the current make up of the court systems. Some authors like Okanny M C in his work titled *The Role of Customary Courts in Nigeria*[42] and Orire A in his

[31] Cossie C T S & Nstaluba T M "A Brief History of the Eastern Cape High Court, Bhisho South African judiciary 100 Years Old" 23 *Advocate* (2010) 52.
[32] Pat Ellis S C "A Short History of the North and South Gauteng High Courts South African Judiciary 100 Years Old" 23 *Advocate* (2010) 48.
[33] Sishuba M "Eastern Cape High Court: Mthath South African Judiciary 100 Years Old" 23 *Advocate* (2010) 50.
[34] Stander J "North West High Court, Mafikeng South African judiciary 100 Years Old" 23 *Advocate* (2010) 52.
[35] Van Neikerk, L. "Northern Cape High Court Kimberly' South African judiciary 100 Years Old" 23 *Advocate* (2010) 42.
[36] Adewoye O *The Judicial System in Southern Nigeria 1854 – 1954* (1977).
[37] Adewoye O *The Legal Profession in Nigeria 1865 – 1962* Nigeria☹1977).
[38] Fawehinmi G *Court Systems in Nigeria: A guide* (1002).
[39]Nwabueze B O *A Cconstitutional History of Nigeria* (1982).
[40] Ume F E *The Courts and Administration of Law in Nigeria* (1989).
[41] Abugu J E "Court System in Nigeria" in Akanki E (ed) *Commercial Law and Practice* (2005).
[42] Okanny M C (1984) *The Role of Customary Courts in Nigeria* (1985).

work titled "An Examination of the Judicial Functions of the Magistrates' Court, District Courts, Area Courts And Customary Courts"'[43] are centered on only a few courts out of the list that make up the current court structures. Though Norton M (ed) in *Reshaping the Structures of Justice for a Democratic South Africa*[44] and Van De Vijver (ed) in *The Judicial Institution in Southern Africa*[45] indeptly address issues pertaining to courts, for the former, several changes have taken place since its publication, and the later only a narrow aspect of what this research is centered on is addressed. I have not come across any material that compares the court systems of Nigeria and South Africa.

1.3 A General Statement on Court Structures

Court structures differ from jurisdiction to jurisdiction as determined by their respective constitutions and other applicable statutes. The nature of court structure adopted by a particular jurisdiction is usually determined by its legal system. While some jurisdictions operate strictly specialized court structures like Germany where there are specialized courts that run through the entire hierarchy of courts with the Constitutional Court also a specialized court at the apex of the judiciary, some jurisdictions like the United States of America operate courts with general jurisdiction from lower cadres right up to the Supreme Court. South Africa and Nigeria however operate a hybrid system of having both specialized courts and courts of general jurisdiction at both the lower and upper cadre right up to the apex court. South Africa has both courts of general and special jurisdiction but is more tilted towards the system of specialised courts by having a good number of specialised courts and a separate Constitutional Court at the apex. Nigeria on the other hand has basically courts

[43] Orire A "An Examination of the Judicial Functions of the Magistrates' Court, District Courts, Area Courts And Customary Courts"' in Osibanjo Y & Kalu A (eds) *Law Development and Administration in Nigeria (1990)* 466-478.
[44] Norton M (ed) *Reshaping the Structures of Justice for a Democratic South Africa* (1994).
[45] Van De Vijver (ed) *The Judicial Institution in Southern Africa* (2006).

of general jurisdiction and very few specialized courts and a Supreme Court at the apex.

1.4 Problem Statement

A pertinent question that comes to bear in relation to court systems for instance is whether the court structures of South Africa can be replicated in Nigeria? In other words, whether the successes that South Africa has achieved in the structural organization of its courts in order to enhance constitutional governance and access to justice, can be replicated in Nigeria? Although both systems have in their legal heritage, the common law, their legal systems are still different. This thesis tries to resolve this issue.

1.5 Thesis Statement and Research Questions

The legal theory for this research will dwell on the suitability of the court systems in both countries with respect to their role, jurisdictions and, in dispensing with the cases filed in court. The research will address the following questions: i) To what extent are the courts in both countries independent against the background of their respective constitutional and statutory provisions? ii) To what extent do they apply judicial precedents and operate the rule of law? (This is summarily addressed) iii) What are the main features of the South African court structure? iv) What are the main features of the Nigerian court structure? v) What are the similarities and differences of both court structures and what is worthy of emulation in the court structure of South Africa by Nigeria?

1.6 Definition of Terms

Legal System; is the network of laws and institutions in a given political entity.

Court: The court is an institution created by law, and

> *saddled with the responsibility of interpreting laws and subsidiary legislations made by the legislative arm of government and other*

> *laws applicable by virtue of usage like the common law and customary laws applicable to the people within the geographic area; examining executive actions viz a viz legislative enactments and the rights of citizens; and adjudicating in disputes between governments, government and citizens and citizens themselves*[46].

Court System (Structure): can be defined as "*the network of courts in a jurisdiction*"[47] classified in a hierarchy with defined authority to exercise judicial powers.

Tribunal: As used in this study has a more restricted meaning from a court as defined here. For the purpose of this research, it is a quasi judicial body outside the regular courts with adjudicatory functions.

Appeal: It is the "resort to a superior (i.e. appellate) court to review the decision of an inferior court…"[48] "Inferior court" as used in this definition does not necessarily mean a court of lower jurisdiction. It simply means a court lower in jurisdiction to the court reviewing its decision.

Judicial officers: This refers to judges of superior courts of record in both South Africa and Nigeria, the only difference being that in South Africa, judicial officers include magistrates. In Nigeria, the constitutional definition of the term excludes magistrates and presiding officers of lower courts.

Justice: Where it is used in reference to a judge, it refers only to judges of the Court of Appeal and the Supreme Court in Nigeria.

Superior courts: Courts from the cadre of high court and above.

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[46] Abugu J E O 'Court Systems in Nigeria' in *Commercial Law and Practice*, (ed Akanki E.O.) (2005) 44 - 95.
[47] Blacks Law Dictionary 7th ed. 1999.
[48] *Ibid*.

Courts of lower jurisdiction: All courts below the cadre of the high court.

Specialized courts: Courts with specialized jurisdiction over particular subject matters as opposed to courts of general jurisdiction.

Federal courts: Courts established by federal legislation, whose jurisdictions are not limited to provinces and states. In some cases in Nigeria, these courts have jurisdiction over specific matters in the exclusive legislative list.

Provincial/State Courts: These are courts with limited territorial jurisdiction within the boundaries of the province or state as the case may be.

1.7 Scope of Research

The study concentrates on Nigeria and South Africa. It generally looks at the role of the judiciary in both countries and their perception of judicial concepts like independence of the judiciary, doctrine of judicial precedents and the application of the rule of law. The object of this aspect of the research is to create a contextual understanding of the principles, makeup and the role of courts in both countries. This will also help in the appreciation of the subtle distinctiveness of court structures in both countries and define the relevance of the current structures, and of proposals for structural reforms in both countries. The research looks briefly at the history of both legal systems, the history and evolution of the court structure of Nigeria, and some of the courts in South Africa.

The research is centered on the court structures of both countries and more particularly, it indentified and examined all the courts in the current court structure of each country, their role, jurisdictions and operations, and identified other non conventional means of adjudication vis a vis tribunals, arbitrations and even the Truth and Reconciliation Tribunal. A comparative analysis is carried out between the Nigerian and South African court systems with particular reference to the structures of the courts. The scope of the research also includes the

analysis of the changes proposed in court structures in Nigeria and South Africa to enhance justice delivery. The research then concludes with recommendations for a more viable court structure for Nigeria, borrowing best practices from South Africa.

The research discusses certain concepts that in themselves are wide enough for independent research. These concepts like the Independence of the judiciary, the role of courts in both countries, the rule of law are discussed only to the extent that they create a background and enhance understanding of the main subject of the research. The legal systems of Nigeria and South Africa are also discussed with the same objective.

The extent of this research does not include a statistical analysis of the performance of the courts in both countries against the other. The performance of the courts is not gauged against their jurisprudential output but rather (assuming that their jurisprudential output are in line), against the number of cases dispensed with out of the total number filed. The figures given is limited to only giving a broad analysis of the structures of the court and the dispensing of its functions. This study reviews a number of literatures on the subject. The primary sources include past and current constitutions of both countries and other statutes that establish and regulate courts, including rules of procedure. Texts, articles and other primary, secondary and tertiary sources including databases about courts; and cases are utilized in this research.

1.8 Aims and Justification for Study

The justification for this study is hinged on the importance of the subject matter through its role in sustaining democratic values, the protection of the fundamental human rights of its people, and its sustenance of peace and equilibrium in the society through its adjudicatory role. The Judiciary makes up the third arm of government in a democratic set up. The role of the judiciary is

expressed through the courts. For both Nigeria and South Africa, a vibrant and effective judiciary is necessary for the achievement of peace and harmony by upholding and enforcing the rights and obligations of its citizens.

The main aim of this research is to assess the current court systems operating in Nigeria and South Africa with regard to how they are set up, how encompassing their jurisdictions are and whether by their set up, they adequately perform their roles. Through doctrinal research, it is expected that a comparison of both systems with each other, will ascertain the most viable court systems that will optimally contribute to an effective adjudicatory system for Nigeria, and indeed other African countries which may have similar legal system with Nigeria.

Additional justification for this research is the changing nature of court structures occurring around the globe of which Nigeria and South Africa are not excluded. At the moment, there have been major changes in the structures of the judiciary in South Africa and in certain parts of Nigeria and there are suggestions for more changes. This has raised the concern of whether the proponents of these changes have carefully considered the implications of adopting these systems and, whether adequate machineries will be made available by the government to enable a thorough research to be embarked upon to ensure their suitability in preference to what already operates.

The choice of Nigeria and South Africa for this comparative research is strategic; because of their legal history, economic potentials, development challenges and strategic engagement with African issues. Both countries occupy strategic roles and satisfy important functions in Africa's economic recovery and regional stability. Another reason is Nigeria's size and strength - being a developing nation and the most populous African country. South Africa on the other hand has a more developed economy that occupies a vital position in ranking among the numerous African economies. Another reason for the choice of Nigeria and

South Africa also rests in the fact that both countries operate juridical systems that are representative of the common law and civil law legal systems in use in Africa. The aim of this research is to afford us a glimpse into the form of these two different legal systems as they affect the development of their court structures. This research also hopes to discover how through the similarities and differences of both systems, there will emerge a paradigm suitable for Nigeria.

1.9 Significance of Study

It is expected that the result of this research will not only be useful to these two countries, but will also be relevant to judicial developments in other African countries. Nigeria operates a Common Law system. South African law on the other hand is rooted in Common Law and Civil Law. Together, both nations are representatives of the legal systems of most African countries. Another reason for this study is that developments in Africa's court systems appear to be somewhat inchoate responses to local needs for efficient justice delivery. As such, the potential benefits of these developments remain subjective, waiting to be harnessed through systematic study as proposed in this research. Thus, the study hopes to identify emergent prototypes of court structures that can be further developed into solid models that are able to absorb the pressures of globalization and support Africa's socio-economic and political development as it meets the needs of the people.[49]

1.10 Methodology

As its object, this dissertation adopts 'an intellectual activity with law' with respect to the court structures in Nigeria and South Africa and, 'comparison as its process'[50] in order to reach a practical judgment and a theoretical conclusion. The Method adopted in this research is basically doctrinal. It commences the

[49] Zweigert K. & Kotz H *An Introduction to Comparative Law* (1987) 2 & 15.
[50] *Ibid* p 2.

history and understanding of the legal systems and court structures of Nigeria and South Africa and the role of the judiciary in both countries which includes the perception of judicial conceptions like the independence of the judiciary, judicial precedents and principles of natural justice as applied by each country, garnered from doctrinal sources. Relevant international treaties and documents for the promotion of legal concepts like the independence of the judiciary and the rule of law were studied against the backdrop of the application of these international standards by Nigeria and South Africa. Afterward, there was a study of the relevant provisions of the constitutions of Nigeria and South Africa on their court structure, as well as other relevant legislations. Specifically there was a survey of the existing courts in the court structures and the identification of other means of adjudication in both countries. Reference was made to relevant doctrinal sources. The empirical data utilized for this research covered the period of 2010 to 2011 for both countries. For South Africa, it covered the court set ups in the country. For Nigeria, the data covered all federal courts across the country, all states high courts across the country and the lower cadre courts in Abuja-the Federal Capital Territory which is centrally situated and Plateau State which is in the northern part of the country and Lagos State which is in the southern part of the country. This division of having a representative of the north and south is justified by the regions being subject to some similar laws which have geographical application to the northern and southern parts of the country. The aim is to provide a glimpse of what obtains in each of these parts of the country as against collecting detailed data on each of the thirty-six states of the country on the lower cadre courts which would require a physical presence in each of the states. The constraint of time and funds limits this. And for some of the states, these data are not readily available and are compiled after a request is made for them.

1.11 Outline of the Dissertation

This dissertation contains six chapters. Chapter one contains the introduction, and a description of the types of court structures, the problem statement, the research theory, research questions and the definition of terms used in the study. It also contains the scope of the study, aims and justification for the study, its significance, and methodology used.

Chapter two takes on judicial principles as they inevitably affect the functions of the courts in Nigeria and South Africa. It briefly discoursed the role of the courts in Nigeria and South Africa viz a viz the sustenance of democracy, the stabilization of the polity and social transformation. The judiciary plays this role subject to the provisions of the governing constitution, through adjudicating disputes between individuals, individuals and the government, and also disputes between the arms of government. The function of the judiciary also includes the enforcement of the fundamental rights of the citizens contained in the constitution. The independence of the judiciary also dealt with in chapter two centers on constitutional and statutory compliance with requirements of judicial independence in Nigeria and South Africa. The doctrine of judicial precedents and rule of law were also briefly explained as they apply to the courts in Nigeria and South Africa.

Chapter three gives a cursory account of the history of South African legal system and how it has shaped its current court structure, a brief history of some courts in South Africa and dwells on the current court structures in more details except in areas already discussed in chapter two. The categories of courts looked at here are courts of high jurisdiction, courts of lower jurisdiction, specialized courts, tribunals and other methods of resolution of disputes outside the regular court structures like tribunals, the truth and reconciliation commission and ADR which were summarily addressed.

Chapter four is a replication of chapter three but is focused on the history of the Nigeria legal system and how it has shaped its current court structure, history and evolution of her courts, and in details, each of the courts in the current court structure. These courts are categorized under courts of high jurisdiction (federal and state courts), courts of lower jurisdiction, specialized courts, tribunals and other methods of resolution of disputes outside the regular court structures like the Truth and Reconciliation Commission and ADR which were also summarily addressed.

Chapter five is focused on the comparative analysis of the current court structures in Nigeria and South Africa as treated under chapters three and four and their performance, and also the analysis of the proposals made for judicial reform as affecting these courts bringing out the strengths and weaknesses of the court structures in both systems.

Chapter six concludes this research by making findings, observations and proffering solutions for the way forward.

Conclusion

So far, this chapter has given a synopsis of what this research entails. The introduction gives a narration of the relevance of carrying out a comparative study of court structures of Nigeria and South Africa and the vital functions performed by the judiciary through the courts in a democratic setup whose functions are basically intertwined and centered on the resolution of conflicts, law making and social control. The rundown of the scope of the research, justification, and methodology, the limitations and the terms defined depicts the mode on which the study was conducted and points out the restrictions and boundaries of the study. The ensuing chapters more succinctly address the problem statements and research questions.

Chapter Two

In this chapter, some legal conceptions that define and enhance the functioning of the courts structures applicable in Nigeria and South Africa are considered. It is imperative that these concepts are discussed prior to the chapters that centre more wholly on court structures because they elucidate some fundamental issues that characterize these courts and their operation in the court structures of both countries. They also delineate the extent to which these conceptions differ in the two countries. The attention given to these concepts in this preceding chapter particularly the item on the compliance with requirements of judicial independence by the Nigeria and South African constitutions and statutes dispenses with the need for a further consideration in the ensuing chapters.

2.1 The Role of the Judiciary in Nigeria and South Africa

Every good government aims amid other objectives to achieve the wellbeing and happiness of the citizens.[51] In addition to other programmes, mechanisms and institutions established towards this achievement, there must of necessity exist a vibrant and effective system of justice administration which is the foremost role of the judiciary.[52] The judiciary plays this role subject to the provisions of the governing constitution and other applicable laws through adjudicating disputes between individuals, individuals and the government, and also disputes between the arms of government.

The judiciary in Nigeria and South Africa occupies an essential position in the respective governments and played a very vital role in the sustenance of their then fledgling democracies, and is currently playing a vital role in the

[51] Yakubu,M G 'Independence of the Judiciary' in *Law Development and Administration in Nigeria* (1990) 547.
[52] *Ibid.*

stabilization of the polity, social transformation,[53] and the enforcement of the fundamental rights of the citizens stipulated in the constitution.[54] The occupants of judicial offices perform their functions as is the case in these two countries through courts. The courts which make up these judiciaries will be discussed in chapters 3 and 4.

In its preamble, the Interim Constitution of South Africa[55] as well as the 1996 Constitution clearly state the role of the judiciary in its explanation of the circumstances that led to the adoption of the current constitution which is to *"Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;"*. At a seminar of the 'World Jurist Association' in Cape Town[56] on the 'Role of the Judiciary in a Changing Africa' organized to address and proffer solutions for the judiciary and legal practitioners in Africa, the significant role of the judiciary towards the achievement of peace and harmony in the continent by upholding and enforcing the rights and obligations of its citizens was reiterated.[57] The Nigerian Constitution in order to enable the judiciary achieve its noble role has endeavoured to remove impediments that may stand in its way by prohibiting the ousting of the powers of the courts by the legislature and the executive arms of government.[58]

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[53] 'The Political Role of Courts in South Africa' http://www.cmi.no/research/project/?398=the-political-role-of-courts-in-south-africa (accessed on 27th December 2011).
[54] Section 6 (6) 1999 Constitution of Nigeria and s 165 South African Constitution where it is inferred. See Amupitan J 'The Role of the Courts in Strengthening Democracy at the Local Government Level in Nigeria' http://www.ialsnet.org/meetings/constit/papers/AmupitanJoash(Nigeria).pdf 27/12/2011
[55] 1993 which came into force in 1994. This was in force in South Africa from 1994 to 1996
[56] Held on 12 – 14 January, 1997.
[57] *Judiciary in Africa* (ed. Ajibola O & Vanzyl, D) (1998) v.
[58] Section 4 (8) see Amupitan, J. *loc. cit*.

2.2 Judicial Independence in Nigeria and South Africa: A Brief Overview

At the end of military rule in Nigeria in 1999 came the institution of a democratic government achieved through the system of universal adult suffrage. This government, through its 1999 Constitution sought to restore the eroding confidence of its people in the judiciary to create a more stable society. Also after the collapse of Apartheid in South Africa, the 1993 Interim Constitution[59] came into force to create a legal platform that ushered in democracy which subsisted until it was replaced by a more permanent constitution in 1996.[60] Both constitutions created a system of constitutional supremacy[61] over all the laws of the land which bound the legislative, executive and judicial organs of government at all levels[62] as well as promoted the rule of law.[63] Putting into consideration the painful past experience which the constitution sought to correct, it was eminent that the policies that will apply in the new era, create a forum which will uplift a system of government legitimized by the principles of universal adult suffrage that will be conducive for the implementation of a credible structure acceptable to the collective people of South Africa.[64]

The constitutions of both countries provided for a system of government made up of three organs; the legislature, executive, and the judiciary with checks and balances to ensure that each organ stays within its limit clearly defined by the law. In determining the limits of each organ of government, though no

[59] Came into force on 27th April, 1994.
[60] Came into force on 4th February, 1997.
[61] Section 2 1996 Constitution South Africa.
[62] Section 4(1 &2) 1993 Interim Constitution South Africa.
[63] Section 1(c) 1996 Constitution South Africa.
[64] Qwelane J "Transformation of the Personnel of the Judiciary" in Norton M (ed) *Reshaping the Structures of Justice for a Democratic South Africa* (1994) 1-12.

international model exists,[65] the constitutions of respective countries try to create boundaries for each organ. For South Africa, Ackermann J in reviewing the case of *Buzani Dodo v The State*[66] however explained that the Constitutional Court's holding on the constitution's provision on separation of power is not wholly strict.[67] For Nigeria, while admitting that the Constitution appears to provide a clear demarcation between the function of the different organs of government, there are instances where each organ exercises certain functions that may be akin to the functions of other arms of government.[68] Nonetheless, looking holistically at the overview of the functions of the judiciary,[69] its independence and insulation from all forms of political and other influences is necessary.

Dr. Christopher Forsyth[70] in addressing the puzzle in the South African judiciary's reaction to the legal regime of Apartheid explained that if judicial independence is defined as the judiciary recognizing no authority other than the law, then the independence of the South African judiciary may not be in doubt in their role in enforcing the provisions of the Apartheid laws. In addition to this is the argument that the judiciary then only had the power to merely mechanically apply the law without the liberty of interpreting it[71] and was often impeded by ouster clauses.[72] He however went on to fault the premise presented above by referring to instances when the judiciary had the discretion to exercise certain choices within the bounds of the law in achieving the justice in a case but did

[65] Enver Surty "The Separation of Powers and Judicial Independence" a paper delivered at the 1st prestige lecture for 2009 of the faculty of law, university of Pretoria, on Tuesday, 17th March 2009 in Pretoria 2.
[66] CC1/2001 396.
[67] Enver Surty 2.
[68] Examples are s 32 where the President is empowered to make regulations on citizenship which must be put before the legislature; ss 147(2) & 135 (2) which provides that the Senate must confirm appointment of Ministers which are an integral part of the executive; s 88 which confers quasi-judicial functions on the legislature; and the act of judicial law making through judgments.
[69] This function is interdependent on other functions like social control and judicial law making. See Shapiro M *Courts: A Comparative and Political Analysis* (1981) vii and 17.
[70] Forsyth C "The South African Judiciary in Time of Crisis" in *The Role of Courts in Society* (ed. Shimon Shetreet) (1988) 57-59.
[71] *Ibid.*
[72] *Ibid* 59.

otherwise by making a pro-executive choice.[73] This looming betrayal of the judiciary was slightly diffused by a few commendable acts where it in a few instances clearly refrained from condemning persons brought before it by the State as violators of the State Security Laws due to the manifold injustice of the security laws[74] and rather chose to exercised discretion towards the promotion of justice despite the provision of the law. Apart from these few instances, the general conclusion is that the South African judiciary during the Apartheid regime did indeed fail in its role towards positive contribution to the South African legal system, and to protect the society as a whole and the innumerable persons who were victims of the unjust laws that applied during the Apartheid regime.[75] Regardless that constitutionally the judges were not in a position to do much which was a reflection of the lack of the independence of the judiciary then, however, where they could exercise discretion to protect victims of discriminatory laws within the bounds of the law, they failed to do so.

In Nigeria, prior to the commencement of the 1999 constitution, the position of the judges were precarious due to the fact that both the legislature and the executive welded such powers that could be utilized to the detriment of the judiciary in terms of revenue allocation, appointments, removal of judicial officers and very poor remuneration. This may have partly created a fostering ground for the conflicting judgments given by various courts of coordinate jurisdiction on the subject of the annulment of the June 12th 1993 elections which gave rise to the proposal that Nigeria should adopt a constitutional court distinct from its established regular courts in order to avoid such occurrence in future.[76] The provisions of the 1999 constitution created a virile environment for judicial

[73] *Ibid* 61. See the case of *Rossouw v Sachs* 1964 (2) SA 551 (A) at 561.
[74] Mathews A S "Law Order and Liberty in South Africa" (1971) in *Ibid*.
[75] *Ibid* 63.
[76] This proposal was part of the memoranda submitted to the Constitution Conference inaugurated on 27 June, 1994 which produced the 1995 Draft Constitution of Nigeria. The provision establishing a constitutional court for Nigeria was excluded from the 1999 Constitution..

independence which is reflected in the outcomes of cases with political flavours like the cases of *Peter Obi v INEC and Ors*[77] and *A. G. Federation v Atiku Abubakar*[78] and a host of other cases. Despite these, there were still a few instances where the judiciary showed elements of external influence like the law suits that arose in 2003 from the erstwhile abducted Governor of Anambra State.

2.1.2 Compliance with Requirements of Judicial Independence by the Nigerian and South African Constitutions and Statutes[79]

In the post Apartheid era, giant strides were taken to build a judiciary that will redeem its image, gain the confidence of the populace and carry out its function of interpreting the constitution and the law without fear or favour. To a considerable extent, this was achieved. This achievement was made possible by major overhauls of the judiciary which included the alteration of the court structures, appointments of judges to reflect a representation of the diverse peoples and minorities in South Africa, extension of the powers of the judiciary, and compliance with the requirements of judicial independence as stated in international, regional and sub-regional documents to which South Africa is a party. The situation in Nigeria was not so innovative. There was hardly any structural reorganization of its court structures. However, the contents of the new constitution and other relevant statutes created a conducive environment that enabled the judiciary discharge its function, independent of external influence and pressures to do otherwise.

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[77] (2007) All F.W.L.R. (Part 378) p. 1116. Where the Supreme Court upheld the mandate of Peter Obi who was sworn in as governor of Anambra State about three years after he should have been sworn in due to a stolen mandate. He was allowed to serve his four year term.

[78] (2007) All F.W.L.R. (Part 375) p. 405. The Supreme Court held amongst other things as unconstitutional the removal from office of the vice president from office by the president on the ground that the senate and not the president was the appropriate authority to do so.

[79] Some of the format under this sub heading is adopted from *The Judicial Institution in Southern Africa* (ed Vijver L V) (2006) 114-157 which has provided a good resource for this subject especially with regard to the South African situation.

In order to ascertain the level of constitutional and statutory compliance of judicial independence in Nigeria and South Africa, it is necessary to first state the criteria and a form of frame work upon which it can be determined. It becomes necessary then that the various guidelines on judicial independence, the codes of conduct for judicial officers and the relation of judicial independence to judicial accountability be considered.[80]

Framework for Judicial Independence

The principles of judicial independence have been adopted and affirmed in a good number of international, regional and sub-regional documents which bind these two countries. These instruments include the Universal Declaration of Human Rights in 1948, which contains the recognition of the basic rights of every person[81] the provision of Article 10 which unequivocally states that- *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".*

The African Charter of Human and People's Rights adopted in 1981, states in its preamble that in reaffirming the-

> *adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations…. State that parties to the present Charter shall have the duty to guarantee the* ***independence of the Courts*** *and shall allow the establishment and improvement of appropriate national institutions entrusted*

[80] Vijver L V (ed) 1.

[81] *"Article 6 Everyone has the right to recognition everywhere as a person before the law.*
Article 7 All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
Article 8Everyone 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.
Article 9 No one shall be subjected to arbitrary arrest, detention or exile."

> *with the promotion and protection of the rights and freedoms guaranteed by the present Charter.*[82]

In the International Bar Association Minimum Standard of Judicial independence 1982, highlights on the independence of the judiciary were centred on judicial independence from the executive and legislature and covers the subjects pertaining to the terms and nature of judicial appointments, the connect between the judiciary and the courts, and the standards of judicial conduct.

The United Nations Basic Principles of the Independence of the Judiciary adopted in 1985[83], amongst other considerations called on the Committee on Crime Prevention and Control to add to its priorities "*the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors*"[84] To buttress the importance and relevance of these efforts to institute a frame work for the implementation of judicial independence in judiciaries across the globe, the United Nations Procedures for the Effective Implementation of the Basic Principles for the Independence of the Judiciary adopted in 1989,[85] were upheld by other instruments like the "Latimer House Guidelines for the Commonwealth on the three branches of government adopted in 1998 and endorsed by the heads of government in 2003,[86] Universal Principles

[82]Article 26 of the African Charter. See also Vijver L V(ed)1.
[83]Adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by General Assembly resolutions in 1985
[84] Ibid see preamble
[85] Based on the recommendations of the congresses the UN adopted other important instruments.
[86]Where it was acknowledged that *"judicial independence and delivery of efficient justice services were important for maintaining the balance of power between the Executive, Legislature and Judiciary".* The object of this document was stated to be that subject to the laws and customs of each country that is a member of the commonwealth, to provide an effective framework that will be implemented by the respective government, parliament and judiciary reflecting the fundamental values of the Commonwealth.

of Judicial Independence for SADC Region 2003[87], and a host of other documents.[88]

To adequately determine to what extent the Nigerian and South African judiciary conform to the standards set by these international instruments, it is necessary that the guidelines cumulatively prescribed by these documents be taken one after the other-

a. Assurance of Judicial Independence by the Constitution[89]

Naturally, where the doctrine of separation of power is adopted, judicial independence must be guaranteed.[90] Respectively, the constitution and applicable laws in all countries should guarantee the place of the judiciary and ensure that the independence of their respective judiciaries is protected.[91]

The 1996 Constitution of South Africa secures the place and power of the judiciary by providing that the judicial power shall be vested in the courts[92] and shall bind all persons and organs it applies to.[93] This Constitution categorically provides that these courts are independent and are subject only to the constitution and the law which they must apply

[87] Which states that a democratic society must be founded on the principle of the rule of law, and that the independence of the judiciary must be respected and it must be provided with 'adequate resources to enable it to perform its constitutional duties as the final arbiter of the constitution".
[88]Same pp. 2 and 32. There are a host of documents consulted towards the drafting of the Bangalore Principles of Judicial Conduct 2002. Reference was made to a good number of existing codes and international instruments and a host of others instruments as listed in the code.
See item 2 of the explanatory note of The Bangalore Principles of Judicial Conduct 2002
[89] Vijver L V (ed) 4.
[90] *Ibid* 118.
[91] U.N. Basic Principles on the Independence of theJjudiciary adopted by the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by the General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 article 1.
[92] Section 165 (1) 1996 South African Constitution.
[93]*Ibid* s 165(5).

impartially and without prejudice, fear and favour.[94] Though the Constitution does not specifically define the phrase "judicial independence," its provisions do not leave anybody in doubt as to what it connotes.[95] Specifically, the Constitution provides conditions that project a judiciary free from all forms of interference whether internal or external in the cause of adjudication and creates responsibility on the state to uphold its dignity.[96]

Further to this is the elaboration by the Chief Justice of South Africa[97] on what constitutes judicial independence in his speech during the orientation of the newly appointed judges in 1997. According to him, in the absence of a constitutional definition of the phrase "judicial independence", it should be understood to connote the exercise of judicial function without real or perceived interference from any quarters but subject to the test of institutional and infrastructural sources, which pertains to all conditions related to the appointment and conditions of service of these judges; observance of the methods and practices that apply to how judicial functions are discharged; and professional and ethical compliance.[98]

For Nigeria, its current Constitution also does not mention the term "judicial independence" but through its provisions, it secures the place of the judiciary by clearly stating that "*The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established*

[94] *Ibid* s 165 (2).
[95] See s 165 (1-5).
[96] Ibid s 165 (3 and4).
[97] "The Role of the Judiciary in a Constitutional State" an address by I Mohamed at the orientation course for new judges 115 SALJ 111 at 112-113 as contained in Vijver L V (ed) 119
[98] Ibid, p. 119.

for the Federation."[99] These courts were specifically listed within the Constitution so as to avoid a misinterpretation or stretching of what the term "courts" connotes.[100] It therefore made a clear demarcation between the institutions that perform judicial functions and the institutions straddled with the functions of other organs of government to protect the judicial functions from external interference.[101] Though the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria,[102] clearly states judicial independence as an indispensable factor in attaining an "*impartial administration of Justice in a democratic State*," it also does not elaborate on what attributes constitute judicial independence. However, Honourable Justice P. Nnaemeka-Agu[103] described judicial independence as the judiciary taking "*charge of its own affairs…without any extraneous influence, manipulation, dictation or control*".[104]

b. Criteria for Judicial Appointment

There must be clearly defined criteria for the appointment of judges. This must be on merit with credence given to competence[105] by way of training, experience, conduct and professional ability.[106]

The South African Constitution provides for two categories of judicial appointments.[107] First, for other courts other than the Constitutional

[99] Section 6 1999 Nigerian Constitution.
[100] Section 6 (3) (4) (5) (i-k).
[101] Karibi-White, A. G. *Selected Essays Of Honourable Justice A. G. Karibi-White on Jurisprudence* 2003 Centre for Publications, (2003) 464-469.
[102] 2002
[103] Retired from the Supreme Court of Nigeria.
[104] Nnaemeka-Agu, p. 'Independence of The Judiciary with Particular Reference to Appointment, Removal and Discipline' In *Law Development and Administration in Nigeria (*ed. Ajibola B Osinbajo Y & Kalu A U) (1999) 512-513.
[105] See universal declaration of human rights. 1948, article 8 and Commonwealth (Latimer House) Principles on the Three Branches of Government November, 2003. Article iv. The Bangalore Principles of Judicial Conduct 2002 article 6.
[106] Latimer House Ibid, iv(a). Ibid Blantyre Rule of Law article 16 (f).

Court, it simple provides that any man or woman, "*appropriately qualified*" and is "*fit and proper*" may be appointed as a judicial officer. The second category is for appointment into the Constitutional Court as judge. Here it states that "*any person to be appointed into the South African Constitutional Court must also be a South African citizen*"

Under the first category, the appointment into the judicial office is open to any body- male or female- without any gender bias. However, the Constitution fails to define what it means as "*appropriately qualified*" and "*fit and proper*". This then requires resorting to other related materials for what these phrases exactly mean.

Under the second category, no qualification is stated except that anybody to be so appointed must be a South African citizen. The use of the word 'also' presupposes that the requirement of South African citizenship is in addition to the earlier requirements mentioned in respect of the first category of judicial officers.

According to the Democratic Governance and Rights Unit, University of Cape Town,[108] the term "appropriately qualified" in referring to superior courts appointments "… *means the right to practice as an advocate of the high court….practicing attorneys of sufficient experience who have an LL.B or Bluris Bproc degree, and hence the right of appearance in superior courts, and also similarly qualified academic lawyers.*"[109] The unit did not state the source of its information.

[107] South African Constitution s 174 (1).
[108] Vijver V D (ed) 122.
[109] *Ibid*.

Additionally, the Constitution provides that consideration must be given to a person's race and gender for judicial appointment to reflect a fair representation of the different gender and racial groups that comprise South Africa's population.[110] The JSC appears to give considerable credence to these criteria[111] for judicial appointment. Constitutionally, this is quite in place for the reason that in addition to professional qualification, an attempt is being made to reflect a balance in the racial and gender components of the South African population in the transformatory government from Apartheid to democracy.[112]

The JSC has been criticized for bringing in other criteria outside what the constitution stated by giving weight to how the candidates contributed in the struggle for democracy and experience gained as acting judges.[113] But it can be argued that the term "appropriately qualified" since it was not specifically defined by the Constitution, may be stretched to include these requirements seeing as they reflect a person's stance towards the promotion of the new democratic era.

In Nigeria, the Constitution unequivocally provides the criteria for judicial appointment. This is tied to the qualification and experience of the candidate thereby presupposing the training obtained to attain the qualification.[114] Professional competence is not clearly stated as a criterion. The Constitution is also silent on the candidate's nationality, geographical spread and gender considerations. The power of the Federal Character Commission, a body established by the Constitution to ensure an even

[110] *Ibid*.
[111] *Ibid*.
[112] Mcquoid-Mason D "Transformation of the Personnel of the Judiciary" *Reshaping the Structures of Justice for a Democratic South Africa* (by National Association of Democratic Lawyers 101-110.
[113] *Ibid*.
[114] Sections 230 (3), 238 (3), 250 (3), 261 (3), 266 (3), 271 (3), 276 (3) and 281 (3), Constitution of Nigeria.

distribution of appointments in public institutions in Nigeria does not extend to judicial appointments.[115] Though the Constitution does not list good conduct as a requirement for judicial appointment, the Code of Conduct for Public Officers[116] and the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria (CCJON) provide a standard of conduct to be maintained by persons already appointed.

The Revised National Judicial Council Guidelines and Procedural Rules[117] (RNJCGPR) provide additional criteria for considerations for judicial appointment. These criteria include professional competence evidenced by a sound knowledge of the law and successful practice at the bar; integrity, good character,[118] geographical spread where applicable, and seniority at the bar.[119] The RNJCGP provides an age criterion which is pegged at 50 or thereabout.[120] The RNJCGPR also mentioned disqualifications like known impecuniosity and bad conduct. The Constitution disqualifies any person who has been a member of the NJC, or any member of the Judicial Service Commissions and Committee for Appointment as a Judicial Officer into any of the courts of superior jurisdiction during the pendency of such membership and for three years thereafter.[121] All justices and judges of superior courts of record in Nigeria must be qualified legal practitioners in Nigeria with the exception of some judges in the Customary Court of Appeal and Sharia Court of Appeal where '*considerable knowledge and experience in the practice*' of either customary law or islamic law are required, and the National Industrial

[115] Section 153 (c) and Item 'c', Part 1 of the Third Schedule of the 1999 Constitution of Nigeria.
[116] Part 1 fifth schedule to the 1999 Constitution of Nigeria.
[117] 2003 which came into force on 1st January, 2004.
[118] Rule 4 (3) of the Revised NJC Guidelines and Procedural Rules for Judicial Officers in Nigeria.
[119] Rule 3 (4) *Ibid*.
[120] Rule 2 (3) (a). *Ibid.*
[121] Section 398 Constitution of Nigeria.

Courts where persons with knowledge and experience in labour related matters are considered.

c. Procedure for Appointment

The procedure for the appointment of judges must be transparent and within public knowledge. This process must reflect equality of opportunity for all those eligible for appointment. The appointment must be on merit and consideration must be given to gender equality and the elimination of historic factors of discrimination.[122] "*Participation 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*."[123]

The South African Constitution provides that the President of the Republic of South Africa as the head of the national executive appoints the judicial officers under two main categories encompassing the judges of the Constitutional Court and the judges of the regular courts.[124] For the Constitutional Court, the President makes three categories of appointments. First is the appointment of the President and Deputy President of the Constitutional Court.[125] This is done by the President after consultation with the Judicial Service Commission and the leaders of the parties in the National Assembly. Secondly, the President appoints the other judges of the Constitutional Court. To do this, he must first consult

[122] Latimer House iv(a). Blantyre Rule of Law
[123] IBA Minimum Standards of Judicial Independence (Adopted 1982) article 3 and 22.
[124] Section 174 (3 -8) and section 175 (1-2) South African Constitution.
[125] [Sub-section. *(3-4)* of section 174 Substituted by *S.* 13 of Act 34 of 2001. where the designation of Chief Judge and Duty Chief Judge of the Constitutional Court was changed to president and deputy president; while the term president and deputy president used for the Supreme Court of Appeal was changed to chief judge and deputy chief judge.

with the President of the Constitutional Court and the parties' leaders in the National Assembly.[126] The JSC must prior to that prepare and submit to the President, a list of persons they have nominated with three names in excess of the number of appointments to be made.[127] The President then exercises discretion to make or not to make appointments from the list submitted to him.[128] He must however, inform the JSC, with reasons, if any if the persons nominated are not satisfactory to him and, if any appointment remains to be made.[129] The President becomes bound to make appointments from the supplementary list submitted by the JSC which must contain further nominees.[130] At all times, at least, four of the judges of the Constitutional Court must be judges before their appointments to the Constitutional Court.

Thirdly, in the occurrence of a vacancy or absence of a judge, the President may appoint a woman or a man to be an acting judge of the Constitutional Court. The President can only do this on the recommendation of the cabinet member responsible for the administration of justice who must do this with the concurrence of the Chief Justice.[131]

For the judges of the regular courts, the President after consulting with the JSC shall appoint the Chief Justice and Deputy Chief Justice of the Supreme Court of Appeal.[132] The judges of all other courts are likewise appointed by the President on the recommendation of the JSC.[133] Acting

[126] Section 174 (3)-(5).
[127] *Ibid.* Vijver L V (ed) 122-123.
[128] *Ibid* Section 174(3)-(5).
[129] *Ibid.*
[130] *Ibid.* See also Vijver V D (ed) (2006) 123.
[131] *Ibid* s175 (1).
[132] *Ibid* s 174 (3).
[133] *Ibid* s 174 (6) .

judges of other courts are appointed by the cabinet member responsible for the administration of justice.

Every judicial officer must take an oath or affirm in accordance with schedule 2 before he or she commences the responsibility of a judge.[134] Although the President exercises discretion in the appointments of the Chief Justice and Deputy Chief Justice of The Supreme Court of Appeal and, The President and Deputy President of the Constitutional Court, the JSC plays a vital role in the appointment process as the President can only appoint from the list of names recommended to him by the JSC.[135] Despite the establishment of the JSC, the appointment of acting judges has remained in the domain of the executive which does not appear to enhance judicial independence.[136]

In Nigeria, the Constitution provides for the appointment of judicial officers. federal judicial officers are appointed by the President on the recommendation of the National Judicial Council (NJC) and for the office of the Chief Justice of Nigeria, the Supreme Court justices, and the heads of all federal courts of superior jurisdiction, such appointments must be confirmed by the Senate.[137] The judicial officers of state courts are appointed by the governor of each state based on the recommendation of the NJC and for the Chief Judge of each State and the Heads of State Customary Court of Appeal and the Sharia Court of Appeal, the appointment is subject to confirmation by the House of Assembly of each State.[138]

[134] *Ibid* s 174 (8).
[135] Van De Vijver (ed) 123 and 124.
[136] *Ibid*. 122.
[137] Sections 230 (1) (2), 238 (1) (2), 250 (1) (2), 261 (1) (2), 266 (1) (2), Constitution of Nigeria
[138] *Ibid, ss* 271)1)b (2), 276 (1) (2) and 281 (1) (2),

The procedure for judicial appointment in Nigeria is undertaken by a number of bodies that play significant roles. These bodies include the President, the Federal Judicial Service Commission (FJSC), State Judicial Service Commission (SJSC), the Federal Capital Territory Judicial Service Committee (FCTJSC), heads of courts, governors, judicial officers of superior courts, the State Security Service (SSS), the Nigerian Bar Association (NBA), the National Assembly and the Houses Of Assembly of each state, and majorly, the NJC. The SJSC of each state of the federation plays a vital role in the appointments of judicial officers in their respective states. The FJSC is responsible for judicial appointment of federal judges of superior courts while the FCTJSC is charged with the responsibility of appointing judicial officers for courts of the FCT. The role of the President and the governors is to make appointments on recommendation of the NJC to be confirmed by the Senate or the respective Houses of Assembly.

For state judiciaries the procedure for appointment of judicial officers (which is similar to the procedure adopted for federal judges), commences with a notification to the governor of the need for judicial appointments to be made. The governor consequently gives approval to the JSC to commence the process of judicial appointments. Usually the JSC will forward a copy of its notification and approval to the NJC. After the governor's approval is obtained, the head of the court concerned calls for the nomination of any suitable person from all the judges of superior courts within the jurisdiction and also from other heads of courts outside the jurisdiction who must only recommend persons who have appeared before them in court and can testify to their meeting the criteria for such appointments. The list of the shortlisted candidates is given to all judicial

officers, the local branches of the NBA, the SSS for reference on their suitability. The shortlisted candidates are considered by the JSC together with reports received on their suitability in addition to other requisite documents, and then forwarded to the NJC for recommendation.[139] Usually, the JSC must shortlist at least twice the number of judicial officers needed.[140] The NJC makes recommendations for appointment from this list.

d. Security of Term

In order to remove all forms of susceptibility from the serving judge towards extraneous internal and external control, an appropriate security of tenure must be in place.[141]

The South African Constitution provides that a judge of the Constitutional Court shall hold office for a non-renewable term of 12 years, or until the attainment of the age of 70, whichever first occurs.[142] This however is subject to an extension by an act of parliament which has been done in the Judges Remuneration and Conditions of Employment Act 2001[143] which further extents the provision of the constitution by providing that where the 12 year term of office of a constitutional court judge expires before completing 15 years in active service, the judge must continue in service until the attainment of 15 years in active service.[144] Again, where a judge of the Constitutional Court attains the age of 70 before attaining 15 years in active service, he must similarly continue until the attainment of 15

[139] *Ibid* rule 4 (1) (2).
[140] *Ibid* rule 3 (2) Blantyre Rule of Law.
[141] Latimer House article iv (b) article 16 (g). Ibid IBA Minimum Standards of Judicial Independence article 23. See also Vijver L V (ed) 5 & 130-131.
[142] Section 176 (1) of theSouth African Constitution.
[143] Section 3 (1a) Judges Remuneration and Conditions of Employment Act (47) 2001.
[144] *Ibid* s 4(a). See Vijver L V (ed) 130.

years in active service or the attainment of the age of 75 whichever occurs first.[145] Likewise, for a judge who holds office in a permanent capacity, the age of retirement is 70 years or the attainment of 10 years active service whichever occurs first. Where the judge attains 70 years but has not been in active service for up to 10 years, the time of retirement will be extended until after 10 years active service is attained. A judge who attains the age of 65 years and has served for not less 15 years may choose to be discharged.

The Act provides for the conditions under which the President may discharge a judge of the Constitutional Court and of other courts from active service which are on the basis of ill health and on request with the approval of the President.[146]

The Nigerian Constitution guarantees security of tenure for judicial officers.[147] All justices of the Supreme Court and Court of Appeal may retire on attaining the age of 65, or compulsorily at 70.[148] For other judicial officers of superior courts, they may retire at the attainment of the age of 60 or compulsorily at 65.[149]

e. Provision of Adequate Resources to Run the Judiciary

Bearing in mind the sensitive nature and importance of the function of the judiciary, in order to promote efficiency and enhance good output and enhance the confidence of the people in the judiciary, it must be given adequate resources to run its affairs. Any deficiency in this respect may

[145] *Ibid* s 4(b) . See Van De Vijver (ed) 131.
[146] *Ibid* s 3(1b-c). See Van De Vijver (ed) 132.
[147] Section 292(1)Nigerian Constitution.
[148] *Ibid* s 291 (1).
[149] *Ibid* s 291 (2).

expose the judiciary to extraneous influence.[150] It is the responsibility of the state to provide adequate resources to enable this third arm of government perform its constitutional duties of adjudication.[151] In order to achieve independence of the judiciary from executive influence, it is preferable that the judiciary be responsible for its general administrative running.[152]

Strangely, the South African Constitution which seeks to promote and uphold judicial independence is silent on the provision of resources for the administrative running of the judiciary and it has no provision regarding placing the central administration of the judiciary as a responsibility of the judiciary. The state is nonetheless responsible for the remuneration paid to the researchers employed for a period of eighteen months and assigned to aid the work of the judges of the constitutional courts who were each assigned a researcher to work with.[153] The arrangements made for the high courts in this respect are however minimal.[154]

Prior to the coming into force of the 1999 Constitution in Nigeria, there were several proposals made for the judiciary to be allowed to control its own finances and budget[155] in order to be truly independent. This was

[150] Latimer House article iv(c) Universal Principles of Judicial Independence for SADC Region 2003, the Blantyre Rule of Law article 8 and 16(e) Ibid U.N. Basic Principles on the Independence of the Judiciary article 7. Ibid IBA Minimum Standards for Judicial Independence. Article 9 & 10.
[151] Universal principles of judicial independence for SADC region 2003THE BLANTYRE RULE OF LAW article 8
[152] Ibid IBA Minimum Standards for Judicial Independence. Article 9.
[153] Vijver L V (ed) 144 .
[154] Ibid 145.
[155] The following are a few examples. Oputa, C. A. "independence of the judiciary with particular reference to appointment, removal and discipline" Oloko, T. "independence of the judiciary with particular reference to appointment, removal and discipline" Yakubu, M. G. 'independence of the judiciary with particular reference to appointment, removal and discipline' in *Law, Development and Administration in Nigeria* (ed Ajibola B & Osinbajo Y & Kalu A U (1990) 500, 543,551, 558 & 559.

because previous constitutions did not provide for this. However the 1999 Constitution has achieve a favourable situation for the judiciary by first, removing the control of the finances and budget of the judiciary from the two organs of government to be paid directly from the Consolidated Revenue Fund of the Federation to the NJC who will disburse the funds to the various heads of court.[156] This removes from the executive the power to make budgetary estimates for revenue and expenditure for the judiciary, and from the legislature the power to approve such estimates for the release of funds from the Consolidated Revenue Fund of the Federation.[157] The judiciary through the NJC is directly responsible for the administration of its finances.

f. Adequate Wage

Judges must be adequately remunerated to effectively perform their functions and be protected from vulnerability and corruption. Hence the government should ensure that resources and career incentives which include salaries and other benefits are adequately provided.[158] These international instruments that promote judicial independence prescribe that in order for states to guarantee the independence of the judiciary, the constitution and their laws must secure the provision of adequate remuneration for judicial officers.[159]

The South African Constitution lightly provides for adequate remuneration for judicial officers. It simply states that "*the salaries,*

[156] Sections 81 (3) & 84 (7)Nigerian Constitution.
[157] *Ibid* ss 80 (1)-(4) and 81 (1) (2).Though s 162 (9) provides for release of monies meant for the judiciary directly from the federation account in contradiction to s 81 (3), the provision of s 162 (9) disregarded as an error. The practice is in line with the former.
[158] Blantyre Rule of Law article 8 and 16(e). *Ibid* U.N. Basic Principles on the Independence of the Judiciary article 7. See also Vijver L V (ed) 6.
[159]Article 13 & 14 IBA Minimum Standards of Judicial Independence.

allowances and benefits of judges may not be reduced".'[160] The Judges Remuneration and Conditions of Employment Act[161] contains more details on the remuneration of judges. The Act empowers the President[162] subject to the confirmation of the Parliament,[163] to determine the salaries of the judges thereby involving the other two organs of government who may impede judicial independence. However, the total remuneration package for judicial officers in South Africa is indeed quite generous[164] with

> *A non-cash component of 27.76% (which includes motor vehicle allowance and employer medical aid contribution). The total remuneration structure does not include pension benefits that are separately regulated by the Judges' Remuneration and Conditions of Employment Act, 2001'*[165]

The salary of a judge runs throughout the life time of the judge even after retirement. In addition to this is the gratuity paid after retirement and a percentage of the salary paid to the spouse of the deceased judge.[166] The only instance when a judge's salary may be reduced occurs when the judge refuses to perform further services when called upon to do so after retirement, if he (she) retired before the attainment of the age of 75 years.[167] After retirement, judges may be called upon to render services for a period not exceeding three months in a year until they attain the age of 75. They may decide to render their services for a period beyond three

[160] 1996 Constitution. s 176 (3). Vijver L V (ed) 132.
[161] 47, 2001. As amended by Total Remuneration Structure of Constitutional Court Judges and Judges Act 55, 2008.
[162] After taking into consideration the recommendations of the Independent Commission for the Remuneration of Public Office Bearer. See *ibid* s 2.
[163] *Ibid* s 2 (3).
[164] See Total Remuneration Structure of Constitutional Court Judges and Judges Act, 2008 *supra*.
[165] *ibid* s 22 and 3.
[166] *Ibid* s 9 2001. Van De Vijver (ed).
[167] Section 7 (1) of the Judges Remuneration and Conditions of Employment Act 47, 2001.

months in a year, and also volunteer to continue such voluntary service even after they attain the age of 75 years.[168]

In Nigeria, the amount of "*remuneration, salaries and allowances*" of judicial officers mentioned in the Constitution is prescribed and determined by the National Assembly and the Revenue Mobilization Allocation and Fiscal Commission.[169] Once fixed, the Constitution prohibits any alteration of the remuneration and salaries to the disadvantage of the judicial officers after their appointment.[170] Any judicial officer who served for at least fifteen years before retirement is "… *entitled to pension for life at a rate equivalent to his last annual salary and all his allowances in addition to any other retirement benefits to which he may be entitled"* if he retired at or after the attainment of the age of sixty-five in respect to the justice of the Supreme Court, the Court of Appeal, the Chief Justice of the Federation, or the President of the Court of Appeal, and the age of sixty or thereafter for the other judges. For any judicial officer who served for less than 15 years before retiring at the agesstated above, such shall be entitled to the benefits explained above *pro rata* the number of years put into service.[171]

g. Clear Cut Relations between the Judiciary and the Executive

The independence of the judiciary should not be curtailed by relations between the judiciary and the executive. This is a vital requirement for the doctrine of separation of powers. Any interactions between these two arms of government should not compromise the independence of the

[168] Section 7 (1). See also Vijver L V (ed) 133 and 134.
[169] Section 84 (1) Nigerian Constitution.
[170] *Ibid* s84 (3)
[171] *Ibid* s 291 (3) (b).

judiciary.[172] Judicial decisions shall not be subject to revision except by appeal to a superior court with jurisdiction to do so.[173] The provision of section 165 of the South African Constitution supports this. The provisions of the Nigerian Constitution with respect to notching a clear cut position for the judiciary away from the influence of the executive is inferred by the clear demarcation of the responsibilities of each arm of the government.[174] This is also buttressed by the absence of any power for the executive to overturn judgments of courts which are subject to appeal only within the judiciary but for the prerogative of mercy exercisable by the executive. The Constitution however does not out rightly prohibit relations with the executive that may curtail the independence of the judiciary.

h. Removal of Judges

Further to the assurance of security of tenure for the judge is the assurance that the process of being removed from office as a judge can only be on grounds of legitimate reasons like incompetence and (or) misconduct which renders a person unfit to continue as a judge.[175] Neither the executive nor the legislature can arbitrarily remove judges. This power must be vested in a judicial tribunal.[176]

[172] Latimer House article iv(d) the Blantyre Rule of Law article12. "If the relations between the executive and the judiciary breaks down, it is likely that the administration of justice in accordance with the rule of law will be impeded. The cause of justice itself is threatened if the executive or legislative branches seek to erode the essential independence of the judiciary, for example, by impugning the legitimacy of decisions that the judiciary have made within the proper sphere of the courts. Such erosion threatens the underlying principle that government ought to be conducted according to law." IBA Minimum Standards of Judicial Independence (adopted 1982) article 1.
[173] Ibid Blantyre Rule of Law article 16 (a). article 4 UN Basic Principles on the Independence of the Judiciary. The Bangalore Principles of Judicial Conduct article 1.1 -1.6.
[174] Sections 4, 5 & 6 of the Nigerian Constitution.
[175] Latimer House.
[176] Ibid IBA Minimum Standards of Judicial Independence article 4 (a-e).

In South Africa, The JSC carries a form of investigation where there is a complaint against a judge on grounds of gross incompetence, gross misconduct and incapacity.[177] A judge may be removed on these grounds by the President, supported by a two thirds majority resolution of the National Assembly.[178] The President has therefore been disenabled from having the power, on his own motion to arbitrarily remove a judge from his (her) office. This consequently creates a handicap on the executive to exercising an untoward influence on the judiciary.

The Nigerian Constitution provides the criteria for the removal of a judicial officer from office as the inability to discharge the responsibilities of the office which is occasioned by either "*infirmity of the mind or of the body*' or '*for misconduct or the contravention of the Code of Conduct*".[179] The code of conduct referred to does not specifically refer to judicial officers. It generally applies to public officers. For all heads of federal courts of superior jurisdiction, the President, on his own, without any recommendation from the NJC is empowered to remove such judicial officers "acting on an address supported by two-thirds majority of the Senate."[180] For heads of State courts of superior jurisdiction, it is the Governor also without recommendation of the NJC but "acting on an address supported by two-thirds majority of the House of Assembly of the State."[181] For other categories of judicial officers, the President or Governor as the case may be, can remove them on the recommendation of the NJC[182]

[177] Vijver V D (ed) UCT 136 & 137.
[178] Section 177 (1 and 2) of the South African Constitution.
[179] Section 292 (1) (a).
[180] *Ibid*.
[181] *Ibid*.
[182] Section 292 (1) (b).

i. Publication of Court Decisions to the Public

Court proceedings must be accessible to members of the public in good time and decisions of the superior courts must also be published. Credence must however be given to applicable laws which may restrict and regulate such publications for overriding public interest.[183]

The 1996 South African Constitution is silent on this. Prof. H. J. Erasmus in his paper titled "Application of advanced technologies in civil litigation and other procedures"[184] explained that though, presently, court proceedings are recorded on tape, transcripts of the record are not immediately available and rather expensive even though these records of proceedings are stored on the original tape until requested for.

Except in special cases involving juveniles and for public interest, trials in Nigeria are done in public. Records of proceedings in Nigeria can be obtained on application and payment of requisite fees. However, certain administrative logistics may hinder these records being made available in good time.

j. Guidelines for Ethical Conduct for Judicial Officers

The guidelines for ethical conduct for judicial officers must be developed and adopted and be periodically reviewed. This will enhance accountability and transparency in the judiciary and will boost public

[183] Latimer House.
[184] H. J. Erasmus "The Challenge of the Information Society: Application of Advanced Technologies in Civil Litigation and Other Proceedings" http://ruessmann.jura.uni-sb.de/grotius/english/reports/southafrica.htm (accessed on 3rd of February, 2011) .

confidence in the judiciary.[185] The contents of these guidelines cover a wide range.[186]

The South African Constitution does not provide for a code of conduct for judicial officers. However, a code of judicial ethics comprising guidelines on ethical and professional standard of behaviour to entrench independence and dignity of the judiciary and a form of accountability (for both intra and extra judicial activities during the period of service, and after retirement) was issued in 2000 by the respective heads of the Supreme Court of Appeal, Constitutional Court, various High Courts and the Labour Court of Appeal.[187] In 2008, the Judicial Service Commission Act 2008 was enacted. It set up a judicial conduct committee under the JSC, and made provision for the adoption of a code of conduct for judicial officers and the creation of a register of judges' financial interest.[188] Thus, a draft code of conduct was compiled by Chief Justice Sandili Ngcobo.[189]

The Nigerian Constitution is silent on a code of conduct made specifically for judicial officers. Prior to the coming into force of the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria in 2002, the judicial officers applied the Code of Conduct for Public Officers contained in the Fifth Schedule to the Constitution and a form of unwritten code to guide them.[190] At the moment, the current code of conduct for judicial officers is the primary document that regulates the general comportment and conducts of judicial officers in respect to the discharge of their

[185] Latimer House article v The Bangalore Principles of Judicial Conduct articles 3, 4 &5.
[186] The Bangalore Principles of Judicial Conduct article 6 IBA Minimum Standards of Judicial Independence article 35-46.
[187] Vijver V D (ed) 138.
[188] News 24 Judges Get New Code of Conduct. http://www.news24.com/SouthAfrica/News/Judges-get-new-code-of-conduct (accessed on 19th January, 2011).
[189] Vijver L V (ed) 138.
[190] Niki Tobi *The Nigerian Judge,* (1992) 68.

administrative and adjudicatory duties as well as their extra-judicial activities.[191]

k. Judicial Accountability and Discipline

The principles of judicial accountability as a necessary check on judicial independence must be observed by providing a fair disciplinary procedure, administered objectively with safeguards to ensure fair proceedings against any judicial officer.[192] Disciplinary proceedings against a judge must be held in private unless the judge request that it be held in public.[193] Ground for commencing disciplinary proceedings against a judge must be fixed by law.[194]

The South African Constitution provides that an act of parliament must provide for the disciplinary steps and procedure that can be taken against a judicial officer complained of which must be without favour and prejudice.[195] Specifically, section 180 provides that national legislation should provide for other matters not specifically dealt with in the Constitution like procedures of complaint against a judicial officer. The same constitution[196] also provides that the functions and powers of the JSC are assigned to it by the Constitution and national legislation and that the procedure to be adopted in performing its functions is to be determined by the JSC and must be supported by a majority of its members.[197] The JSC is also empowered by the Constitution to advice the

[191] See rules 1, 2, & 3 of the Code of Conduct.
[192] Latimer House vii (b) and Blantyre Rule of Law article 16 (i). See also Vijver L V (ed) 9 & 10.
[193] IBA Minimum Standards of Judicial Independence article 28.
[194] Ibid article 29 IBA Minimum Standards of Judicial Independence article 33.
[195] Ibid s 174 (7) South African Constitution.
[196] Ibid s 178 (5).
[197] *Ibid* s 178 (6).

President to suspend a judge who is a subject of disciplinary proceedings for removal from office.[198]

The JSC had observed that though it played a central role in the disciplining of judicial officers, the mechanism for dealing with the complaints against these judges were not available.[199] Hence the issuing of the code of judicial ethics by the respective heads of the superior courts in 2000 which comprises guidelines on ethical and professional standard of behaviour to establish an environment suitable for promoting the independence and dignity of the judiciary, and a minimum standard upon which a form of accountability of judicial officers in respect of their judicial functions may be determined.[200]

The Judicial Service Commission Act enacted in 2008 provided for a committee of the JSC known as the Judicial Conducts Committee, and the adoption of a code of conduct for judicial officers[201] as a result of which the Chief Justice- Sandili Ngcobo compiled a code of conduct upon which acts by judicial officers requiring discipline may be measured, and at the same time creating a form of reciprocal obligation of accountability on them.[202] The Judicial Conduct Committee was to enable the JSC carry out disciplinary proceedings against judges complained of, for impeachable and lesser offences.[203] The Act endeavoured to create a balance between preserving the independence of the judiciary and upholding the principle of accountability.[204] Apart from the ethical standards specifically

[198] *Ibid* s 177 (3).
[199] Vijver V D (ed) 136 & 137.
[200] *Ibid.*
[201] News 24 Judges Get New Code of Conduct.
[202] Vijver L V (ed) 138 .
[203] *Ibid*.
[204] *Ibid.*

mentioned in the Act, the South African Constitution broadly provides that the grounds for removing a judge (on which the JSC must find a wanting) are incapacity, gross misconduct and gross incompetence.[205]

The Nigerian Constitution does provide that the NJC should recommend for the removal of all judicial officers with the exception of all heads of court.[206] The NJC exercises disciplinary control over all judicial officers.[207] The measuring line for the determination of whether or not a judicial officer has acted out of order is the Code of Conduct for Judicial Officers.[208] The NJC adopts an internal procedure to ensure discipline and accountability. On receiving a complaint against a judicial officer, [209] the NJC first seeks to determine whether there is a prima facie case. If this is confirmed, it constitutes a panel to hear the matter and makes its recommendation to the President or Governor as the case may be. Pending the action of the President or Governor, the NJC may suspend the judicial officer indefinitely without pay. Despite the need to maintain judicial independence, a balance must be maintained to ensure accountability and discipline.[210] The NJC also adopts a system of monitoring judicial officers by setting up an Evaluation and Monitoring Committee which carries out periodic monitoring on quarterly basis of all courts of high jurisdiction in the country.[211]

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[205] Section 177 (1)(a).
[206] Section 292 (1) (b) Constitution of Nigeria. See also Item I, s 21 (b) (d) part 1 of the third schedule to the Constitution of Nigeria.
[207] *Ibid*.
[208] Hon. Justice Dan Abutu, "Judicial Ethics, Decorum and Code of Conduct for Judicial Officers" A paper presented at the induction course for newly appointed judges and kadis which held at Abuja, 22nd June-3rd July 2
[209] Through its chairperson or his deputy. The Chief Justice of Nigeria is the chairperson of the NJC and the next most senior justice to the chief justice in the Supreme Court is the deputy.
[210] "Judicial Accountability and Discipline" http://www.transparency.org (accessed 6th July, 2009)
[211] Badejogbin R E & Onoriode M E "Judicial Discipline and Accountability in Nigeria: Imperatives for a New Democratic order' a paper delivered at the African Network of Constitutional Lawyers which held in September 2009.

l. Immunity from Civil and Criminal Suits

Judges need to be protected from unnecessary harassment capable of affecting their independence and therefore should enjoy personal immunity from any act or omission done by them in the course of any civil proceedings before them.[212]

In South Africa, the question of whether or not judicial officers should be open to litigation brought by discontented litigants who had matters in their courts has been deliberated in the courts.[213] The assertion is that judicial officers should be given the liberty and a conducive atmosphere to perform their functions optimally without any fear or threats of possible litigation brought against them by unsuccessful litigants.[214] The general defense for the judicial officer is if he acted in good faith.[215] However a few instances are identified that may expose the judicial officer to personal liability for bad judgments tied to his incompetence. They are if the judicial officer deliberately acted in bad faith or if his wrong judgment was occasioned by malice, and if the judicial officer elects to be a party in an action.[216]

While the Nigerian Constitution is silent on providing for immunity for judges, Nigerian judges are immune from legal proceedings emanating from the discharge of their judicial powers within their jurisdiction and outside their jurisdiction if done in good faith.[217] The doctrine of judicial

[212] Blantyre Rule of Law article 16 (h).
[213] Vijver V D (ed) 137. See the cases refereed to – *Regional Magistrate Du Preez v Walker* 1922 AD 492 and *Matthews and Others v Young* 1945 AD 6.
[214] *Ibid*.
[215] *Ibid*.
[216] *Ibid*.137-138.
[217] Tobi, N. 549

immunity- a common law doctrine applicable in Nigeria is provided for under the High Court Laws of the respective states in the federation and the High Court Act of the FCT.[218] The rationale for judicial immunity transcends the protection of the person of the judge who is protected from incessant and unnecessary suits by litigants on every case lost. It is for the greater benefit of protecting the administration of justice.[219]

m. Autonomy in the Performance of Judicial functions

The performance of judicial function shall not be usurped from ordinary courts and tribunals using well accepted legal procedures to tribunals that do not follow these established procedures. It is the exclusive preserve of the former to decide whether or not it has jurisdiction to hear and decide a matter.[220]

The South African Constitution vests the performance of judicial function on the courts and clearly prohibits any form of interference on the courts performing these functions (impartially, independently and within the confines of the law) from any person or organ of Government.[221] The courts referred to by the Constitution are specifically identified by the same instrument to avoid a wider application of the term to include institutions that do not fall under the regular courts.[222]

The Nigeria Constitution clearly vests the judicial powers of the country in courts of law.[223] The Constitution provides for fair hearing in any civil

[218] *Ibid*.
[219] *Ibid* 133.
[220] *Ibid*. U.N. Basic Principles on the Independence of the Judiciary articles 2 and 5. Ibid Blantyre Rule of Law article 16 (d). Ibid IBA Minimum Standards of Judicial Independence article 8.
[221] Section 165 (1) (2) (3) Constitution of South Africa.
[222] Ibid s166 (a-e).
[223] Section 6 91) (2) Constitution of Nigeria.

or criminal matter for all parties in a court of law or other tribunal established and duly constituted by law to ensure its impartiality and independence from extraneous influence.[224] During past military regimes in Nigeria, a number of tribunals were set up which were not bound to observe well accepted legal procedures and for some of them, their decisions were not appealable. The advent of democracy saw to the dissolution of these tribunals by the Tribunals (Certain Consequential Amendments, Etc.) Decree.[225] The matters being handled by these tribunals were transferred to the regular courts.

n. Training Programme for Judicial Officers.

Persons selected for judicial appointments must be appropriately trained or must have academic qualifications in law.[226] Judges should also have access to human rights education.[227] Every judge is expected to engage in activities that will enhance the judge's skills and knowledge required to adequately discharge his (her) judicial functions.[228] These activities may include formal trainings organized for judges to meet this need.[229]

In South Africa, the Constitution provides for the national legislation to make laws with respect to the training of judges.[230] Again, in South Africa, training programmes for judges take three forms. The first is the pre appointment training which is usually in form of educational seminars for persons who aspire to be judges which began in 1999; the second being periodic orientation courses for newly appointed judges and the third

[224] *Ibid* s 36.
[225] 62 of 1999.
[226] U.N. Basic Principles on the Independence of the Judiciary article 10.
[227] Latimer House article 1 (8)
[228] The Bangalore Principles of Judicial Conduct 2002 value 6 (30
[229] *Ibid*.
[230] Section 180 (a).

which is the opportunities to work as acting judges for short terms for potential judges.[231]

In Nigeria, the Constitution is silent on any training programme for judges. The National Judicial Institute was set up in 1991[232] to provide training and continuing judicial education for judges with respect to the necessary skills required in judicial functioning, induction programmes for newly appointed judges and magistrates as well as training generally in the administration of justice.[233] Prior to the setting up of this institute, in 1989 and shortly thereafter, annual lecture series and orientation programs were organized for judges and magistrates through the personal efforts of the judges themselves.[234] The Constitution does not provide for acting judges. The "Acting Chief Justice and Chief Judge" mentioned in the Constitution connote a different meaning. It refers to only already serving judges who temporarily are appointed to occupy the office of the head of court in the case of a vacancy pending when a substantive appointment will be made.

2.2 The Application of the Doctrine of Judicial Precedent by Courts in Nigeria and South Africa.

The doctrine of judicial precedent, a common law doctrine adopted from the English legal system is applicable in Nigerian courts.[235] Judicial precedent is simply a system of bindingness of the decisions of a superior court over all courts

[231] Vijver L V (ed) 134.
[232] National Judicial Institute Decree 28 1991.
[233] Owasanoye B "Judicial Education " in *Law, Justice and the Nigerian Society* Essays in Honour of Honourable Justice Mohammed Bello (ed. Ayua I A) (1995) 35.
[234] Bello ."'Continuing Judicial Education in Nigeria" a paper presented at the fifth international appellate judges conference held in Washington D.C. U.S.A. 10th-14th September, 1990 in Bello M *In the Course of Justice* (1995) 49.
[235] Umoh P U *Precedents in Nigerian Courts* (*1984)* 8-9.

of subordinate jurisdiction in a particular legal system.[236] This operates to ensure certainty of the applicable principles of justice in a given circumstance and is operative only in concrete cases before the court. Therefore, a court faced with a case must in deciding the merits of the case; adopt the reasoning of a superior court of record in a similar case with similar facts. In such instance, case laws serve as sources of law prescribing the principles to be made applicable in the determination of matters of similar subjects.[237] The principles developed in the course of the judicial reasoning of the particular judge(s) in the interpretation of the laws form the basis of what becomes binding on courts of subordinate jurisdiction. The rigidity of this doctrine assures a certainty and predictability of principles governing the applicability of laws to given situations while the flexibility occasioned by adaptability to specific circumstance gives room for the development of the law.[238] In Nigeria, the decisions of the Supreme Court being the apex court, are binding on all courts of subordinate jurisdiction to it. Similarly in the absence of any decision by the Supreme Court on a particular matter, the decisions of the Court of Appeal which is the next court in hierarchy becomes binding on all courts of subordinate jurisdiction to it. This continues down the hierarchy to the High Courts.

It is not all parts of the judgment of a court that are binding. The reasoning of the judge in determining the claim before the court is called the *ratio decidendi.* This has a binding effect on all courts of subordinate jurisdiction. The other part of the judgment which is not necessary to determine the subject of dispute is called the *obiter dictum* and merely has a persuasive effect on courts of subordinate jurisdiction. An advantage derived from this system is the ease of the applicability of every novel decision achieved through judicial activism which is

[236] *Ibid* 16 & 17.
[237] *Ibid* 8 & 9.
[238] Karibi-White A G *Judicial Despotism and the Development of Nigerian Law* 160-161.

a common feature of the Nigerian legal system where the judges exercise broad powers of interpreting the laws. The corresponding disadvantage here is also the binding effect of decisions reach through erroneous reasoning. The Supreme Court has had cause to subsequently depart from its earlier decisions on discovery that the earlier decision was erroneously made or if in application of the earlier decision to the facts of a case before it, injustice will be occasioned.[239] The Honourable Justice Karibi-White states an additional ground under which the Supreme Court may depart from its earlier decision "*such as political realities, social and economic conditions which make the enforcement of previous decision inappropriate*."[240]

A judge is at liberty to decline the application of the decision of a superior court of record where he (she) can establish a distinction between the issues of the previous case and the case before him (her). Where there are conflicting decisions of the Supreme Court, the subordinate court is at liberty to choose which to adopt which may either be the latest of the decisions or the one that appears more comprehensible.[241] Decisions of courts of coordinate jurisdiction in Nigeria are only persuasive on each other.

The courts in Civil law countries do not strictly apply judicial precedent. The judges are not bound by past decisions of higher courts and of even themselves; and the doctrine of *stare decisis* is not applicable.[242] What is adopted is the Principle of "*Jurisprudence Constante*"[243] which simply means the application of a judges reasoning to a given case to reflect "*cohesion and predictability*" without

[239] *Ibid*164 *Johnson v Lawanson* (1971) 1 All NLR 56.
[240] *Ibid* 166 O*di v Safile* (1985) 1 NWLR p. 51.
[241] *Ibid*, *Osakue v Federal College of Education (Technical) Asaba* (2010) 10 NWLR (Part 1201) 1.
[242] Understanding the Concept of Judicial Precedent and the Doctrine of S*tare Decisis* under the Nigerian Legal System http//nigerialaw.blogspot.com/p/understanding-concept -of –ju (accessed on 25th December, 2011).
[243] *Ibid*.

going into details to explain his (her) reasoning.[244] Under this system, judicial law making is discouraged as encroaching into the sphere of the legislature and the responsibility of the judge is to merely apply the law.[245] By virtue of its legal history, South Africa is both a Civil law and a Common law country. Though a mixed system, the doctrine of judicial precedence applies in South Africa where case law is regarded as a major source of law without distinguishing whether or not the case law interprets Civil or Common Law.[246] The adoption of this doctrine by South African courts is due to its partly Common Law heritage.[247] Therefore hierarchically, the decisions of the Constitutional Court on constitutional matters are binding on the Supreme Court of Appeal and all other courts of subordinate jurisdiction. The decision of the Supreme Court of Appeal is binding on that of all other courts of subordinate jurisdiction to it; and that of the High Court on courts of lower jurisdiction with merely persuasive effect on other high courts.[248] Decisions of lower courts have no binding effect on other courts.[249] In South Africa, the Supreme Court of Appeal may also depart from its previous decision where it is convinced that the previous decision was clearly erroneous.[250]

2.3 The Rule of Law and the Judiciary in Nigeria and South Africa.

The rule of law presupposes a shared spread of state powers amongst the various organs of government.[251] The judiciary being an organ of government

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[244] *Ibid*.
[245] Tetly W *Mixed Jurisdiction: Common Law v. Civil Law (Codified and Uncodified)* http://www.mcgill.ca/maritimelaw.comparative/mixedjur-1 (accessed on 26th December, 2011).
[246] Barrat A & Snyman P Update: Researching South African Law http://www.nyulawglobal.org/Globales/SouthAfrica1.htm (accessed on 26th December, 2011).
[247] Judicial Education in South Africa www.judicial education.org.za (accessed on 26th December, 2011).
[248] *Ibid*.
[249] *Ibid*.
[250] *Ibid*.
[251] See Latimer House article 1& 2 (a) (b) which reads as follows- *"Each commonwealth country's parliaments, executives and judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability... Relations between parliament and the*

plays a vital role in the observance of the rule of law. In looking briefly at the applicability of this doctrine in Nigeria and South Africa, it is necessary that a frame work is proffered on which the applicability of the doctrine will be considered. Judge Patricia Wald[252] states that

> *'The rule of law … requires that courts acknowledge the statutes and rules that bind them in the exercise of their powers, even when those restrains interfere with understandable aspirations to maximize human rights norms. Courts must lead the way in following the law if there is to be a rule of law'*[253]

This very aptly states the vital role of the courts in entrenching the rule of law in a polity and gives an insight of the concept of the rule of law which generally, is the prevalence of law over all forms of arbitrariness in the exercise of power.[254] The evolution of the rule of law dates back to medieval times.[255] Its development is traced through the middle ages and on to the 19th century in the writings of A. V. Dicey whose exposition of the doctrine has had the most profound influence on modern society.[256] At the centre of this doctrine is the attempt to check the arbitrariness of the sovereign which must be made subject to certain laid down rules and not merely on its whims and caprice.[257] The precise definition of this concept has proved elusive.[258] It has been proposed that the UN should come up with a working definition as a guide to countries.[259] The result of this is the

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judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand… Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner."

[252] In the case of *Prosecutor v. Tadic* Case No. IT-94-1-A-R-77 as contained in McAuliffe P "Transitional Justice and the Rule of Law: The Perfect Couple r Awkward Bedfellows?" HJRL (2010) 127.

[253] *Ibid*.

[254] Ashi V B *Fundamental Constitutional Doctrines and Concepts (*2010) 43.

[255] *Ibid*.

[256] Ayua . "The Rule of Law in Nigeria' in *Law, Justice and the Nigerian Society* 69-71. Other philosophers who expounded on the doctrine of the rule of law include Aristotle ((384-322 B. C.), roman jurists, early Christian philosophers, etc. *ibid*.

[257] Ashi V B *loc cit.* and Ayua, . "The Rule of Law in Nigeria" *loc cit*

[258] Banks C "Reconstructing justice in Iraq: promoting the rule of law in a post-conflict state" (2010)155-156.

[259] *Ibid*.

explanation of this concept in the UN Secretary-General's guidance note titled UN Approach to the Rule of Law Assistance as[260]

> *a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights and standards. It requires as well measures to ensure adherence to the principles of the supremacy of the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency'*[261]

In Nigeria, the judicial powers of the courts are exercisable in '*all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that persons*'[262] The accountability of all persons and institutions regardless of their status is enforced by the courts which must be independent. The Nigerian constitution, in addition to guaranteeing the independence of the Judiciary, also ensures every citizen of equal treatment before the law irrespective of "*ethnicity, place of origin, sex, religion, or political opinion' and 'by reason of the circumstances of his birth*".[263] The conferment of judicial power in courts in all areas of conflict is not absolute in Nigeria due to the unjusticiability of the fundamental objectives and directive principles of state policy contained in chapter two of the Constitution. However, despite the

[260] Of April, 2008 as contained in Banks, C. *loc cit*
[261] *Ibid* http: // www.unrol.org/files/guidance/note) accessed by Banks, C. "Reconstructing Justice in Iraq: Promoting the Rule of Law in a Post-conflict State".
[262] Section 6 (6) (b) 1999 Constitution of Nigeria.
[263] Section 17 (2) (a & e) See also s 42 (1) (a & b) and (2).

seeming constitutional compliance of persons, institutions and the government being subject to law, the practicality of the application of the rule of law in Nigeria has been called into question.

Dr. T. O. Elias,[264] in expounding the concept of the rule of law, explains that it is not just enough to have laws, but such laws must enhance economic, moral, communal development, as well as encouraging unity amongst ethnic groups.[265] Lawyers and judges in Nigeria play key roles in ensuring the adherence to the rule of law in Nigeria.[266] Despite the contents of the Constitution which devotes a whole chapter to fundamental rights which are majorly in line with the international human rights standards, there have been violations and threats to these rights by individuals, groups, institutions and government, which the courts have over the decades tried to ensure protection for. A good instance is the popular case of *Government of Lagos State v Ojukwu*[267] where the court ruled against the oppressive actions of the then military government of Lagos State over a citizen by attempting to take over from him properties he inherited from his father.[268] The enforcement of the rule of law in Nigeria is however subject to public policy.[269]

The courts were highly impeded by the military regimes in Nigeria which lasted for about four decades of the five decades and was characterized by violations of the basic rights of the citizens prior to the institution of democracy in 1999.[270] These Military regimes establishment in the first place in abrogation of the

[264] Former chief justice of Nigeria and former president of the International Court of Justice.
[265] Olanrewaju, A. *The Bar and the Bench in Defense of the Rule of Law in Nigeria* (1992) 4.
[266] *Ibid* 5.
[267] (1986) ANLR 233.
[268] Ashi V B 46-47.
[269] *Ibid*.
[270] See for example the State Security (Detention of Persons) Decree No. 2 of 1984.

provisions of the constitutions then in force[271] suspended a good portion of the constitution and created ouster clauses to limit the powers of the courts in entertaining certain matters[272] and were replete with unlawful detentions, ousting of the jurisdiction of courts, flagrant disobedience of court orders, setting up of tribunals with wide powers above the judicial system of the country for specific matters whose decisions were not appealable to regular courts and the promulgation of laws with retrospective effect.[273] It tried to use the courts to create a form of legitimacy for the governments.[274] The position of the Austinian positivist which places ultimate state authority in the sovereign found some measure of adoption in Nigeria during military regimes whereby the provisions of the constitutions where made subject to the decrees promulgated by the military governments.[275] The current Constitution clearly prohibits the Federal and State legislatures from making such laws.[276]

Though there appears to be a conformity in Nigeria to the requirement that no person should be tried for an offence not clearly prescribed by law, there are however other criminal justice processes in its institutions that leave a lot to be desired in adherence to this doctrine like long detentions of persons awaiting trial, absence of notification of the particular charge against the accused, right to defense counsel etc.[277] Apart from cases where it is necessary, criminal trials in Nigeria are conducted publicly.[278] The delays in the administration of justice and

[271] Karibi-Whyte A G "The Role of the Courts in the Protection of Human Rights" in *Selected Essays of Honourable Justice A. G. Karibi-Whyte on Jurisprudence* (ed. Peters S C) (2003) 413.
[272] Fawehinmi G "Denial of Justice through Ouster of Courts Jurisdiction in Nigeria" in Olarinde E S *et al* (eds) *Contemporary Issues in Nigerian Legal System* (1997) Ibadan: GLJ Services Limited.
[273] Ibid.
[274] Ginsburg T & Moustafa T (ed) *The Politics of Courts in Authoritarian Regimes* 2008 USA: Cambrige University Press p. 4
[275] Ibid. See Constitution (Supremacy and Enforcement of Powers) Decree 28 of 1970. See also the case of *Lakanmi v A. G. West & Others* (1971) IUILR 201. See also s 36 (8) and see also Ashi V B 54.
[276] Section 36 (8) and see also Ashi V B 54.
[277] Oputa C A "Crisis in the Rule of Law" in T*owards a Functional Justice: seminar papers of justice Chukwudifo A. Oputa* (ed. Okeke C) (2007) 150-151.
[278] Ibid.

the flagrant disregard of court orders by the past administration[279] were menace to the observance of the rule of law in Nigeria.[280]

The application of the principles of the rule of law in South Africa is buttressed by the preamble to the Constitution which commits to the adherence of democratic values and equal protection of all citizens before the law. Section 1 (c) of the current constitution provides for the "*supremacy of the constitution and the rule of law*".[281] These, the courts must apply impartially to all persons, government and institutions.[282] Section 165 makes provisions to secure the independence of the judiciary. 'The Blantyre Rule of Law/Separation of Powers Communiqué *to the leadership and people of the sadc region'* also in line with earlier mentioned international instruments, places a responsibility on individuals, nongovernmental as well as governmental groups to closely see to the preservation of the independence of the judiciary, the observance of the rule of law and the implementation and monitoring of these concepts in practice.[283]

The separation of powers operative in South Africa is reflected by a legislature,[284] executive[285] and judiciary comprising of courts where the judicial power is based.[286] Though this separation is not absolute,[287] these organs of government still act as checks and balances on each other and the interdependence of these organs of government also promote adherence to the rule of law. Prior to the commencement of a new democratic order in South Africa which gave birth to a

[279] *A. G. Lagos State v A. G. Federation* (2004) 18NWLR (Part 904). See also Taiwo L O "Democracy, Courts and the Rule of Law in Nigeria: Problems and Prospects" EAJPHR 287.
[280] Taiwo *Democracy, Courts and the Rule of Law in Nigeria: Problems and Prospects* 281 & 289.
[281] See also s 8 (3) on equal protection of all citizens by the law.
[282] Section 156 (2) 1996 constitution.
[283] Blantyre Rule of Law articles 17-20.
[284] Sections 42 & 43 of the 1996 constitution. The legislative function is majorly the responsibility of the parliament but with participation from the Council of Province and the National Assembly.
[285] *Ibid* ss83, 84 & 85
[286] *Ibid* s 65.
[287] Van De Vijver (ed) 120-121.

new interim constitution in 1993, the Apartheid regime which operated a racist ideology and was enforced by law was replete with violations of the human rights of the other population groups. The role of the courts for the protection of the citizens left a lot to be desired.[288]

The new democratic order which adopted a system of constitutional supremacy[289] through the constitution, sought to enhance the rule of law.[290] Institutions were established and reorganized. The judiciary which was tainted by its role during the Apartheid era[291] was restructured and constitutional court was established to ensure and entrench equality treatment of all persons and the enforcement of the rule of law by the courts.

2.4. Conclusion

In summary this chapter states the role of the judiciary in Nigeria and South Africa expressed through their courts though vital, but wanting with respect to the upholding of democratic values and the protection and enforcement of the fundamental human rights of their citizens prior to their current democracies but more so for South Africa. The chapter also looked at the constitutional and statutory frame work for the promotion of the independence of the judiciary by both countries. It gave an illumination of the concept of judicial precedent practiced by both countries but more entrenched in the Nigeria judiciary by virtue of its legal system. The chapter concludes with a brief discourse of the adherence to the principle of the rule of law by both countries which currently, still leaves room for improvement.

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[288] Dyzenhaus D "The Past and the Future of the Rule of Law in South Africa" www.yale.edu/macmillan/aparthied/dyzenhausp2pdf+rule+of+law (accessed on 26th December, 2011)
[289] Rule of law http://www.leadershiponline.co.za/articles/ploitics/1658-rule (accessed on 26th December, 2011)
[290] *Ibid*.
[291] Vijver V D (ed) 148.

Chapter Three

3.1 Brief History of South African Legal System

South Africa is a sovereign state made up of an estimate of 49,109,107 population[292] with diverse people groups of different races. The history of South Africa is related to the indigenous inhabitants, and the arrival of the Europeans and other settlers. Before the arrival of the Europeans, the indigenous people operated a legal system regulated by their respective traditions and customs. In 1652, The Roman-Dutch law (the Law of Holland) was brought in by Jan Van Reibeeck.[293] This law remained in force for about a century and a half before the British took over in the 1800s and established a colony in the Cape.[294] Consequently, they brought with them, the influence of British law over the Roman-Dutch law which remained the main applicable law especially in the area of private law like contract, property, succession etc.[295] The Roman-Dutch law is the Dutch writers' interpretation of the Roman law in the 17th and 18th centuries.[296] The influence of the British common law was more in the area of procedural law and statutory laws that were enacted as a result of the lacuna in the Roman Dutch law.[297] These enacted laws were greatly influence by the English law.[298] The success registered by Britain at the South African Boer War[299] ushered in British control of the entire country which led to the amalgamation of all lands and the establishment of four provinces in the Union of South Africa in 1910.[300] By implication, the amalgam gave rise to the application of similar laws mainly achieved through legislation in the provinces. Native law had very

[292] As at 2010. http://www.factmonster.com/ipka/A0107983.html (accessed 4th January 2012).
[293] Mireku O *Three Most Important Features of the South African Legal System that Others Should Understand'* http://www.ialsnet.org/meetings/enriching/mireku.pdf (accessed 3rd January 2012).
[294] *Ibid.*
[295] *"The Legal System" http://countrystudies.us/south-africa/76.htm (accessed 3rd January 2012).*
[296] . *http://www.factmonster.com/ipka/A0107983.html*.
[297] "The Legal System" http://countrystudies.us/south-africa/76.htm.
[298] Barrat A and Snymam P "Researching South African Law" http://www.llrx.com/features/southafrica.htm#Sources%20of%20Legislation (accessed 3rd February 2012).
[299] (1899-1902).
[300] These Provinces are the Cape, Natal, the Orange Free State, and the Transvaal.

limited application on the indigenous people who elected to be bound by their indigenous customary laws which were applicable in very limited areas.[301] The South African situation is described as a hybrid of the English Common Law and the Roman-Dutch Civil Law.[302]

1948 saw the success of the Nationalist Party at the election polls and the application of a distinct law from the English law and the Roman-Dutch law called Apartheid.[303] This is a law made by the South African parliament based on the ideology of racial segregation and discrimination against the other races who were in the majority.[304] This policy was enforced by a number of legislation and a widespread judicial device.[305] These enactments include-

> *"Population Registration Act 30 of 1950 (classifying the South African population into 'racial groups'); the Group Areas Act 41 of 1950 (providing for the segregation of residential and other areas) and a plethora of other acts designed to segregate every aspect of life, including public administration, education, health services, employment, transport and public amenities."*[306]

The struggle against apartheid gave rise to certain events prominent in the history of South Africa in the 1990s. One of such is the release of one of the main opponents Nelson Mandela and the collapse of Apartheid. The negotiations between the government and the oppositions, gave rise to the Interim Constitution in 1994 which was replaced by a new substantive Constitution in 1996. Nelson Mandela was elected the first black President in 1994.

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[301] Barrat A and Snymam P "Researching South African Law".
[302] Mireku O *Three Most Important Features of the South African Legal System that Others Should Understand'*.
[303] Barrat A and Snymam P "Researching South African Law".
[304] *Ibid*.
[305] "The Legal System" http://countrystudies.us/south-africa/76.htm.
[306] Barrat A and Snymam P "Researching South African Law".

By virtue of the interim constitution and its current constitution, South Africa operates a constitutional democracy with constitutional supremacy, parliamentary sovereignty and some components of federalism.[307] South Africa is composed of nine provinces made up of Eastern Cape; Free State, Mpumalanga, Northern Cape, Gauteng, KwaZulu-Natal, Northern Province, North West and the Western Cape. The doctrine of separation of powers operates in the country. South Africa three organs of government made up of the executive, legislature and the judiciary. The President is the chief executive officer and operates through a cabinet with ministers and deputy ministers in charge of various government sectors. The legislature is bicameral in nature. It comprises the National Assembly and the Council of Provinces. The judiciary is made up of the Constitutional Court and other courts established under the Constitution or provided for by the Constitution to be established through the act of Parliament.

At the provincial level, the premier is the head of the executive of each province. Each province has a legislature made up of about 30 to 80 members elected for a term of five years depending on its proportion of the "*national common voters' roll*".[308] Each province may have a constitution.[309] The provincial legislature is empowered to make laws for the province subject only to the national constitution and the provincial constitution where there is one.[310] There is however a few minor areas where the provincial legislature has exclusive power to legislate on.[311]

The sources of law in South Africa are the Roman-Dutch law, English law, customary law, statute law judicial precedents and sometimes opinions

[307] Barrat A and Snymam P "Researching South African Law".
[308] <http://www.southafrica.info/about/government/govprov.htm > (accessed J4th January 2012).
[309] *Ibid.*
[310] *Ibid.*
[311] Barrat A and Snymam P "Researching South African Law"

expressed in reputable law journals by academics and lawyers which judges may consult and if so persuaded, may adopt their reasoning.[312]

The legal profession in South Africa is split into two. They are the advocates who are barristers and the attorneys who are solicitors. The minimum requirement for both professions is an LL.B from a South African university.[313] To become an attorney, in addition to the LL.B, a candidate must go through an article of clerkship with a serving attorney and pass the admission examination organised by the provincial law society.[314] Participation in a community service or attendance of lectures at a training programme which is practical in nature may earn a reduced duration of the clerkship period.[315] On the other hand, to qualify as an advocate, in addition to the LL.B degree, the candidate must go through a period of training under an advocate and pass the admission examination.[316] Practicing as both an advocate and an attorney is prohibited. While attorneys on the one hand deal directly with the clients; manage cases and determine when, and whether or not an advocate should be engaged for a client, the advocates on the other hand argue cases for clients in court but do not have direct dealings with clients until they are referred to them.[317]

3.2 History and Evolution of some Courts in South Africa

The history of the European type courts in South Africa is tied to the settlement of the European settlers.[318] The slave lodge is stated to have provided

[312] "Introduction into the South African Legal System" http://www.justice.gov.za/policy/african%20charter/afr-chart (accessed 26th December 2011).
[313] <http://www.sabar.co.za/legal-system.html (accessed 3rd January 2012).
[314] "The Legal System "http://countrystudies.us/south-africa/76.htm (accessed on 3rd January 2012).
[315] *Ibid*.
[316] http://www.sabar.co.za/legal-system.html (accessed 3rd January 2012).
[317] "The Legal System'" *supra*.
[318] Prior to the establishment of the Union of South Africa which saw to the establishments of the Supreme Court and its provincial divisions, there were established adjudicatory bodies for instance ' in 1807, the governor had constituted himself a court of appeal for civil cases and 1808 the governor and two assessors became the same in criminal cases. In 1811, circuit courts were introduced; in 1813 court proceedings were conducted in public; from 1814, Dutch and English were the languages of judicial proceedings; in 1826,

accommodation for the Supreme Court of the Union of South Africa in its Cape provincial division in 1828.[319] The history of this provincial division is linked to the Supreme Court of the Cape of Good Hope whose library is reputed to possess texts dating as far back as 1592 and 1743 respectively.[320] The effect of the unification of the colonies of South Africa which occurred in 1910 saw the establishment of the respective supreme courts of these colonies as the provincial divisions of the Supreme Court of South Africa.[321] The supreme court in King William's Town was established prior to 1864.[322] This however was short lived and was absorbed in 1866 into the superior court established for the Cape Colony's eastern districts in 1864.[323] This court was often on circuit where it heard several cases from as far as Humansdorp even to Kokstad and having coverage over the Transkian terrain and East Griqualand.[324] The first discovery of diamond in De kalk in 1866 propelled the development of the Northern Cape which saw to the establishment of the Northern Cape Supreme Court in 1871.[325] The application of the rule governing land rights in Griqueland gave birth to the land court in 1875 which adjudicated on the land disputes that emanated from the application of the rules.[326] Appeal went from this court to the Supreme Court.[327] The first circuit court in the Orange Free State was manned by Judge Buchanan in 1896.[328] During the Anglo Boer War, martial law was in operation

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justices of the peace were created; in 1827 the jury system was adopted which in turn lead to the introduction of the English law of evidence in 1830.' See Thomas P *J Harmonizing the Law in a Multilingual Environment with Different Legal Systems: Lessons to be Drawn from the Legal History of South Africa* (2008) 136 footnote 22.

[319] Rautenbauch F "The History of the Cape Provincial Division : South African Judiciary 100 Years Old" (2010) Advocate, Vol 23, 34

[320] *Ibid*.

[321] *Ibid*.

[322] Rocke S C And Rawjee A "The High Court of the Eastern Cape South African Judiciary 100 Years Old' (2010) Advocate, Vol 23, 40

[323] *Ibid*. See Eastern District Court Act 21 of 1864.

[324] *Ibid*.

[325] Van Neikerk L "Northern Cape High Court Kimberly South African Judiciary 100 Years Old" (2010) Advocate, Vol 23, 42.

[326] *Ibid.*

[327] *Ibid*.

[328] [328] Van Neikerk L (2010) *Advocate*, Vol 23, 44

and the courts were closed in 1899. The court established at the end of the Anglo Boer war metamorphosed into the Supreme Court's provincial division at the Orange Free state which was established in 1910.[329] In 1911, appeals on the decisions of the Supreme Court appellate division went to the Privy Council.[330] The history of the North and South Gauteng High Courts formally known as the Transvaal provincial division is traced to 1877 when judicial function for the region was bestowed on the high court, magistrate court and circuit court.[331] This court was established as the Transvaal provincial division of the Supreme Court of the newly formed Union of South Africa in 1910.[332] It is now known under the current constitution as the "*High Court for Gauteng, Mpumalanga, Limpopo and (part of) the North West Province*."[333] Other courts such as the Eastern Cape High Court Mthatha formerly known as the Supreme Court of Transkei,[334] Eastern Cape High Court Bhisho formerly known as the Supreme Court of Ciskei established in 1981,[335] and North West High Court Mafikeng formerly known as the Supreme Court of Bophuthatswana established in 1977[336] were formally designated as provincial divisions of the High Court of South Africa via the 1994 Interim Constitution.[337] The current high courts in South Africa replaced the former supreme courts of the former colonies in the Union of South Africa,[338] which were originally established by the South Africa Act of 1909 and confirmed by the Supreme Court Act 1959.[339] The Constitutional Court of South Africa sits

[329] *Ibid.*
[330] *Ibid.*
[331] Pat Ellis S C "A Short History of the North and South Gauteng High courts South African Judiciary 100 Years Old' (2010) Advocate, Vol 23, 46.
[332] *Ibid.*
[333] *Ibid.*
[334] Sishuba M "Eastern Cape High Court: Mthatha South African Judiciary 100 Years Old' (2010) Advocate, Vol 23, 48.
[335] Cossie C T S And Nstaluba, T. M. "A Brief History of the Eastern Cape High Court, Bhisho'South African Judiciary 100 Years Old" (2010) Advocate, Vol 23, 52.
[336] Stander J "North West High Court, Mafikeng South African Judiciary 100 Years Old" (2010) Advocate, Vol 23, 53.
[337] See the Republic of Bophuthatswana Constitution Act 18 of 1977 as referred to by Stander, J. *Supra*
[338] Renaming of High Court Act 1261 of 2008.
[339] 59 of 1959.

in Johannesburg and is established by the joint provisions of the 1993 Interim Constitution, and the Constitutional Court Complimentary Act,[340] and validated by the current constitution. The Supreme Court of Appeal sits in Bloemfontein and was established by the South Africa Act, 1909 and the Supreme Court Act, and confirmed by the Constitution.[341]

3.3 Applicable Laws for the Creation of Courts and Regulation of Proceedings in Courts in South Africa.

In South Africa, the main legislation for the creation of courts is the constitution. The parliament is empowered to make laws establishing other courts and, to provide for rules of procedures to regulate proceedings in courts. The laws and rules which are published in government gazettes are as follows-

1. Constitutional Court Complimentary Act,[342]
2. Rules of Constitutional Court.[343]
3. Rules of the Supreme Court of Appeal.[344]
4. Renaming of High Court Act.[345]
5. Uniform Rules of Court.[346]
6. Magistrate Court Act.[347]
7. Magistrate Court Rules.[348]

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[340] 13 of 1995.
[341] Section 168, 1996 Constitution of South Africa. See Pete S *Civil Procedure: A Practical Guide* 2nd ed (2011) xii.
[342] 13 of 1995.
[343] GN R 1675 in GG25726 of 2003. See Boraine A *et al Fundamental Principles of Civil Procedure* (2006) *8 & 9.*
[344] Ibid, GN R 1523 in GG 19507 of 1998.
[345] GG REPUBLIC OF SOUTH AFRICA. Vol. 521 Cape Town of 2008. No. 31636. THE PRESIDENCY. No. 1261 of 2008.
[346] GN R48 in GG 999 of 1965 as amended by GN R229 of 2004.
[347] 32 of 1944.
[348] GN R1108 in Regulation Gazette 980 of 1968 as amended by GN R 880 GG26601 of 2004.

8. Labour Relations Act[349]

9. Income Tax Act[350]

10. Land Rights Act[351]

11. Land Reform (Labour Tenants) Act.[352]

12. Consumer Affairs (Unfair Business Practices) Act[353]

13. Electoral Act.[354]

14. Competition Act.[355]

15. Divorce Court Amendment Act 1997.[356]

16. Maintenance Act of 1998.[357]

17. Children's Act.[358]

18. Child Care Act[359]

19. Children's Act 2005.[360]

20. Magistrate Courts Amendment Act of 1993.[361]

21. Short Process Court and Mediation in Certain Civil Cases Act[362]

22. Promotion of Equality and Prevention of Unfair Discrimination Act[363]

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[349] 66 of 1995.
[350] Section 83 No. 58 of 1962.
[351] 22 of 1994.
[352] 62 of 1997.
[353] 71 of 1988
[354] 73 of 1998.
[355] 89 of 1998.
[356] Section 10. 65 of 1997.
[357] 23 of 1993 and 99 of 1998.
[358] 33 of 1960.
[359] 74 of 1983.
[360] 38 of 2005.
[361] 120 of 1993.
[362] 103 of 1991.

23. Small Claims Court Act[364]

24. Black Administration Act[365]

25. Competition Tribunal's Act.[366]

26. National Credits Act.[367]

27. Rules for the Conduct of Matters before the National Consumer Tribunal[368]

28. National Waters' Act.[369]

29. Arbitration Act[370]

3.4 The Current Court Structures in South Africa

The Constitution of South Africa vests the judicial authority of the country on the courts.[371] This judicial authority must be exercised prudently and are applied impartially, in the application of the constitution and the law which it is subject to.[372] The decisions of the courts also have binding effect on all persons and organs of state directly related to such decisions.[373] The courts in South Africa are either directly established by the constitution or are created by statutes empowered by the constitution to do so. The Parliament is by the constitution

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[363] 4 of 2000.
[364] 61 of 1984.
[365] 38 of 1927
[366] 1985.
[367] 34 of 2005.
[368] GN 30225 28 of 2007) See http://www.thenct.org.za/mandate
[369] See Schedule 6, 36 of 1998.
[370] 42 of 1965.
[371] Section 165 (1) of the Constitution of South Africa.
[372] *Ibid* s 165 (2).
[373] Section 165 (5).

empowered to 'establish and recognise' any court of superior or inferior jurisdiction at par with the hierarchy of the high court or the magistrate court.[374]

Both the constitution and other statutes established courts of superior and inferior jurisdiction. There are different categories of classification of these courts. They may be classified as courts directly prescribed by the constitution and courts created by other statutes. The second form of classification in a broad sense is classification done on the cadre of the court i. e. courts of superior jurisdiction and courts of inferior jurisdiction. To adopt the later classification, the courts regardless of their creating instrument will be classified between whether they are courts of superior or inferior jurisdiction. The third form of classification is that done along the line of the jurisdiction of the courts. For this category, the classification is done between courts of general jurisdiction and courts of special jurisdiction regardless of the establishing instrument. The first category of classification will be adopted for this research with a further subdivision into courts of superior and inferior jurisdiction for each category. Under courts established by other statutes, apart from the items 'k' and 'l' below, all the others are courts of specialized jurisdiction.

The courts established by the constitution are-

> a. "*the Constitutional Court;*
> b. *the Supreme Court of Appeal;*
> c. *the High Courts, including any high court of appeal that may be established by an act of parliament to hear appeals from high courts;*
> d. *the magistrates' courts;…*"[375]

Other courts established by other statutes are-

a. Labour Court and Labour Appeal Court

b. Special Income Tax Court

[374] Section 166 (e) Constitution of South Africa.
[375] *Ibid* s 166 (a-d).

c. Land Claims Court

d. Commercial Court

e. Special Consumer Court

f. Electoral Court

g. Competition Appeal Court

h. Divorce Court

i. Maintenance Court

j. Children's Court

k. Family Court

l. Short Process Court

m. Equality Court

n. Small Claims Courts

o. Courts of Chiefs and Headsmen

p. Community Courts

q. Child Justice Courts

r. Sexual Offences Courts

s. Special Criminal Courts

3.4.1 Courts Established by the Constitution

3.4.1.1 Courts of High Jurisdiction

3.4.1.1.1 The Constitutional Court

The Constitutional Court of South Africa sits in Johannesburg and is established by the joint provisions of the 1993 Interim Constitution, and the Constitutional Court Complimentary Act,[376] and validated by the current constitution. It is composed of a total of eleven justices consisting of the President and the Deputy President of the constitutional court and nine judges.[377] The appointment of the president, deputy president and judges in the constitutional court is done by the President of South Africa in the manner earlier discussed in chapter two. The criteria for such appointments have been earlier discussed in chapter two.

The Constitutional Court is the highest court of appeal on constitutional matters in South Africa.[378] Its jurisdiction is strictly limited to constitutional matters or issues that are "*directly connected with decisions on constitutional matters*"[379] which "*includes any issue involving the interpretation, protection or enforcement of the Constitution*"[380] It exercises original and exclusive jurisdiction with respect to the following constitutional matters-

a. "*…disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;*
b. *…the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;*
c. *… applications envisaged in section 80 or 122;*
d. *…the constitutionality of any amendment to the Constitution;*
e. *…that Parliament or the President has failed to fulfill a constitutional obligation; or*

[376] 13, 1995.
[377] Section 167 (1) and s. 13 of Act 34 of 2001. See also Geldenhuys B A *et al Criminal Procedure Handbook* (2011) 31.
[378] *Ibid* s 167 (3) (a).
[379] *Ibid* s 167 (3) (b).
[380] *Ibid* s 167 (8).

f. *…certify a provincial constitution in terms of section 144.*"[381]

All orders of invalidity made by all courts of superior jurisdiction must be confirmed by the Constitutional Court before they can be valid. This court also has the sole responsibility for the final determination of the constitutionality of the "*conduct of the President*" and all parliamentary and provincial acts.[382] Though the Constitution is silent on the hierarchy through which an appeal can be made to the Constitutional Court, it provides that in exceptional circumstances, to avoid the occurrence of injustice, a person may directly institute an action in the Constitutional Court or appeal directly to the Constitutional Court from any court on constitutional matters with the leave of the court,[383] otherwise, such matters, must be commenced at the High Court.[384] The procedures applicable to the court are prescribed by the Rules of Constitutional Court.[385] The quorum for the determination of any matter before the court is eight Judges.[386]

3.4.1.1.2 Supreme Court of Appeal

The Supreme Court of Appeal sits in Bloemfontein and was established by the South Africa Act, 1909 and the Supreme Court Act, and confirmed by the constitution.[387] Its decisions have binding effect all over South Africa.[388] The constitution provides for a composition of a President, a Deputy President and other judges whose number is to be determined by an act of parliament.[389] The appointment of the President, Deputy President and other judges of this court is

[381] *Ibid* s 167 (4) (a-f).
[382] *Ibid* s 167 (4).
[383] *Ibid* s 167 (7) (a&b).
[384] 18 Rules of the Constitutional Court. See Theophilopoulos C *et al Fundamental Principles of Civil Procedure* (2012) *9.*
[385] GN R 1675 in GG25726 of 2003. See Theophilopoulos C 8 & 9.
[386] Section 167 (2) 1996 constitution of South Africa.
[387] *Ibid* s 168, 1996. See Theophilopoulos C 10
[388] *Ibid*.
[389] *Ibid* s 168 (1) and 12 of Act No. **34** of 2001.

done by the President of South Africa in the manner discussed earlier in chapter two. The criteria for such appointment have also been discussed in chapter two.

The Supreme Court of Appeal which was formerly the apex court in South Africa[390] is an appellate court with no original jurisdiction.[391] It is still the highest court of appeal on all matters, except matters with constitutional questions.[392] This court also hears appeal on constitutional questions but a further appeal may proceed on its decision to the Constitutional Court which is the final court of appeal on constitutional matters.[393] The Supreme Court of Appeal hears appeals from the high courts and determines issues associated with appeals and other matters referred to it for determination by an act of parliament.[394] The Constitution provides that an act of parliament will determine the quorum for the sitting of the court. The Supreme Court Act provides for a quorum of five judges and the decision of the court is the majority decision by the quorum of judges.[395] The procedure of the court is as prescribed by the Rules of the Supreme Court of Appeal published in the Government Gazette.[396]

3.4.1.1.3 High Courts

The High Courts replaced the former supreme courts of the former colonies in the Union of South Africa,[397] which were originally established by the South Africa Act of 1909 and confirmed by the Supreme Court Act 1959.[398] The constitution provides for the High Courts with general jurisdiction and for the establishment of another category of High Courts with appellate jurisdiction by

[390] Theophilopoulos C xli.
[391] *Ibid* s 168 (3)
[392] Geldenhuys B A *et al* 32.
[393] *Ibid*.
[394] *Ibid* s 168 (3) (a-c).
[395] *Ibid* s 12 Supreme Court Act. See Theophilopoulos C *10*.
[396] *Ibid*, GN R 1523 in GG 19507 of 27 1998.
[397] Renaming of High Court Act GG REPUBLIC OF SOUTH AFRICA. Vol. 521 Cape Town of 2008. No. 31636. THE PRESIDENCY. No. 1261 of 2008.
[398] 59 of 1959.

an act of parliament.[399] Currently, there are six provincial divisions and three local divisions of the High Courts together with the High Courts in the former independent TBVC states with only territorial jurisdiction.[400] The Superior Courts Bill approved by Cabinet in December 2010 was presented before the Parliament in June 2011 to establish a single high court for the entire country with divisions in all the provinces.[401] Each division of the high court consists of a Judge President and other judges in such number as may be appointed by the President of South Africa.[402] The appointment of the Judge President and other judges of the high court as well as the criteria for such appointments has been discussed in chapter two. The High Courts sit as courts of first instance as well as appellate courts. They hear appeals from courts of lower jurisdiction and sometimes from the decision of a judge of the High Court.[403] The quorum of the High Court is one.[404] When sitting over an appeal, from the decision of a lower court, two judges will form a quorum.

The High Court has both civil and criminal jurisdiction. The jurisdiction of the High Courts as conferred by the Constitution covers all matters including matters with constitutional questions except those in the exclusive preserve of the Constitutional Court and such matters that are assigned to other courts of similar status with the High Courts, by an act of Parliament.[405] Appeal lies from the decision of the High Court to the Supreme Court of Appeal on constitutional matters and other matters. In certain instances to avoid the occasion of injustice, appeal may lie from the decision of the High Court on constitutional matters

[399] Section 166 (c).
[400] Transkei, Bophuthatswana, Venda, and Ciskei. See Geldenhuys B A *et al* 33.
[401] http://www.sabinetlaw.co.za/justice-and-constitution/articles/superior-courts-bill-tabled-parliament (accessed 9th December 2011).
[402] Theophilopoulos C *12.*
[403] *Ibid*. Juta's Statutes of South Africa 2009.
[404] *Ibid*.
[405] Section 169 1996 Constitution South Africa.

straight to the Constitutional Court with the leave of the Constitutional Court.[406] Again in certain instances, appeal may lie to the appellate cadre of the high court sitting with three judges on decisions of a single judge of the High Court on point of fact and in circumstances where a single judge of the court refers a matter with an important question of law to a full court of three judges.[407] Where more than one judge sits, the majority decision will be the judgment of the court. Where no majority decision is achieved, the trial will have to commence *denovo* before a newly appointed court. The Judge President or the most senior judge in a division where he (she) seems necessary may transfer an ongoing, matter to commence *denovo* before more judges.[408] The procedures of the high courts are prescribed by the Uniform Rules of Court.[409]

3.4.1.2 Courts of Lower Jurisdiction

Section 170 of the Constitution provides for the establishment of under this cadre, magistrate courts and other courts. The other courts of lower jurisdiction referred to in this section will be discussed under lower courts established by an act of parliament.[410] The Constitution prohibits any court of lower jurisdiction to the high court from entertaining any matter relating to the constitutionality of legislation and the conduct of the president.

3.4.1.2.1. Magistrate Court

This court is established by the Magistrate Court Act.[411] Appeal from the magistrate court goes to the high court.[412] The magistrate courts are spread across regional and district divisions. The district divisions alone are almost five hundred in number and have a geographical spread across all provinces to cater

[406] *Ibid* s 167 (6) & (7).
[407] Theophilopoulos C *et al loc cit.*
[408] *Ibid*.
[409] GN R48 in GG 999 of 1965 as amended by GN R229 of 2004.
[410] *Ibid* s 166 (e).
[411] Magistrate Court Act 32 of 1944 as amended.
[412] Section 1 (*b*) of 66 of 1998.

for the people.[413] Where a district has at least ten magistrates, a chief magistrate will be appointed for the district.[414]

Magistrate courts have territorial jurisdiction.[415] Magistrate courts have both criminal and civil jurisdiction with limited powers. The powers of regional magistrates are higher than that of district magistrates. The regional magistrates are empowered to hear civil matters involving amounts less than R100,000 and criminal matters with fines up to the tune of R200,000 or ten years imprisonment except the offence of treason.[416] The civil jurisdiction of magistrate courts does not extend to matrimonial causes, distribution of properties under wills and a few other causes.[417] A district magistrate may hear criminal matters not exceeding R20,000 in fine or one year imprisonment.[418] There are also magistrate courts that seat from time to time on circuit.[419] The procedures applicable in these courts are contained in the Magistrate Court Rules.[420] Magistrates may be assisted by assessors.[421] The magistrate court hears appeals from the courts of chiefs and headsmen.[422]

3.4.2 Courts Established by Statutes

3.4.2.1 Courts of Superior Jurisdiction

3.4.2.1.1 Labour Court and Labour Appeal Court

While the Labour Court is a court of superior jurisdiction at par with the high court, the Labour Appeal Court also a court of superior jurisdiction, is at par by

[413] See s 2 Magistrate Court Act and Theophilopoulos C *et al loc cit.*
[414] *Ibid*.
[415] Section 28 Magistrate Court Act.
[416] *Ibid* s 89.
[417] See chapter vi of the Magistrate Court Act.
[418] *Ibid*.
[419] Geldenhuys B A *et al* (2011) 33 &34.
[420] GN R1108 in Regulation Gazette 980 of 1968 as amended by GN R 880 GG26601 of 2004. See Theophilopoulos C *et al* 2 & 13.
[421] Section 93 Magistrate Court Act.
[422] Section 29 (a) Magistrate Courts Act.

virtue of its functions, with the Supreme Court of Appeal.[423] These courts were established by the Labour Relations Act[424] with exclusive jurisdiction over labour matters including labour matters related to the contents of the Labour Relations Act[425] with constitutional questions. The labour court sits at Johannesburg with jurisdiction over the entire country. The court has a judge president, a deputy judge president and other judges. The appointment of the judges is as discussed in chapter two. The Labour Court is a court of first instance, and its decisions are subject to appeal to the Labour Appeal Court.[426] When sitting on appeal, it is composed of the Judge President, Deputy Judge President and three other high court judges.[427] The Labour Court of Appeal is the final court of appeal on all labour related issues[428] except issues with constitutional questions which will go from this court to the Constitutional Court. This however appears to contradict the constitutional provision which sets the supreme court of appeal as the final court of appeal on all matters except constitutional matters without any distinction for labour matters. The Labour Court exercises discretion to decide whether or not to hear a dispute that no attempt had been made for reconciliation.[429] Proceedings at this court are regulated by special labour rules.[430] Pertinent to note is the proposal in the Superior Court Bill to merge the Labour Court as a branch of the high court and the Labour Appeal Court as a branch of the Supreme Court of Appeal.[431]

[423] Theophilopoulos C *et al* 17
[424] 66 1995.
[425] These include matters covered by Basic Conditions of Employment Act 75 of 1977; Compensation for Occupational Injuries and Diseases Act 130 of 1993; Employment Equity Act 55 of 1998; Sills Development Act 97 1998; Unemployment Insurance Act 30 of 1966 etc.
[426] Section 167 Labour Relations Act.
[427] Klyen D G *Beginners Guide for Law Students* (2002) 203.
[428] Section 167 Labour Relations Act.
[429] Section 157 (4)(a).
[430] Theophilopoulos C *et al* 17.
[431] *Ibid.*

3.4.2.1.2 Special Income Tax Court

This court was established by virtue of the Income Tax Act[432] to hear appeals from the decision of the commissioner of the South African revenue service.[433] The court consists of a high court judge, an accountant of not less than ten years standing and a representative of the business community constituted by the President.[434]

3.4.2.1.3 Land Claims Court

This court is established by virtue of section 22 of the Land Rights Act[435] to hear and determine cases involving the restitution of lands or compensation of acquired or appropriated land to their respective owners.[436] It is situated in Ranburg but may convene in any part of the country for the convenience of the claimants.[437] This court determines its own rules and it proceedings are informal.[438] It has exclusive jurisdiction on issues related to Land Reform (Labour Tenants) Act.[439] It was established in 1996 and received applications for claims till 1998.[440] It is composed of a court president and other judges to be appointed by the President of South Africa.[441] Currently, some judges of the high court are assigned to the court as well as acting judges appointed for this purpose to hear outstanding cases not dealt with by the original judges who were appointed for five years to hear such cases.[442] The Commission on Restitution of Land Rights

[432] Section 83 Income Tax Act 58 of 1962.
[433] Ibid.
[434] Theophilopoulos C *et al* 18.
[435] 22 of 1994.
[436] See the Preamble to the Land Rights Act.
[437] *Ibid* s 22 (2) Ibid.
[438] *Ibid* s 24.
[439] 62 of 1997.
[440] Section 2 (1) (b). See also Beginner's Guide for Law Students 203-204.
[441] The qualification for judges of this court are as follows- (a) is a South African citizen;(b) is a fit and proper person to be a judge of the Court; and (c) (i) is a judge of the Supreme Court or is qualified to be admitted as an advocate or attorney and has, for a cumulative period of at least ten years, practised as an advocate or an attorney or lectured in law at a university; or (ii) by reason of his or her training and experience, has expertise in the fields of law and land matters relevant to the application of this Act and the law of the Republic.
[442] Section 22 (5) Land Rights Act.

established by section 4 (1) of the Land Rights Act may refer matters to this court for determination.

3.4.2.1.4 Commercial Court

The establishment of commercial courts appears to be as a result of the joint efforts of the Business Against Crime, South African Banks Risks Information Centre and the particular province to combat commercial crimes speedily through trials, conviction and appropriate sentencing.[443] This appears to be successful with the period of the 'case processing time' for commercial crimes being reduced from about 30 months in 1999 to about 14months.[444] As at 2006, there were established commercial courts in Port Elizabeth, Durban, Johannesburg, Pretoria and some to come. This court is manned by specialist in the field and the procedure adopted is informal. As at 2nd November, 2011, the latest case updated in this court is the case of *S v Maddock incorporated and Another*[445]

3.4.2.1.5 Special Consumer Court

This court is established by the Consumer Affairs (Unfair Business Practices) Act[446] which empowers the President to establish an ad hoc court on a permanent basis for the determination of matters resulting from "*business practices harmful to the public*" in order to "*promote and advance the social and economic welfare of consumers in South Africa*"'[447] It is a court of superior jurisdiction at par with the high court and manned by a president who is a high

[443] http://www.southafrica.info/business/economy/development/bac.htm (accessed on 31st December 2011).
[444] *Ibid.*
[445] (2008) ZACOMMC 1 (1 February, 2008). See http://www.saflii.org/za/cases/ZACOMMC/ (accessed on 31st December, 2011).
[446] 71 of 1988
[447] Section 3 (1) of the Act. See http://www.cliffedekkerhofmeyr.com/news/files/CDH-Consumer-Protection-Act-Winter-2009.pdf (accessed 31st December 2011).

court judge and two other persons knowledgeable in relevant consumer subjects.[448]

3.4.2.1.6 Electoral Court

This court, established by the Electoral Act of South Africa serves as an appeal court and is vest with the power of review.[449] It reviews decisions of the electoral commission with regard to election matters and may hear appeals from the decision of the said commission.[450] It is a court of superior jurisdiction at par with the status of a high court and is manned by a judge of the Supreme Court of Appeal, two judges of the high court and two members of South African nationality.[451]

3.4.2.1.7 Competition Appeal Court

This is a court of superior jurisdiction established by the Competition Act with power to review and hear appeals from the decisions of the commission and the Competition Tribunal which hears matters within the purview of the Competition Commission's responsibilities which are with respect to restrictive practices and mergers.[452] This court is constituted by three judges of the high court who are appointed by the President.[453]

3.4.2.2 Courts of lower Jurisdiction

3.4.2.2.1 Divorce Court

This court has been in existence since 1929 by virtue of the Native Administration Act[454] and its existence was confirmed by the Divorce Court

[448] Theophilopoulos C *et al* 19.
[449] 73 of 1998. Section 18 Electoral Commission Act.
[450] Section 96 Electoral Act.
[451] Theophilopoulos C *et al* 18 & 19.
[452] 89 of 1998. See s 36
[453] *Ibid* s 36 (2) (a & b).
[454] Theophilopoulos C *et al* 19.

Amendment Act 1997.[455] Though originally established for blacks, its jurisdiction is now broadened to all people groups in South Africa.[456] It has three geographical jurisdictions and goes on circuit to other parts of the country. It is difficult to classify this court as a court of lower jurisdiction because its jurisdiction on divorce and related matters are concurrent with that of the high court.[457] It is presided by an officer with similar qualification to a regional magistrate and sits in magistrate court buildings.[458]

3.4.2.2.2 Maintenance Court

Each magistrate court also serves as maintenance court in its geographical jurisdiction.[459] The maintenance court was established to ensure the welfare of persons who should legally be maintained by others e.g. children to be maintained by their parents.[460] It was established by the Maintenance Act of 1963 and confirmed by the Maintenance Act of 1998.[461]

3.4.2.2.3 Children's Court

This court was established in 1960[462] by the Children's Act and confirmed in 1983 by the Child Care Act[463] and subsequently by the Children's Act 2005.[464] This court is manned by a commissioner of child welfare who is a district magistrate.[465] Each magistrate court serves as a children's court for the particular district.[466] The jurisdiction of this court is with respect to child welfare in respect of adoption, guardianship etc as contained in section 45 (1) of the Act.

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[455] Section 10. 65 of 1997. This Act was renamed.
[456] Boraine A *et al* 19.
[457] *Ibid*.
[458] *Ibid*.
[459] Section 3 Maintenance Act.
[460] See the preamble of the Maintenance Act
[461] 23 1993 and section 30 99 of 1998.
[462] 33 of 1960.
[463] 74 of 1983.
[464] 38 of 2005.
[465] Theophilopoulos C *et al* 17 &18.
[466] Section 42 of Children's Act.

3.4.2.2.4 Family Court

This court is established by virtue of the Magistrate Courts Amendment Act of 1993.[467] This is a court of lower jurisdiction with power to entertain family matters like divorce cases.[468] The implication of this is that the high court no longer has exclusive jurisdiction to entertain divorce matters.[469] The advantage of instituting a matter in a family court is that it is speedier and more cost effective for litigants whose applications usually are unopposed.[470]

3.4.2.2.5 Short Process Court

This is a court of lower jurisdiction established by Short Process Court and Mediation in Certain Civil Cases Act[471] with jurisdiction only in civil matters contained in the Act which defied resolution by mediation.[472] It is a special court established for speedy and less expensive litigation.[473] The presiding officer is called an adjudicator and is empowered to on the request of the litigants adopt any methods including the avoidance of the rules of evidence that would ensure speedy and inexpensive litigation.[474] The adjudicator has similar powers with the magistrate and the decisions of the court are not appealable but may be reviewed.[475] The minister is empowered to make rules for the court.[476]

3.4.2.2.6 Equality Court

This court is established by the Promotion of Equality and Prevention of Unfair Discrimination Act[477] with power to hear matters hinged on the violation of the

[467] 120 of 1993.
[468] *Ibid.* Klyen D G 204.
[469] *Ibid.*
[470] *Ibid.*
[471] 103 of 1991.
[472] Section 9 of the Act.
[473] Klyen D G 205.
[474] Section 6 of the Act. See also Klyen D G 205.
[475] *Ibid.*
[476] Section 13 of the Act.
[477] 4 of 2000.

rights of a person to equal treatment based on the rights of persons contained in the Constitution.[478] Each high court and magistrate court is an equality court and is usually trained in this regard before it can sit as such a court.[479] The procedure for instituting an action in an equality court is simplified for the litigant with the court clerk providing necessary assistance.[480] The nature of the hearing in this court is inquisitorial.[481]

3.4.2.2.7 Small Claims Courts

This appears to be similar to the short process court but there are clear distinctions between the two. This court is a specialized court established by the Small Claims Court Act[482] with jurisdiction in civil matters involving small claims not exceeding R12,000 in commercial transaction.[483] The presiding officer is a commissioner and the procedures are informal inexpensive and speedier.[484] The court sits after working hours.[485] Legal representations are not allowed.[486] Litigants present their cases themselves and only natural persons can be plaintiffs in this court.[487] This court was created to make litigation accessible to those who cannot afford to institute actions in the high court and magistrate court.[488] Rules of evidence are not applicable and it is not a court of record.[489] The procedure of adjudication is inquisitorial in nature.[490]

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[478] See the preamble to the Act and ss 6-12 of the Act.
[479] Section 16 (1)(a)(b). See also Theophilopoulos C *et al* 19.
[480] Section 17 (1) of the Act.
[481] Theophilopoulos C *et al ibid.*
[482] 61 of 1984.
[483] http://www.justice.gov.za/scc/scc.htm (accessed on 16th January 2012).
[484] http://smallclaimssa.co.za/ (accessed 16th January 2012).
[485] Klyen D G.
[486] Pete S 37.
[487] 'Small Claims Court' http://www.westerncape.gov.za/eng/directories/services/11458/17579 (accessed 16th January 2012).
[488] *Ibid* http://smallclaimssa.co.za/ .
[489] Theophilopoulos C *et al*
[490] *Ibid* 15.

3.4.2.2.8 Courts of Chiefs and Headsmen

The operation of this court is by virtue of the Black Administration Act[491] and the Constitution.[492] This court exists in some black communities where the chiefs and headsmen who are ordinarily knowledgeable in the customs and traditions of the indigenous people exercise certain judicial power in civil and criminal matters often involving mild offences committed within the communities and disputes arising from the customs applicable in that community and applicable legislation.[493] Rules of evidence do not apply, proceedings are informal, and the decisions of the chiefs and headsmen are appealable to the magistrate court.[494]

3.4.2.2.9 Community Courts

This is quite distinct from the court of chiefs and headsmen. They exercise criminal jurisdiction similar with magistrate courts but are restricted to only non serious crimes like shop lifting, traffic offences, drunkenness etc.[495] The court adopts a system of restorative justice.[496]

3.4.2.2.10 Child Justice Courts

The child justice system tries to secure and preserve the child guilty of a crime by adopting measures suitable to the positive restoration of the child back to the community as a useful member of the community.[497] The method adopted by this court is inquisitorial.[498] After a child is apprehended and it is confirmed that a formal trial in a formal court be avoided, the child will be referred to this court.

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[491] Section 12, 38 of 1927.
[492] Item 166 (e).
[493] Section 2 (7) Black's Administration Act.
[494] [494] Theophilopoulos C *et al* 13.
[495] Website: www.justice.gov.za/EQCact/eqc_main.html (accessed 3rd February 2011).
[496] *Ibid*. The Western Cape has three community courts in Cape Town, Gugulethu and Mitchell's Plain.
[497] *Ibid*.
[498] *Ibid*.

Usually, inquiries are made of the child's participation in the crime by adopting an informal means and were the child confesses, sentencing is made.[499]

3.4.2.2.11 Sexual Offences Courts

As a measure to protect sexual offence victims who sometimes are children and are already by the act committed on them vulnerable, these special courts were set up with a geographical spread across the country to enable the victims have easy access to report such offences.[500] The Court is arranged in such a way to provide a comfortable environment during trial by putting the victims in a comfortable room[501] from where they can testify and to avoid contact with the offender.[502]

3.4.2.2.12 Special Criminal Courts

This Court is a mobile court designed to make justice more accessible to the people. The jurisdiction of the court is with respect to crimes that are of a public nature like public unrest, public violence, intimidation etc.[503] Evidence constituting such public crimes may be referred to this court from the commission of inquiry regarding the prevention of public violence and intimidation.

3.4.3 Tribunals

3.4.3.1 Competition Tribunal

This is established by the Competition Tribunal's Act.[504] The tribunal exercises jurisdiction over large mergers, confirms agreement made by the commission

[499] *Ibid.*
[500] *Ibid.*
[501] Sometimes arranged with toys, television, etc.
[502] *Ibid.*
[503] The Special Criminal Court (Amendment) Act 1958 was cited as an Apartheid legislation which established this court to exercise jurisdiction over treasons and violations of the provisions of Communism Act. See http://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01892.htm (accessed 16th January 2012).
[504] 1985.

and a party, determines matters referred to it by the commission on prohibited practices and hears matters brought by private persons.[505] Tribunal members are appointed by the President for a term of five years and are usually knowledgeable in the field of law and economics.[506] Generally, three tribunal members form a quorum for hearing except in simple procedural issues.[507] Hearings are done in public and the decision of the tribunal is subject to appeal to the competition court.[508]

3.4.3.2 National Consumer Tribunal

This was established by virtue of the National Credits Act.[509] It has a similar status with the high court.[510] Different persons like 'consumers, credit providers, credit bureaux, debt counselors and the national credit regulator including applications' may institute matters before the tribunal.[511] The procedure adopted is in line with the Rules for the Conduct of Matters before the National Consumer Tribunal.[512] This tribunal also reviews decisions of the National Credit Regulator.[513]

3.4.3.3 Rental Housing Tribunals

Each Province is meant to have this tribunal which is on a similar status with the magistrate court to hear matters relating to all types of illegal and unjust transactions between landlords and tenants.[514]

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[505] Competition Tribunal South Africa http://www.comptrib.co.za/about (accessed 1sth January 2012)., See the recent prohibition of the merger between Pioneer Hi Bred and Pannar Merger Seed Merger. http://www.gmwatch.org/latest-listing/1-news-items/13451-south-african-tribunal-rejects-dupont-deal (accessed 1st January 2012).
[506] *Ibid.*
[507] *Ibid.*
[508] *Ibid.*
[509] 34 of 2005.
[510] http://www.thenct.org.za/mandate (accessed 1st January 2012).
[511] http://www.thenct.org.za/ (accessed 1st January 2012).
[512] GN 30225 28 August, 2007) See http://www.thenct.org.za/mandate ibid.
[513] *Ibid.*
[514] Examples are the Gauteng Rental Housing Tribunal and Western Cape Rental Housing Tribunal see http://www.southafrica.info/services/rights/rights.htm (accessed 1st January 2012).

3.4.3.4 Companies Tribunals

This is established by the Companies' Act to provide easy access and speedy proceedings for any person who has a grievance, to institute an application.[515] It is free and planed to be established in all major cities.[516]

3.4.3..5 Water Tribunals

This was established by the National Waters' Act.[517] It entertains matters related to disputes with respect to administrative decisions affecting the distribution and use of water.[518]

3.4.4 Other Methods of Resolution of Disputes outside the Court Structures

3.4.4.1 Truth and Reconciliation Commission

The Truth and Reconciliation Commission (TRC) was set up by virtue of The Promotion of National Unity and Reconciliation Act.[519] It is not a court. It is merely a medium through which crimes committed with political connotations under the apartheid era are appropriately addressed.[520] This commission functioned through committees. They are the Amnesty Committee, the Human Rights Violation Committee and the Reparation and Rehabilitation Committee.[521] The identified victims of such crimes are referred to the Reparation Committee who determines the form of compensation to be extended to them.[522] The Human Rights Violation committee determines when the acts committed constitute infringements of human rights and the Amnesty Committee determines from the stories related whether or not amnesty should be extended to the perpetrators of

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[515] http://www.moorestephens.co.za/images/uploads/Article_1_-_Mediation_as_the_new_trend_MS.pdf (accessed 1st January 2012).
[516] *Ibid*.
[517] See Schedule 6 36 of 1998.
[518] See Preamble to Water Act.
[519] 34 of 1995. See http://www.justice.gov.za/trc/
[520] Website: and http://www.westerncape.gov.za/eng/pubs/public_info/C/32303 www.justice.gov.za/scc/scc.htm 15/02/2011 (accessed 16th January 2012).
[521] *Ibid*.
[522] *Ibid*.

these crimes who must in order to be considered for amnesty, relate the true facts of what really transpired.[523] Where amnesty is not granted, the perpetrators will be tried formally in a court of law.[524]

3.4.4.2 Alternative Dispute Resolution Methods

Not all disputes are resolved through courts in South Africa.[525] There are other alternative means through which disputes may be resolved with effective outcomes. These other means are negotiation, mediation and arbitration. In certain instances, parties in a dispute may choose to first exploit these measures before resorting to litigation.[526] The advantages of these alternatives are that they are faster, less expensive and less formal, and also have the possibility of fostering a continuing relationship with the parties.[527] Negotiation is simply a means by which the parties discuss the dispute between them and try to arrive at a solution acceptable to them.[528] Where negotiation fails, the parties may choose to invite a third party who will enable them negotiate better by acting as a go between and simplifying the issues in the dispute to enable them reach an acceptable solution.[529] This is called mediation. Arbitration though less formal that litigation, is when the parties in a dispute appoint a third party who is usually an expert in the subject matter of the dispute, to resolve the dispute by listening to both sides of the story and arriving at a decision which is not appealable in a court of law.[530] The parties may choose to have such decision registered as a decision of the court. The implication of this is that it becomes enforceable by the court.

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[523] *Ibid.*
[524] *Ibid.*
[525] http://www.saflii.org/za/other/zalc/ip/8/8-CHAPTER-2.html (accessed 16th January 2012).
[526] *Ibid.*
[527] *Ibid.*
[528] http://www.simplylinks.co.za/article2565_view.htm 1(accessed 16th January 2012).
[529] *Ibid.*
[530] *Ibid.*

In South Africa, the Arbitration Act[531]regulates arbitration agreements in writing. The Commission for conciliation, Mediation and Arbitration was established by the Labour Relations Act[532] for the resolution of labour disputes through first mediation and then arbitration where necessary.[533] There are also organizations specialized in ADR with specific areas of focus. The Arbitration Foundation of South Africa focuses on commercial and international arbitration and the Arbitration, Mediation Service of South Africa focuses on construction arbitration.[534]

3.5 Conclusion

To adequately appreciate the current court structure in South, the place of understanding the legal system of the country cannot be down played. The hybrid legal system of combining the principles of the Roman Dutch law and the influences of the English Common Law no doubt has had a tremendous influence on the nature of its court systems and more particularly, court structures. Of immense influence is also its experience of racial separatism which has propelled the adoption and reorganization of its court structures and also the creation of certain specialized courts to carter for specific needs like the equality court and the land claims court. Other specialized courts were set up to achieve a speedier, cost effective and a specialization for the enhancement of justice delivery for the people. The narratives on the courts were categorized under the superior and lowers courts established by the constitution, and the superior and inferior courts established by other statutes which dealt with the specialized courts. Other methods of adjudication outside the regular courts like tribunals, alternative dispute resolution methods and the truth and reconciliation

[531] 42 of 1965.
[532] 66 of 1995.
[533] *Ibid*.
[534] http://www.arbitration.co.za/pages/default.aspx (accessed on 16th January 2012).

commission were summarily mentioned to give a general picture of the different methods of adjudication in the country.

Chapter Four

4.1 Brief Narration of Nigerian Legal System

Nigeria is a sovereign state of over 140,000,000[535] population made up of diverse peoples groups with a heritage of diverse cultures and languages. By virtue of its colonial history, Nigeria adopted the Common Law system and operates a dual system made up of English laws and customary laws.[536]

The British consulate was established for the Bights of Benin and Biafra in 1849 and by 1853, Lagos was made a separate consulate.[537] Prior to 1849, there were presence of British nationals and dealings between the British government and the traditional chiefs of Nigerian territories evidenced by the various treaties entered between 1830 and 1870.[538] With the cession of Lagos to her Majesty Queen of England in 1861, British law formally became applicable in Nigeria.[539] This birthed the establishment of institutions of government including a court system for Nigeria which was practically the extension of the jurisdiction of English courts.[540] The development and current structure of these courts will be better understood against the background understanding of the Nigerian legal system and its sources of law[541] which are-

1. The received English law by virtue of the Statute of General Application which makes all English laws applicable in England as at 1st January 1900 applicable in Nigeria. A number of Nigerian legislations now apply in

[535] Data from World Bank World Development Indicators stated the population in Nigeria to be 158.423 million as at 2010. See http://data.worldbank.org/ (accessed on 17th November 2011). See also the website of National Population Commission of Nigeria http://www.population.gov.ng/index.php?option=com_content&view=article&id=89 (accessed on 18th November 2011).
[536] The sharia law applicable in some parts of the north are regarded as part of customary laws since it subsist as the way of life of the people to whom it applies.
[537] Land areas that eventually made up Nigeria. Nwabueze, B. O. *A Constitutional History of Nigeria* (1982) 5.
[538] *Ibid*.
[539] Obilade A O *The Nigerian Legal System* (1979) 4.
[540] Nwabueze B O 7.
[541] Walker P *Courts of Law a Guide to their History and Working (*1970) 9.

place of these statutes which currently, only apply in areas where there is no indigenous law.

2. Nigerian Legislation: These are Nigerian laws made through the organs authorized to make laws. They include the constitution, laws made by the national assembly, various houses of assembly, and even bye-laws made by the local governments.
3. Case Laws: This is a major source of law in Nigeria. Judges in Nigeria interpret the law through concrete cases brought before them. The doctrine of judicial precedents *stare decisis* operates in Nigeria and decisions of the courts are binding on all courts of subordinate jurisdiction therefore the decision of the Supreme Court takes ultimate authority.
4. Customary laws: These are made up of the customs of the peoples which through usage over a period of time have become accepted as standard norms. These customs are upheld by the courts once they are sufficiently proved to be the practice of the people and have passed the repugnancy test of not being contrary to equity, good conscience and natural justice. These customs must also not in any way be incompatible with any law in force, and must not be contrary to public policy.[542] Sharia is regarded as the customs of the muslim people to whom it applies.
5. Common law: This is made up of unwritten codes accepted over centuries of general usage, and eventually incepted in statute law,[543] and the doctrines of Equity.

Unlike in England, the legal profession in Nigeria is fused. Any one admitted to practice as a legal practitioner in Nigeria is entitled to practice both as a barrister and a solicitor. This is reflected in the content of the training received by bar aspirants who wish to practice in Nigeria. Legal education is on two levels. The

[542] Asein J O *Introduction to Nigerian Legal System* (1998) 127-138.
[543] Walker P 9.

first is obtaining an LL.B. degree from a university whose course content is approved by the Council of Legal Education and the National Universities Commission. The second level is a successful completion of a one year vocational training at the Nigeria Law School which includes a form of pupilage at the courts and law firms for about three months.

Nigeria departed from its colonial heritage and adopted a federal system of government[544] with subsidiary federating units called states each of which has subdivisions called local government areas. The Federal Capital Territory is in Abuja[545] and it is directly administered by organs of the federal government. There are thirty-six states of the federation[546] with collectively seven hundred and sixty-eight local government areas.[547]

There are three organs of government in Nigeria made up of the executive, legislature and the judiciary.[548] At the federal level, the executive powers lie with the President.[549] The National Assembly makes laws for the federation to the extent permitted by the Constitution.[550] It is bicameral in nature. It consists of the lower house called the House of Representatives and the upper house called the Senate.[551] The Chief Justice of the Supreme Court is at the apex of the judiciary.[552] At the state level is the governor of each state who is the chief executive officer[553] with the various houses of assembly of each state as the legislature empowered to legislate within the confines of constitutional limits.[554] The high court of each

[544] Section 2 (2) of the Constitution.
[545] *Ibid* s 2 (2) (4).
[546] *Ibid* s 3 (1).
[547] *Ibid* s 3 (6).
[548] Sections 4, 5 and 6 of the Constitution.
[549] Section 5 (1) (a&b).
[550] Section 4 (1) (2) (3) (4) (a&b).
[551] Section 4 (1).
[552] Section 231 (1).
[553] Section 5 (2) (a&b).
[554] Section 4 95) (6) (7).

state is headed by a chief judge.[555] At the local government level is the local government chairman as the chief executive. The "*structure, composition, finance and functions of local government councils*" are determined by the respective States.[556]

Nigeria operates a system of constitutional democracy and adopts a written constitution which is a diversion from its colonial heritage.[557] The Nigerian democracy through its constitutionalism sought to imbibe the concept of social justice by creating a system whereby both individual and social justices are given a good ground to thrive.[558] This it does by ensuring that adjudicatory powers are vested in a separate body that can compel compliance by government institutions of the provisions of the laws of the land however partial or incomplete the attainment of social justice may have been.[559] Hence, the judiciary was separated from the executive and legislature[560] in both structure and personnel in order to safeguard the liberty of the citizens from arbitrariness of power.[561] Though the judges in Nigeria interpret the law, the courts in Nigeria have no power to on their own motion declare as unconstitutional, any executive or legislation act.[562] They can only do so in concrete cases properly brought before them when conflicts arise in such cases in which they have to determine the constitutionality of such actions.[563] The practice in Nigeria is akin to the system of judicial review of executive and legislative action consolidated in the United States through the case of *Mabury v Madison*[564] though the distinction between the two systems in this respect is that while in the United States the

[555] Section 270 (2).
[556] Section 7 (1).
[557] Britain has an unwritten Constitution.
[558] *Ibid* 137.
[559] *Ibid* 139.
[560] Sections 4, 5 and 6 1999 Constitution.
[561] Nwabueze B O 189-190.
[562] *Ibi*d 199.
[563] *Ibid* 200.
[564] 1 Cranch 137 (1803).

constitution does not expressly bestow this power on the Supreme Court, in Nigeria the case is the reverse.[565] Nigeria adopts the adversarial/accusatorial system. Its judges are established to be impartial arbiters who would not descend into the arena of conflicts but allow prosecutors and defense counsel to prove their cases before them.[566]

4.2 History and Evolution of Court Structures in Nigeria

Long before the advent of colonial rule in Nigeria, the indigenous communities in Nigeria had a form of adjudicatory mechanism as a long established practice in which persons by virtue of their occupation of traditional stools or as elders served as arbiters.[567]

Decades before the formal adoption of English law in Nigeria, British presence in the colonies had been entrenched due to commercial transactions carried out with the locals, expeditions and missionary activities.[568] Interactions between British subjects and the locals definitely brought about disputes which required a form of adjudicatory mechanism outside the customary practice. Thus the setting up of the English-type courts out of necessity for the interest of commerce, and as a means to acquire and entrench British influence.[569] The English–type courts which adopted the English judicial procedure had operated in Nigeria (before English laws became applicable in Nigeria) with authority over the locals and British subjects.[570] The Niger delta areas witnessed the earliest establishments of

[565] Section 6 (6) (a&b) 1999 Constitution.
[566] *Ibid* 7.
[567] Adewoye O *The Legal Profession in Nigeria 1865 – 1962* (1977) 1-8. Though the aims of these adjudicators was to achieve justice, social equilibrium, peace and reconciliation of the disputants, there were certain trial ordeals which will fail the repugnancy test to which all customary laws are put through in Nigeria.
[568] Mamman T *The Law and Politics of Constitution Making in Nigeria. 1862 – 1989: Issues, Interests and Compromises* (1998) 47& 48.
[569] Adewoye O *The Judicial System in Southern Nigeria 1854 – 1954* (1977) 33-34.
[570] *Ibid* 31.

the English-type courts in Nigeria in 1854[571] and 1870.[572] These new courts were tagged "*courts of equity*".[573] These courts were regularized in 1872 by an Order in Council which prescribed and extended powers for the consul.[574] This reorganization led to the establishment of the consular court.[575] In 1886, the Royal Niger Company via a charter established its own system of administering justice.[576] In 1885, governing councils were established with jurisdiction over Africans.[577] After 1891, Native Courts were reorganized with political and judicial functions presided by local chiefs at the lower grades, and colonial officials at the higher grades.[578] These native courts had existed prior to 1842.[579] The Supreme Court of Southern Nigeria was established in 1900 when the Southern Nigerian Protectorate was created, as a superior court at the same level with the High Court in England.[580] This court had original and appellate jurisdiction and applied Common Law, Equity and all laws applicable in England as at 1900.[581] The Commissioners' Courts were also established to be subordinate to the Supreme Court.[582]

Prior to 1900, for Lagos colony, in 1862, a commercial court later called Petty Debt Court was established.[583] In 1863, a supreme court of Her Majesty's

[571] In Bonny.
[572] Brass, Benin, Okrika, Opobo and Calabar.
[573] Adewoye O *The Judicial System in Southern Nigeria 1854 – 1954* 33. This court was established in southern Nigeria.
[574] February, 1872 in ss 5, 15, 25 and 26 as contained in Adewoye, O. *ibid*, 34 &37.
[575] *Ibid*.
[576] *Ibid* 38.
[577] *Ibid* 38-39.
[578] *Ibid* 41.
[579] Ogundere J D *The Nigerian Judge and His Court* (1994) 1. This author made reference to favourable comments of the court's procedures and decisions garnered from the following materials- Sir James Marshal's Article in the Times, London 17 July, 1886; Lord Lugard, Political Memoranda,84-90; and Anderson, Islamic Law in Africa 172.
[580] *Ibid* 41.
[581] The Commissioner's Proclamation 1990 referred to in Adewoye O *The Judicial System in Southern Nigeria 1854 – 1954* 42.
[582] *Ibid.*
[583] *Ibid* 48.

Settlement of Lagos later called Chief Magistrate's Court was established.[584] In 1866 a court of civil and criminal justice was established which supersedes the Supreme Court of Lagos to carter for all West African settlements.[585]

The West African Court of Appeal was established sometime in 1867 with jurisdiction to hear appeals from all British colonies in West Africa from which appeals were made to the Privy Council in the United Kingdom.[586] In 1872, the Vice-admiralty Court and the Court of Divorce and Matrimonial Causes were established.[587]

In 1906 when the colony of Lagos was amalgamated with the Southern Nigerian Protectorate, to form a single southern Nigeria protectorate comprising of the Western, Central and Eastern Provinces, a single supreme court was established for the protectorate with similar powers and jurisdiction with the former Supreme Court of the Southern Protectorate which was established in 1900.[588]

By virtue of the Protectorate Courts Proclamation of 1900, the High Commissioner of Northern Nigeria[589] established "*a supreme court, provincial courts and cantonment or magistrate courts*" all with defined jurisdictions.[590] In the same year, he also established or reorganized the native courts.[591]

On 1st January, 1914, the Northern and Southern Protectorates of Nigeria were amalgamated. This brought about a judicial reorganization and the following

[584] *Ibid*.
[585] These settlements include the colonies of Gambia, Gold Coast, Lagos and Sierra Leone. See Ogundere J D 1 and Adewoye O *Judicial System in Southern Nigeria 1854 – 1954* 49.
[586] *Ibid* 49.
[587] *Ibid* 50.
[588] *Ibid* 60-61.
[589] By virtue of the Northern Nigeria Order in Council. See Ogundere J D 7.
[590] *Ibid* 7&8.
[591] By virtue of the Native Courts Proclaimation 1900. *Ibid*.

courts were adopted- a supreme court, provincial courts and native courts.[592] Sir Donald Cameron who became the governor of Nigeria in 1931[593] established high courts for all the provinces after abolishing the provincial courts.[594] Each high court had a chief judge. He established magistrate courts above the native courts in cadre, but below the high courts.[595] The magistrate courts were presided by qualified legal practitioners and lay persons.[596] Appeals went from the decisions of the High Court to the Supreme Court, from the Supreme Court to the West African Court of Appeal and then to the Privy Council in London from 1934 – 1954. From 1954, appeals went straight to the Privy Council from the Supreme Court.[597]

By virtue of the 1954 Constitution, Nigeria became a federation with three regions i.e. Northern, Western and Eastern Regions.[598] A supreme court was established for the federation with original and appellate jurisdiction from each of the high courts of the Regions.[599] Appeal from the Supreme Court still went to the Privy Council.[600] The high courts of the Regions had original and appellate jurisdictions. They heard appeals from the magistrate courts and the native courts.[601] The Northern Region established a court of resolution,[602] and an islamic court to hear appeals from the native courts with islamic questions.[603] The

[592] This was authorized by the Nigerian Protectorate Order in Council 22nd November, 1913. Reproduced in Fawehinmi, G. *Court Systems in Nigeria: A Guide* (1992) 2-11 and Adewoye O *The Judicial System in Southern Nigeria 1854 – 1954* 137.
[593] Between 1931 and 1935.
[594] Ogundere J D 12-13.
[595] *Ibid*.
[596] *Ibid*.
[597] *Ibid.*
[598] Elaigwu J I *The federal republic of Nigeria* http://www.federalism.ch/files/categories/IntensivkursII/Nigeriaq2.pdf *(accessed on 18th November 2011)*
[599] Ume F E *The Courts and Administration of Law in Nigeria* (1989) 67.
[600] Adewoye O *The Judicial System in Southern Nigeria 1854 – 1954.*
[601] *Ibid*.
[602] By virtue of the Court of Resolution Law 1960 of Northern Nigeria.
[603] *Ibid*.

Eastern region also in 1956 reorganized and changed the designation of its native court to customary courts.[604] This statusquo was maintained after Nigeria gained independence on 1st October, 1960.[605] However in 1963 via its new constitution, Nigeria became a republic and severed its political string from Britain thereby abolishing any appeals to the Privy Council. The Supreme Court of Nigeria became the final arbiter on appeals.[606]

The Federal Court of appeal was established as an intermediate appellate court between the Supreme Court and the high courts[607] which was eventually renamed as court of appeal.[608] At par with the high court is the Federal Revenue Court established in 1973[609] to have jurisdiction over revenue matters. The designation of this court was later changed to federal high court. [610]

4.3 Applicable Laws for the Creation of Courts and Regulation of Proceedings in Courts in Nigeria.

All courts of record in Nigeria basically, exercise criminal and civil jurisdiction either conjunctively, or in few cases disjunctively. The main laws regulating the conduct of civil proceedings and criminal proceedings in Nigeria are:[611]

1. The various civil procedure rules of court applicable to each court which include
    a. Supreme Court Rules[612]

[604] Asein J O 166.
[605] See ss 104-119 of the 1960 constitution.
[606] Section 111 of 1963 constitution of the Federal Republic of Nigeria.
[607] By virtue of the Constitution (Amendment) (No.2) Decree 42 of 1976. See Fawehinmi G *Courts' Systems in Nigeria: A Guide* 87.
[608] *Ibid*, By virtue of Constitution (Suspension and Modification) Decree 1 of 1984.
[609] Federal Revenue Court Decree No. 13 1973.
[610] *Ibid*, by virtue of s 228 of the 1979 constitution.
[611] See Okorie, P. C. "Sources of Civil Procedure" in *Modern Civil Procedure Law (ed* Afolayan A F & Okorie P C) (2007) 1-7; Agaba,J A *Practical Approach to Criminal Litigation in Nigeria* (2011) 9-16; Efevwerhan D I *Principles of Civil Procedure in Nigeria* (2007) 2-6; Afolayan A A *Criminal Litigation in Nigeria* (2010) 6-13;Aguda T A *Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria* ((1995) 6, 795 & 897; Doherty, O. *Criminal Procedure in Nigeria: Law and Practice* (1990) 19-25.

b. Court of Appeal Rules[613]
c. High Court Rules of the various States of the Federation, the Federal Capital Territory and the Federal High Court[614]
d. National Industrial Court Rules
e. Customary Court of Appeal Rules of the various States and the Federal Capital Territory[615]
f. Sharia Court of appeal Rules of the Various States and the Federal Capital Territory[616]
g. District Court Rules applicable in the various States and the Federal Capital Territory[617]
h. Customary Court Rules of the various States and the Federal Capital Territory[618]
i. Sharia Court Rules of the Various States and the Federal Capital Territory[619]
j. The Magistrate Court Rules of the various States of the Federation and the Federal Capital Territory.[620]

2. The 1999 Constitution[621]
3. Statutes enacted by the appropriate legislature[622] which include the following:
   a. Supreme Court Act[623]
   b. Court of Appeal Act[624]

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[612] 1985.
[613] 2002.
[614] These rules were enacted in different years.
[615] This is applicable only in states that have customary courts of appeal.
[616] Also applicable only in states where this court is established.
[617] An example is the District Court Rules Cap 495 Laws of the Federation of Nigeria (Abuja) 1990.
[618] This is applicable only in states that have *Customary Courts of Appeal*. An example is the Customary Court of Appeal Rules, Delta State 2001.
[619] This is applicable only in States that have sharia courts of appeal. An example is the Sharia Court of Appeal Rules Cap 550 Laws of the Federation of Nigeria (Abuja) 1990.
[620] Though listed under rules of civil procedure, it is a court of criminal jurisdiction.
[621] *Supra*.
[622] The National Assembly for federal courts and the respective Houses of Assembly for each state.
[623] Cap S15 LFN 2004.

c. Federal High Court Act[625]
d. Various High Court Laws of the various States[626]
e. High Court Act of the Federal Capital Territory[627]
f. National Industrial Court Act[628]
g. Criminal Procedure Act[629]
h. Criminal Procedure Code[630]
i. Criminal Procedure Code Act[631]
j. Administration of Criminal Justice Law[632]
k. Criminal Code Law[633]
l. Penal code Law[634]
m. Penal Code Act[635]
n. Children and Young Persons' Laws[636]
o. Economic and Financial Crimes Commission Act[637]
p. Independent Corrupt Practices and other Related Offences Commission Act.[638]
q. Magistrate and District Court Laws of the various States and the Federal Capital Territory
r. Area Courts Laws of the State[639]
s. Rules made to apply to specific matters like:

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[624] Cap C36 LFN 2004.
[625] Cap 134.
[626] For example High Court Laws Lagos State Cap H3 2003.
[627] LFN 2004
[628] 2006.
[629] 1945 Cap. C41 LFN 2004 applicable in Southern Nigeria.
[630] !963 Cap 30 LNN
[631] Applicable in the Federal Capital Territory.
[632] 10 of 2007 applicable in Lagos State.
[633] Applicable in southern Nigeria.
[634] Cap.89 LNN 1963.
[635] Applicable in the Federal Capital Territory.
[636] 2003
[637] 2004.
[638] 2000.
[639] Each state that operates area courts has its laws regulating them.

- The Fundamental Rights (Enforcement Procedure) Rules, 1979[640]
- 'Sheriffs and Civil Process Act/Law
- Judgment (Enforcement) Rules
- Foreign Judgment (Reciprocal Enforcement) Act 1961
- Companies and Allied Matters Act 1990
- Companies Winding up Rules 2001
- Companies Income Tax act
- Matrimonial Causes Act
- Matrimonial Causes Rules
- The Admiralty Jurisdiction Act 1991
- Trade Dispute Act
- National Industrial Court Act'[641]

4. Judicial Authorities [642]
5. Practice Directions.[643]

It should be noted that where the procedural rules are directly validated by the Constitution, they over ride statutes where there are inconsistencies between the provisions of the rules and the provisions of statutes.[644]

4.4 The Current Court Structures in Nigeria

Section 6 of the 1999 Constitution of the Federal Republic of Nigeria provides that *The judicial powers of the Federation shall be vested in the courts to which this*

[640] Validated by s 46 (3) of the 1999 Constitution.
[641] See Okorie P C "Sources of Civil Procedure" 4-5.
[642] Subject to the doctrine of judicial precedents, Nigerian courts, in interpreting rules and laws decide cases which may create a new practice. A good example is the rule pertaining to the conditions to be fulfilled before an injunction may be granted by the court in the case of *Kotoye v Central Bank of Nigeria* (1989) 1NWLR (Part 98) 49. See Okorie P C *Ibid* 5 and Efevwerhan D I 167.
[643] Practice directions are directions issued by the head of a superior court or the chief justice of a jurisdiction prescribing details of how certain procedures may be complied with. It is usually made when there is a lacuna in the rules. See the case of *University of Lagos v Aigoro* (1984) 11 S.C. 152. All mentioned in Okorie P C *Ibid* 6 and Efevwerhan D I 5.
[644] *Abia State University Uturu v Anyaibe* (1996) 3NWLR (Part 439) 646 mentioned in Efevwerhan D I 3-4.

section relates, being courts established for the Federation."[645] It also provides that "*The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State.*[646]

Subject to prescriptions of the National Assembly or the House of assembly of a state, the courts mentioned here will constitute the "*only superior courts of records in Nigeria*"[647] and are respectively bestowed with all the powers of a superior court of records in Nigeria.[648] Each of the categories of these superior courts has defined jurisdictions which sometimes are exclusive to them.

Both the National Assembly and each House of Assembly of a State have the power to establish other courts in addition to the courts referred to here, "*with subordinate jurisdiction to that of a high court*"[649] and also to abolish any court they have established or are capable of establishing.[650] Consequently, there have been established for the Federal Capital Territory (FCT) and the 36 states that make up Nigeria, categories of courts of lower jurisdictions which are also considered in this chapter.

The courts specifically referred to in the Constitution include-

1. "*the Supreme Court of Nigeria;*
2. *the Court of Appeal;*
3. *the Federal High Court;*
4. *the High Court of the Federal Capital Territory, Abuja;*
5. *the High Court of a State;*
6. *the Sharia Court of Appeal of the Federal Capital Territory, Abuja;*
7. *the Sharia Court of Appeal of a State;*
8. *the Customary Court of Appeal of the Federal Capital Territory, Abuja;*
9. *the Customary Court of Appeal of a State;*

[645] See s 6(1) 1999 constitution.
[646] *Ibid* s 6(2).
[647] *Ibid* s 6(3).
[648] *Ibid*.
[649] *Ibid* s 6(4) (a)
[650] *Ibid* s 6(4) (b).

10 *such other courts as may be authorised by law to exercise jurisdiction on matters with respect to which the national assembly may make laws; and*
11. *such other court as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a house of Assembly may make laws."*[651]

4.4.1 Courts of High Jurisdiction

4.4.1.1 Federal Courts

Sometimes the jurisdictions of federal and state courts overlap. However, the distinctive features of federal courts in Nigeria are the sphere of their jurisdictions which are not limited to the geographical confines of a state and the subject matters they entertain which feature federal interests. All federal courts are courts of superior jurisdiction except for courts of lower jurisdiction within the FCT which are also federal courts. Courts of superior jurisdiction in Nigeria are made up of federal courts and some state courts.

4.4.1.1.1 The Supreme Court

The Supreme Court of Nigeria is a federal court and the highest court in the land. It is the final arbiter in terms of appeal apart from the prerogative of mercy conferred on the President or the Governor of a state.[652] The Constitution provides for the establishment of a supreme court of Nigeria[653] comprising the chief justice of Nigeria[654] and other justices of the Supreme Court. The number of the justices of the Supreme Court is to be fixed by the National Assembly which shall not exceed the maximum of twenty-one justices as stated in the Constitution.[655] The appointments of the Chief Justice of Nigeria and the other justices of the Supreme Court is done by the President on the recommendation of

[651] *Ibid* s 6 (5)(a-k)
[652] *Ibid* s 235.
[653] *Ibid* See s 230 (1).
[654] *Ibid* ss 230 (2) (b) and 230 (2) (a).
[655] *Ibid* s 230 (b).

the NJC and confirmed by the Senate.[656] The requirements for appointment to the office of the Chief Justice of Nigeria and a justice of the Supreme Court is the qualification to practice as a legal practitioner in Nigeria for a period of at least 15 years.[657]

The Supreme Court has both original and appellate jurisdictions. The original jurisdiction of the Supreme Court is as conferred on it by the Constitution and by an act of the National Assembly[658] through the Supreme Court (Additional Original Jurisdiction) Act[659] which confers exclusively on the Supreme Court, some original jurisdiction relating to any dispute between the President and the National Assembly, any state governor and the National Assembly, and between the National Assembly and any house of assembly of a state.[660] The Constitution excludes the conferment of original jurisdiction on the Supreme Court on criminal matters.[661] The Supreme Court is empowered to exclusively hear matters on disputes that relate to any question of law or fact that affect any legal rights between the federation and any of the states within the federation, and between the states of the federation.[662] The Supreme Court is also exclusively empowered to hear and resolve appeals emanating from the Court of Appeal.[663] No appeal can go to the Supreme Court from any other court without first passing through the Court of Appeal. The appealable decisions of the Court of Appeal to the Supreme Court include both final decisions and interlocutory decisions of the Court of Appeal.[664]

[656] *Ibid* s 231 (1).
[657] *Ibid* s 231 (3).
[658] *Ibid* s 232 (1) (2).
[659] 2002.
[660] Section 1 of the Act. See also Okorie P C 386.
[661] Section 232 (2) 1999 constitution.
[662] *Ibid* s 232 (1).
[663] *Ibid* s 233 (1).
[664] Alimi L O "Appeals" in *Modern Civil Procedure Law* (ed Afolayan . F & Okorie P C) (2007) 386.

Appeals from the Court of Appeal to the Supreme Court are either as of right or by leave of court.[665] "*As of right*" means an aggrieved person who wishes to appeal against the decision of a lower court need not obtain permission from either the court or the court the appeal is being made to. "By leave of court" means the permission of either the court whose decision is being appealed against or the court the appeal is being made to must first be sought and obtained before any appeal may be filed.[666] The grounds on which decisions of the Court of Appeal could be appealed against to the Supreme Court as of right are stated in the Constitution.[667]

The right of appeal to the Supreme Court is governed by the provisions of the Constitution, any applicable act of the National Assembly[668] in this case the Supreme Court Act,[669] and the current Supreme Court Rules[670] made by the Chief Justice of Nigeria who is empowered to do so to regulate "*the powers, practice and procedure of the supreme court.*"[671] The minimum number of justices of the Supreme Court required to sit on any matter within its jurisdiction as conferred upon it by this constitution or any applicable law, is five.[672] However if the matter before the Supreme Court is in respect of its original jurisdiction, or any matter relating to the provisions on fundamental rights as enshrined in chapter IV of the Constitution, or any matter relating to the interpretation or application of the provisions of the Constitution, the minimum number of justices required to sit are seven.[673]

[665] Section 233 (a-f) & (3) 1999 Constitution of Nigeria.
[666] Alimi, L O 347. See also *Ojeme v. Momodu* (1983) 1 SCNLR 188 at 266.
[667] Section 233 (2) (a-f) 1999 constitution of Nigeria.
[668] *Ibid* s 233 (6).
[669] Cap S15 Laws of the Federation of Nigeria, 2004.
[670] 1985 and the Supreme Court (Amendment) Rules 1999. See Alimi L O 394.
[671] Sections 233 (6) & 236of the 1999 Constitution.
[672] *Ibid* s 234.
[673] *Ibid*.

4.4.1.1.2 The Court of Appeal

This is a federal court established by the Constitution.[674] It is an intermediary court to the Supreme Court and its decisions are subject to appeal to the Supreme Court with exception to its decisions on appeals from election tribunals and courts on election matters that pertain to election at the national and state legislatures and governorship elections. In these respects, its decisions are final.[675] This court consists of a president who is the administrative head of the court and such number of other justices to be determined by the National Assembly, which is constitutionally pegged at not less than 49.[676] However, the Court of Appeal Act 2005 has increased the number of justices to be appointed to 70. There is currently a draft bill before the National Assembly to increase the number of justices of the Court of Appeal from 70 to 90.[677] The necessitation for this increase are the additional divisions of the court created nationwide, the inability of the court to clear up back log cases before it, and the need for clearing the several election petitions which sprung from the 2011 general elections which the current number of judges could not cope with.[678] Of the number of justices to be appointed to the Court of Appeal, not less than three must be learned in customary law and islamic law respectively.[679] The appointments of the President of the Court of Appeal and other justices of the Court are done by the President on the recommendations of the NJC.[680] For the President of the Court of Appeal, the appointment must be confirmed by the Senate.[681] The criteria for

[674] *Ibid* s 237 (1).
[675] *Ibid* s 246 (3).
[676] *Ibid,* s 246 (1) (a-b).
[677] http://nigerianpilot.com/?q=content/appeal-court-set-get-90-judges-bill-scales-second-reading-senate (accessed on 4th November 2011). A Bill for an Act to Amend the Court of Appeal Act 2005.
[678] *Ibid* .
[679] Section 237 (1) (b) 1999 Constitution of Nigeria.
[680] *Ibid* s 238(1) (2).
[681] *Ibid*.

appointment as a justice of the Court of Appeal are the qualification to practice as a lawyer in Nigeria for a period of at least 12 years.[682]

The court of appeal has both original and appellate jurisdictions. The original jurisdictions are related to election petitions and are in respect to hearing and determining whether-

a. *'any person has been validity elected to the office of President or Vice-President under this Constitution; or*
b. *the term of office of the President or Vice-President has ceased; or*
c. *the office of President or Vice-President has become vacant.'*[683]

The appellate jurisdiction of the Court of Appeal is exercised to the exclusion of any other court to hear appeals from-

a. the Federal High Court;
b. all States High Courts;
c. the High Court of the FCT;
d. the Customary Court of Appeal of the FCT;
e. the Sharia Court of Appeal of the FCT;
f. the Customary Court of Appeal of the States;
g. the Sharia Court of Appeal of the States;
h. court martial; and
i. other tribunals as the National Assembly may prescribe by an act.[684]

The jurisdiction of the Court of Appeal to hear appeals from courts whose jurisdictions are lower, is categorized into four. The first category is appeals from the Federal High Court and other high courts. The second category is the appeals from the Customary Courts of Appeal to the Court of Appeal. The third category

[682] *Ibid* s 238(3).
[683] *Ibid* s 239 (1) (a-c). Section 239 (2) provides for a quorum of three justices to hear and determine election petitions related to sub 'a' of subsection (1).
[684] *Ibid* s 240.

is the appeals from the Sharia Courts of Appeal to the Court of Appeal; and the fourth category is appeals from The Code of Conduct Tribunal and other courts and tribunals.

4.4.1.1.3 The Federal High Court

The Federal High Court is established by the Constitution[685] and consists of the Chief Judge and other judges of the Federal High Court the number of whom is to be determined by the National Assembly.[686] The appointment of the Chief Judge and judges of the Federal High Court is done by the President on the recommendation of the NJC, and for the Chief Judge, to be confirmed by the Senate.[687] The minimum requirement for appointment as a judge of the Federal High Court is qualification to practice as a legal practitioner in Nigeria for at least ten years.[688] To competently hear a matter, it must have at least one judge sitting.[689]

The Federal High Court has two classes of jurisdiction. The first is the jurisdiction that overlaps with other courts also competently empowered to exercise such jurisdictions, and the second is the jurisdictions in certain "*civil causes and matters*" exclusively preserved for the Federal High Court by the Constitution and by any enactment of the National Assembly.[690] The first and second categories of jurisdictions encompass civil and criminal matters.[691] Under the first category, it is immaterial whether or not exclusive jurisdiction is conferred on any other court on the subject. Once the National Assembly, by an act confers such jurisdiction on the Federal High Court, it becomes competent to

[685] *Ibid* s 249 (1).
[686] *Ibid* s 249 (2) (a-b).
[687] *Ibid* s 250 (1) (2).
[688] *Ibid* s 250 (3).
[689] *Ibid* s 250 (3).
[690] *Ibid* s 251 (1) (a-s).
[691] *Ibid* s 251 (s) and section 251 (3).

hear and determine such a matter. Its exclusive jurisdiction spreads over disputes arising from government revenue;[692] federal taxation;[693] customs and excise duties;[694]banking;[695] regulation of companies incorporated in Nigeria;[696] copyright;[697] admiralty;[698] *"diplomatic, consular and trade representation';[699] citizenship;[700] 'bankruptcy and insolvency";*[701] aviation;[702] "arms, *ammunitions and explosives";*[703] *"drugs and poisons";*[704] mines and minerals;[705] weights and measures;[706] *"the administration or the management and control of the Federal Government or any of its agencies";*[707] application of Constitutional provisions to the Federal Government and its agencies;[708] *"any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies";*[709] *"such other jurisdiction civil or criminal and whether to the exclusion of any other court or not as may be conferred upon it by an Act of the National Assembly";*[710] treason, treasonable felony and allied offences.[711]The Federal High Court, in order to adequately exercise its jurisdictions, is empowered with all the powers of a state high court.

[692] *Ibid* s 251 (1) (a).
[693] *Ibid* s 251 (1) (b).
[694] *Ibid s* 251 (1) (c).
[695] *Ibid s* 251 (1) (d).
[696] *Ibid s* 251 (1) (e).
[697] *Ibid s* 251 (1) (f).
[698] *Ibid s* 251 (1) (g).
[699] *Ibid s* 251 (1) (h).
[700] *Ibid s* 251 (1) (i).
[701] *Ibid s* 251 (1) (j).
[702] *Ibid s* 251 (1) (k).
[703] *Ibid s* 251 (1) (l).
[704] *Ibid s* 251 (1) (m).
[705] *Ibid s* 251 (1) (n).
[706] *Ibid s* 251 (1) (o).
[707] *Ibid s* 251 (1) (p).
[708] *Ibid s* 251 (1) (q).
[709] *Ibid s* 251 (1) (r).
[710] *Ibid s* 251 (1) (s).
[711] *Ibid s* 251 (2).

The Federal High Court has additional jurisdiction conferred on it by the Federal High Court Act validated by section 251 of the constitution which to a large extent is similar to the jurisdiction listed in the constitution[712] but for the additional powers contained in Federal High Court (Amendment) Decree No. 60.[713] A replete or other national legislations and decrees have also enlarged the powers of the federal high court in a number of ways.

Though the Constitution does not specifically bestow on the Federal High court any appellate jurisdiction, it hear appeals on civil and criminal matters in respect of the decisions of appeal commissions,[714] immigration and prisons services board,[715] any other body set up by any federal act pertaining to any of the matters related to the jurisdiction conferred on it by the Federal High Court Act.[716]

The Federal High Court also has concurrent jurisdiction with the State High Courts. These shared jurisdictions are with respect to admiralty matters;[717] where the issues involve a question of law regarding the interpretation and application of the provisions of the Constitution;[718]cases pertaining to the enforcement of the fundamental rights contained in chapter IV of the Constitution;[719] and cases pertaining to banking in respect to their dealings with their customers.[720] Despite this shared jurisdiction, each operates independent of the other and therefore the Federal High Court Act cannot legislate for the state high courts for instance, in

[712] Okorie P C 18
[713] 1991. *Ibid*.
[714]Set up by the Companies Income Tax Act.
[715] Set up by the Immigration and Prison Services Act.
[716] Efevwerhan,D I 48-49.
[717] *Ibid* 42.
[718] *Bamaiyi v A. G. Federation* (2001) 7 SCNJ 346. Mentioned in Efevwerhan D I 37-39.
[719] *Ibid* 39.
[720] *Ibid* 37.

the matter of transferring a matter from one court to the other.[721] The Federal High Court in accordance with the provision of the Federal High Court Act may where necessary, transfer a matter to the state high court. The provision of the Federal High Court Act[722] empowering the court to transfer a matter to a magistrate court in the particular state where the cause of action was perpetrated, where in the opinion of the judge the matter will be more expeditiously dealt with, appears to be inconsistent with the provision of the constitution that bestows exclusive jurisdiction to the Federal High Court.[723]

4.4.1.1.4 High Court of the Federal Capital Territory, Abuja

The High Court of the Federal Capital Territory, Abuja is established by the Constitution[724] to consist of a chief judge and as many judges as the National Assembly may by an act, determine.[725] Being a federal court, the appointment of the Chief Judge of the High Court of the Federal Capital Territory and the judges of the court is done by the President on the recommendation of the NJC and for the Chief Judge, to be confirmed by the Senate.[726] The qualification for appointment as a chief judge and a judge of the High Court of the FCT is the qualification to practice as a legal practitioner in Nigeria for at least ten years.[727] The jurisdiction of this court is territorial and limited to the geographical confines of the FCT and it court doubles as a court of first instance and an appellate court.[728] Subject to the jurisdiction of the federal High Court,[729] the High Court of the FCT has jurisdiction-

[721] Section 22 (2) Federal High Court Act. See *Aluminum Manufacturing Company Limited v Nigerian Ports Authority* (1987) (Part 51) 475. All mentioned Efevwerhan D I 45.
[722] Section 26 Federal High Court Act.
[723] See Efevwerhan D I 46-48.
[724] Section 255 (1) 1999 constitution of Nigeria.
[725] *Ibid* s 255 (2) (a & b).
[726] *Ibid s* 256 (1) (2).
[727] *Ibid s* 256 (30.
[728] *Ibid s* 257 (1).
[729] As stated in section 251 *Ibid.*

> *to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.*[730]

The jurisdiction quoted above applies to both matters commence at the High court of the FCT and on appeal to the High Court from the decisions of courts of subordinate jurisdictions over which it supervises or has appellate jurisdiction.[731] To competently hear a matter, the court must be composed of one judge must sit.[732] Two judges sit on appeal.

4.4.1.1.6 The Customary Court of Appeal of the Federal Capital Territory, Abuja

A customary court of appeal is established by the Constitution for the FCT.[733] It consists of the President of the court and other judges whose number is determined by the National Assembly.[734] Being a federal court, the appointment of the President and other judges of this court is made by the President on the recommendation of the NJC and in the case of the President, to be confirmed by the Senate.[735] The Constitutional provision stating the qualification for the appointment of the President and other judges of this court makes room for additional qualifications to be determined by the National Assembly in addition to the clearly stated qualifications.[736] This is another court where a person who is not a qualified legal practitioner may serve as a judge. The qualification for appointment as a judge of this court is twofold. First is the qualification as a legal

[730] *Ibid* s 257 (1).
[731] *Ibid s* 257 (2).
[732] *Ibid* s 258.
[733] *Ibid* s 265 (1)
[734] *Ibid s* 265 (1) (a & b).
[735] *Ibid s* 266 (10.
[736] *Ibid s* 266 (3).

practitioner for at least ten years coupled with a "*considerable knowledge and experience in the practice of customary law*"[737] to the satisfaction of the NJC.

The second is simply satisfying the NJC that the candidate has "*considerable knowledge of and experience in practice of customary law*".[738] The constitutionally stated jurisdiction of the Customary Court of Appeal of the FCT is in addition to whatever the National Assembly may by an act confer upon it. This however is limited to civil matters with respect to questions relating to customary law filed on appeal from courts of subordinate jurisdiction it has appellate and supervisory powers over.[739] The Constitution does not provide a list of the areas of customary law that the court can adjudicate on.[740] The Constitution is also silent on the specific courts from which appeals could emanate to the Customary Court[741] of Appeal. The least number of judges to constitute a valid sitting of this court is three.[742] The President of this court, subject to an act of the National Assembly is empowered to make rules of practice and procedure for the court.[743]

4.4.1.1.5 Sharia Court of Appeal of the Federal Capital Territory, Abuja

The Sharia Court of Appeal of the FCT is established by the Constitution with a territorial jurisdiction limited to the FCT.[744] It has a grand kadi and other kadis, the number of which is determined by the National Assembly through an act.[745] The Grand Kadi and the other kadis are appointed by the President on the recommendation of the NJC and for the Grand Kadi, subject to the confirmation

[737] *Ibid s* 266 (3) (a).
[738] *Ibid s* 266 (3)(b.
[739] *Ibid* s 267.
[740] Efevwerhan D I 512.
[741] Ibid, 511.
[742] Section 268 Constitution of Nigeria.
[743] *Ibid* s 296.
[744] *Ibid* s 260 (1).
[745] *Ibid s* 260 (2) (a & b).

of the Senate.[746] The qualification for appointment to such offices is either the qualification to practice as a legal practitioner in Nigeria for at least ten years coupled with an additional recognized qualification in islamic law from an institution that meets the standard of the NJC[747] or merely the attendance at and obtaining an acceptable qualification in islamic law from an institution recognized by the NJC.

Constitutionally, the jurisdiction of this court is appellate and supervisory and it pertains to only civil matters that entail the application of islamic personal law.[748] The National Assembly may confer additional jurisdiction on the court.[749] The Sharia Court of Appeal of the FCT is empowered to adjudicate on islamic personal law in respect to Islamic marriages,[750] family relationship,[751] guardianship,[752] succession[753] and gifts.[754] Where all the parties in the court of subordinate jurisdiction are muslims and they specifically request for the determination of other questions other than those earlier mentioned, the court will be empowered to adjudicate on them.[755] To exercise its jurisdiction, at least three kadis must sit.[756] The Grand Kadi of this court, subject to an act of the National Assembly is empowered to make rules of practice and procedure for the court.[757]

[746] *Ibid s* 261 (1) (2).
[747] *Ibid s* 261 (3) (a-b).
[748] *Ibid* s 262 (1).
[749] *Ibid*.
[750] *Ibid* s 262 (2) (a & b).
[751] *Ibid s* 262 (a).
[752] *Ibid s* 262 (2) (a & d).
[753] *Ibid s* 262 (2) (c).
[754] *Ibid.*
[755] *Ibid s* 262 (2) (e).
[756] *Ibid s* 263.
[757] *Ibid s* 264.

4.4.1.2 State Courts

State courts are classified into two. Some State courts are courts of superior jurisdiction and the others are courts of lower jurisdiction. All courts of inferior jurisdiction are state courts except inferior courts within the FCT.

4.4.1.2.1 State High Courts

Though state courts, they are established by the Constitution for each of the thirty-six States of the federation and their jurisdiction is also conferred by the Constitution.[758] All judges appointed for the state high courts are appointed on the recommendation of the NJC who are also responsible for their discipline and recommend their removal.[759] The High Court of each State consists of the Chief Judge of the State and other judges whose numbers are to be determined by the House of Assembly of each State respectively.[760] Because they are state courts, the Chief Judge and other judges of the state are appointed by the respective governor of each state, still on the recommendation of the NJC. The appointment of the Chief Judge is confirmed by the House of Assembly of each state respectively.[761] The minimum requirement for appointment into the office of a judge of the State High Court is qualification to practice as a legal practitioner in Nigeria for a minimum period of ten years.[762] Each state high court is divided into judicial divisions. The jurisdiction of each state high court is tripartite i.e. the jurisdiction to try matters commenced in the high court, the jurisdiction to hear appeals on the decisions of courts of subordinate jurisdiction to it, and the power to carry out supervisory roles [763]over courts of subordinate jurisdiction to it.[764] Its civil and criminal jurisdiction empowers it-

[758] *Ibid s* 270 (1).
[759] *Ibid* s 271 (1) & (2).
[760] *Ibid s* 270 (2) (a & b).
[761] *Ibid s* 271 (2).
[762] *Ibid s* 271 (3).
[763] These supervisory roles include prerogative writs, mandamus, prohibition, certiorari and habeas corpus as provided by the various Rules of the high Court of each state in Nigeria. See Abugu J E (44-95.
[764] Section 272 (2) 1999 constitution of Nigeria.

> *to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person*[765]

The jurisdiction of each state high court is confined to the geographical boundaries of each state in the federation. The Constitution provides that the minimum number of judges to duly constitute a court is one. However, the High Court Laws of Northern Nigeria[766] provides for two judges to sit in respect of appeals and while discharging supervisory function.[767] The Chief Judge of this court, subject to any laws of the House of Assembly of that particular state is empowered to make rules of practice and procedure for the court.[768]

4.4.1.2.3 Customary Court of Appeal of the State

Customary Court of Appeal of a state is only for the states that require it.[769] It consists of the President of the court and other judges in such number to be determined by the House Of Assembly of each state respectively.[770] The appointment of the judicial officers here is done by the State Governor on the recommendation of the NJC, in respect of the President of the court, to be confirmed by the House of Assembly.[771] The qualification for appointment as a judge of this court is similar to that of the same court at the FCT treated above.[772] The jurisdiction of the court is also similar to that of the FCT. Its jurisdiction is

[765] *Ibid* s 272 (1).
[766] Section 63 Cap. 49 Laws of Northern Nigeria 1963. See Okorie P C 33.
[767] See *Ishola v Abioye* (1994) 6 NWLR(Part 352) 506 see *Ibid* Okorie, P. C.
[768] Section 274 Constitution of Nigeria.
[769] *Ibid* s 280 (1).
[770] *Ibid s* 280 (2)(a & b).
[771] *Ibid s* 281 (1)(2).
[772] *Ibid s* 281 (3) (a-b).

only with respect to civil proceedings involving issues of customary law.[773] The House of Assembly of each state where a customary court of appeal exists is empowered to prescribe the extent of jurisdiction of the court.[774] The quorum for a valid sitting of the court is three judges.[775] The President of this court, subject to any laws of the House of Assembly of the particular state is empowered to make rules of practice and procedure for the court.[776]

4.4.1.2.2 Sharia Court of Appeal of the States

The Constitution makes the establishment of a sharia court of appeal of a state optional. It is established only in states that require it.[777] Each sharia court of appeal of a state is constituted with a grand kadi other kadis in such number as to be determined by the House Of Assembly of each respective state.[778] The appointment of these judicial officers is similar to that of the Sharia Court of Appeal of the FCT but being a state court, it is done by the respective state governors and for the Grand Kadi, to be confirmed by the House of Assembly of each respective state.[779] The qualification for such appointment is similar to that of the FCT already treated above.[780] Subject to the enlargement of its jurisdiction by the law of the state, the jurisdiction it exercises is also similar to that of the FCT treated above which is strictly appellate and supervisory in strictly civil matters.[781] The court is duly constituted with at least three kadis of the court.[782] The Grand Kadi of this court, subject to any laws of the House of Assembly of

[773] *Ibid s* 282 (1).
[774] *Ibid s* 282 (2).
[775] *Ibid s* 283.
[776] *Ibid s* 284.
[777] *Ibid* s 275 (1).
[778] *Ibid s* 275 (2) (a & b).
[779] *Ibid s* 276 (1) & (2).
[780] *Ibid s* 276 (3) (a & b).
[781] *Ibid s* 277 (1) & (2) (a-e).
[782] *Ibid s* 278.

that particular state is empowered to make rules of practice and procedure for the court.[783]

4.4.2 Courts of Lower Jurisdiction

Courts of lower jurisdiction in Nigeria are not specifically mentioned in the Constitution; however, it provides for their establishment by empowering the National Assembly to establish the federal courts of lower jurisdiction and the houses of assembly of the states with respect to state court. These courts have subordinate jurisdiction to the high court.[784] The Constitution provides for

> *"(i). such other courts as may be authorised by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws; and (k) such other courts as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws."* [785]

These courts of subordinate jurisdiction exercise both civil and criminal jurisdictions with a few that exercise either solely civil or criminal jurisdictions. They are not all uniform. Apart from the marked distinctions of these courts between the northern and southern parts of the federation partly due to their history and applicable laws, individual states of the federation have incorporated certain peculiarities of experiences in the categories of these courts.

4.4.2.1 Magistrate Courts

These are courts of record with subordinate jurisdiction to the High Courts. They are established throughout the thirty-six States of the federation and in the FCT and their decisions are binding on the parties until they are varied on appeal to the appropriate court.[786] They are established by the respective laws of their

[783] *Ibid s* 279.
[784] *Ibid s* 6 (4) (a).
[785] *Ibid* s 6 (5) (i-k).
[786] Onadeko O A *The Nigerian Criminal Trial Procedure* (1998) 14.

respective states in this case, the respective Magistrate Court Laws of each of the southern states and for some northern state. The Criminal Procedure Code established four grades of magistrate courts. The northern states however now have between six to seven grades of magistrate courts.[787] Where six grades are adopted, the lowest grade i.e. magistrate grade III is omitted.[788] Some of these courts exercise only criminal jurisdiction while some are empowered to exercise both civil and criminal jurisdictions.[789] Notwithstanding that the subject matters of their jurisdiction is similar,[790] the nature and extent of the jurisdiction of these differ from state to state. In Nigeria, magistrate courts are courts of summary jurisdiction because cases instituted in them are adjudicated upon summarily and expeditiously without pleadings,[791] while maintaining the application of the principles of natural justice. Apart from Lagos State which has a single grade of magistrate court, there are generally seven Grades of Magistrate Courts in the Southern part of the country comprising of

- Chief Magistrate Grade I
- Chief Magistrate Grade II
- Senior Magistrate Grade I
- Senior Magistrate Grade II
- Magistrate Grade I
- Magistrate Grade II
- Magistrate Grade III.

The jurisdiction of these magistrate courts is fixed by the same law which established them. The jurisdiction of a magistrate is determined by the grade of the court. For civil jurisdiction, a chief magistrate may, depending on the particular state try cases involving amounts of money that may not exceed the

[787] *Ibid* 23.
[788] Onadeko, O A. *loc cit.*
[789] Okorie P C 59; Agaba J A 17; Osamor B 1 & 2; Efevwerhan D I 59-60; Afolayan A A 67-94; Onadeko O A *lo. ci*.
[790] Okorie P C 38.
[791] Efevwerhan D I 59.

sum of N1,000,000 [792] while a magistrate grade III may try cases involving amounts of between N25,000 to about N50, 000.[793] In Lagos State for instance, the jurisdiction of the court covers subject matters in the area of contract, recovery of premises, monetary recovery, torts and land.[794] Magistrate courts cannot entertain any case centered on succession of estates, interest and title to land, and maters subject to the jurisdiction of area courts.[795] For criminal jurisdiction, depending on the state, a chief magistrate grade 1 may impose punishment of up to seven years imprisonment or a fine of N7,000 or both while a magistrate grade 11 may impose a punishment of about six months imprisonment or N200 fine or both.[796] With the exception of magistrate grade 11, all magistrates can try indictable offences except those punishable with death.[797]

Magistrates are appointed by the JSC of each state.[798] For the FCT, they are appointed by the Judicial Service Committee.[799] Magistrate courts, apart from magistrate court Grade III are presided by qualified legal practitioners.[800] Police officers generally prosecute in the magistrate courts.[801] Law officers from the office of the attorney-general though rarely prosecute in the magistrate courts, do so when the offence is of a serious nature.[802] Part of the ongoing efforts towards criminal justice reform in Nigeria, is a bill before the National Assembly which seeks to remove the powers of the police as prosecutors.

[792] For Lagos state.
[793] District Court (Increase of Jurisdiction of District Judges) Order 1997, Abuja. Contained in Efevwerhan D I 61.
[794] Okorie P C 42.
[795] *Ibid* 43.
[796] *Ibid* 20.
[797] Onadeko O A 18.
[798] See Item C, Part II of the Third Schedule of the Constitution of Nigeria.
[799] See Part II Third Schedule to the Constitution of Nigeria.
[800] Onadeko O A 18.
[801] Section 19 Police (Miscellaneous Provisions) Decree 5 of 189 mentioned in Onadeko O A 17.
[802] *Ibid*.

4.4.2.2 District Courts

This court is established by state laws. A district court is presided by a district judge. The distinction between a magistrate court and a district court occurs only in the northern part of the country.[803] In the south, a magistrate court also exercises jurisdiction in civil proceedings. In the north however, a dividing line is drawn between the two. A magistrate court sits strictly over criminal matters while a district court sits strictly over civil matters. Here the same magistrate sits as a district judge in the same court room. Where the court is sitting over a criminal matter, the presiding judge is referred to as a magistrate and when hearing a civil matter, the same judge converts into a district judge. This can go on seriatim in a day's sitting. The appointment as a magistrate implies an appointment as a district judge. The jurisdiction of a district court is as discussed above under magistrate courts. Appeals go from the decisions of magistrate/district courts to the High Court and Customary Court Of Appeal depending on the subject matter of the appeal.

4.4.2.3 Upper Area Courts

Upper Area Courts operate only in the northern part of the country and the FCT. They are established by the respective state laws.[804] They are presided by upper area court judges who are qualified legal practitioners. These judges are appointed by the SJSC of the state in question and the Judicial Service Committee of the FCT with respect to Abuja. Legal practitioners have right of audience in these courts.[805] The chief judges of states where they exist are authorized to establish these courts and define their territorial and subjects jurisdictions.[806] They exercise original and appellate jurisdictions. They hear appeals from the

[803] Efevwerhan D I *loc. cit*.
[804] For Plateau State for instance is the Area Court Edict of 1968 amended by Area Courts Law (Amendment) Edict 8 of 1984 . See Onadeko O A 34.
[805] *Ibid* 36.
[806] Okorie P C 43

decisions of Area Courts.[807] Appeals from the decisions of the Upper Area Courts, depending on their contents, go to either the High Court (on questions of law), or the Customary Court Of Appeal (on customary law questions), or the Sharia Court of Appeal (on islamic questions).

Upper Area Courts exercise both civil and criminal jurisdictions. They also exercise jurisdiction in customary matters.[808] A single judge sits to determine matters freshly brought before it. When hearing appeals, at least two judges must sit to duly constitute the court.[809]

4.4.2.4 Area Courts

Area courts are established by the Area Court Laws of the respective northern states and the FCT.[810] The judges of these courts are generally, non legal practitioners. In Plateau State[811] the lay persons who serve as judges are being replaced by qualified legal practitioners. The jurisdictions of these courts are similar from state to state. [812] In Kano State for instance, their jurisdiction includes matters relating to islamic personal law, custody of children governed by customary law, debt recovery and damages, customary law administration of estate and land matters.[813] Area courts also have criminal jurisdiction to try offences in the Penal Code expressly stated to be within their jurisdiction.[814] In their proceedings, they adopt rules of natural justice without unduly being bound by technicalities.[815] Apart from matters with islamic content which go to the Sharia Court Of Appeal, appeals from the decisions of the Area Courts go to

[807] Efevwerhan D I 61.
[808] Onadeko O A *loc cit.*
[809] *Ibid* 33.
[810] Onadeko O A 29.
[811] One of the states in northern Nigeria.
[812] Okorie P C 42.
[813] *Ibid* 43.
[814] Column 7 Appendix A Criminal Procedure Code in Onadeko O A 30.
[815] *Ibid* .

the Upper Area Court and then to the High Court or Customary Court of Appeal.

4.4.2.5 Customary Courts

Customary Courts are established by states laws with defined civil jurisdiction which vary from state to state. Their jurisdiction is also conferred by other statutes like the Land Use Act which confers jurisdiction on the Customary Courts in land maters under customary law.[816] These courts are more prevalent in the southern part of the country due to the absence of area courts. Usually, their jurisdiction is limited to matters of custody of children, debt recovery and damages, administration of estate and land matters all related to customary law. They exercise criminal jurisdiction over offences created by law, rules and bye laws.[817] They are presided by customary court judges of not less than five years standing.[818] Appeals from these courts go to the Customary Court of Appeal on questions of customary law and to the High Court on other questions of law. In certain states, appeal from the lowest grade of customary courts goes to the magistrate court.[819]

4.4.2.6 Sharia Courts

Sharia Courts are also established by state laws in northern Nigeria. Their jurisdiction is territorial, limited to civil proceedings over persons of islamic faith in disputes involving questions of islamic law.[820] Non muslims may voluntarily submit to the jurisdiction of the court. In certain parts of the north, these courts have replaced the area courts; and in some states, they operate simultaneously. The jurisdiction of the court is made by warrant of the Chief Judge of a state to be

[816] Okorie P C 45.
[817] Onadeko O A 38.
[818] Efevwerhan D I 62.
[819] Onadeko O A 41.
[820] Efevwerhan D I 61. See also Okorie P C 44

approved by the State Governor.[821] Sharia Court judges are not qualified legal practitioners.

4.4.3. Specialized Courts

The existence of specialized courts in Nigeria is validated by statutes and the Constitution. The provisions of the Constitution enabling both the National Assembly and Houses of Assembly to by means of their laws establish courts and determine their jurisdiction has brought to bear the existence of specialized courts.[822] While some of these specialized courts have jurisdictions distinct from any jurisdiction already being exercised by the regular courts, others share jurisdictions with already existing courts. For the later, the justification may simply be for the reason of creating a speedier avenue for quick dispensation of justice.

4.4.3.1 National Industrial Court

The National Industrial Court– a federal court was first established by the Trade Dispute Act of 1976.[823] As at then, it was not a superior court of record.[824] By the National Industrial Court Act 2006,[825] the court was made a court of superior jurisdiction, with all the powers of a high court.[826] The attendant amendment to the 1999 Constitution to reflect the position of the National Industrial Court amongst the list of courts of superior jurisdiction in Nigeria was passed by the National Assembly in 2011. The court consists of the President and not less than

[821] *Ibid*.
[822] Section 6 (5) (j&k) of the constitution of Nigeria.
[823] Decree 7 of 1976.
[824] See the case of *Attorney General, Oyo State v National Labour Congress* (2003) 8 NWLR 1 as mentioned in Onyearu A O The "National Industrial Court: Regulating Dispute Resolution in Labour relations In Nigeria".
[825] Signed into law by the president on 14 June, 2006. See The Punch, Monday, September 18, 2006.
[826] Section 1 of the National Industrial Court Act, 2006.

twelve judges[827] who are appointed by the President on the recommendation of the NJC and for the President of the court, to be confirmed by the Senate.[828] The criteria for appointment as a judge of the court are twofold. The first category of persons who may be appointed as judges of the court must be qualified to practice as legal practitioners in Nigeria for not less than ten years.[829] The second criterion does not require any law qualification. For this category, it is simply a non law degree of at least ten years standing and a "*considerable knowledge and experience in the law and practice of industrial relations and employment conditions in Nigeria*".[830] This second category must form at least one third of the judges appointed for the court.[831]The jurisdiction of the court is exclusive with regards to all

a. *i.* *labour, including trade unions and industrial relations; and*
ii. *environment and conditions of work, health, safety and welfare of labour, and matters incidental thereto; and*

b. *relating to the grant of any order to restrain any person or body from taking part in any strike, lock-out or any industrial action. Or any conduct in contemplation or in furtherance of a strike, lock-out or any industrial action;*

c. *relating to the determination of any question as to the interpretation of*
i. *any collective agreement.*
ii. *any award made by an arbitral tribunal in respect of a labour dispute or an organizational dispute,*
iii. *the terms of settlement of army labour dispute, organizational dispute as may be recorded in any memorandum of settlement,*
iv. *any trade union constitution, and*
iv. *any award or judgment of the Court"*[832]

The court may be conferred with additional powers by the National Assembly[833] which may also by an act prescribe such matters that may first go through

[827] *Ibid s* 2 (2).
[828] *Ibid* s 2 (1).
[829] *Ibid* s 2 (4) (a).
[830] *Ibid s* 2 (4) (b).
[831] *Ibid* s 1 (2) (b).
[832] *Ibid* s 7(1).

alternate dispute resolution process before it is brought to the court on appeal.[834] Appeal from the decisions of this court goes to the Court of Appeal.[835] Though the jurisdiction of this court is stated to be exclusive, it contradicts the provision of section 272 conferring similar jurisdiction on the High Courts of states.[836] Since the jurisdiction of the High Courts of the state is not made exclusive, both courts may be said to have concurrent jurisdiction on certain subjects because the provisions of the constitution supersedes any statute.[837]

4.4.3.2 Coroner's Court

The Coroner's Court is established by the coroner's laws of respective states in the federation.[838] Every magistrate in the country in addition to their responsibilities also functions as coroners.[839] The Coroner's Court is not a regular court. Its main function is to carry out a fact finding inquest into the death of a person kept in official custody to identify who may be responsible for the death, and the committal of such a person to trial before a court of law. [840]

4.4.3.3 Juvenile Court

The Juvenile Courts are established by the Children and Young Person's Act and the various Children and Young Person's Law of the respective states of the federation.[841] They are courts of summary trial and are constituted by usually a magistrate and other persons who may not be legal practitioners for the trial of children and young persons with respect to the commission of non capital

[833] *Ibid* s 7 (2)
[834] *Ibid* s 7 (3)(4)
[835] *Ibid* s 9 (2).
[836] Okorie P C 46 & 47.
[837] Opinion also shared by Okorie, P C *Ibid*.
[838] For instance in Lagos, it is the Coroners Law of 1994.
[839] Onadeko O A 62.
[840] *Ibid*.
[841] *Ibid* 58.

offence which in practice is referred to the High Court for trial.[842] Usually, the magistrate being learned in law considers and decides legal issues that may arise in the course of the trial while the other members concentrate and decide on issue of fact.[843] Section 2 of the Juvenile and Young Persons Act[844] defines a child as any person below the age of 14 years and a juvenile as any person below the age of 18 years but has attained the age of 14 years.

4.4.3.4 Military Court

Two types of courts martial are established by the Armed Forces Act, 1993.[845] They are the General Court Martial consisting of a president, at least four members and a waiting member, a liaison officer and a judge advocate;[846] and the Special Court Martial consisting of a president, at least two members and a waiting member, a liaison officer and a judge advocate.[847] The jurisdiction of the General Court Martial relate to trying a person who is "*subject to service law under this Act who by law of war is subject to trial by a military tribunal and may adjudge a punishment authorised by law of war or armed conflict.*"[848]

> *A general court-martial shall, subject to the provisions of this Act, try a person subject to service law under this Act for an offence which, under this Act, is triable by a court-martial and award for the offence a punishment authorised by this Act for that offence, except that, where the court-martial consists of less than seven members it shall not impose a sentence of death.*[849]

[842] *Ibid* 59.
[843] *Ibid*.
[844] Applicable in Abuja.
[845] *Ibid* s 129, Decree 105.
[846] *Ibid* s 129 (a).
[847] *Ibid* s 129 (b). See also Onadeko O A 43.
[848] *Ibid* s 130 (2).
[849] *Ibid s* 130 (1).

The jurisdiction of the Special Court Martial relate to the same areas covered by the General Court Martial. Where a special court martial sits with only two members, it is incapable of imposing a sentence of more than one year and it cannot impose a death penalty.[850] Appeal from this court is made to the Court of Appeal.

4.4.4. Tribunals

This is a special category of courts or adjudicatory bodies set up under Nigerian law for the adjudication of specific class of civil or criminal disputes. The existence of tribunals is backed by the constitution and the various laws establishing them. Over the years, a number of tribunals have been dissolved and their matters transferred back to the regular courts.[851] A good example of this is the Robbery And Firearms Tribunal established by the Robbery and Firearms (Special Provisions) Decree[852] and dissolved by the Tribunals (Certain Consequential Amendments, Etc.) Decree.[853]

4.4.4.1. Election Tribunals

Two types of election tribunals are established under the Constitution. The first is an election tribunal for the federation with exclusive original jurisdiction to adjudicate on petitions relating to the election of members of the National Assembly.[854] The composition of this tribunal is set out in the sixth schedule to the Constitution.[855] The second is the governorship and legislative houses

[850] *Ibid* s 130 (3).
[851] Examples of dissolved tribunals are those established under these laws- Recovery of Public Property (Special Military Tribunal Decree 1984; Special Tribunal Miscellaneous Offences Decree 1984; Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree 1994, etc.
[852] 5 of 1984
[853] 62 of 1999.
[854] Section 285 (1) (a-d) of the 1999 constitution of Nigeria.
[855] *"1. (1) A National Assembly Election Tribunal shall consist of a Chairman and four other members. (2) The Chairman shall be a Judge of a High Court and the four other members shall be appointed from among Judges of a High Court, Kadis of a Sharia Court of Appeal, Judges of a Customary Court of Appeal or other members of the judiciary not below the rank of a Chief Magistrate. (3) The Chairman and other members shall be appointed by the President of the Court of Appeal in consultation with the Judge of the State, the*

election tribunal of the various states of the federation with exclusive original jurisdiction to adjudicate on matters relating to the elections of governors, deputy governors and members of the state legislature.[856] The composition is also as set out in the sixth schedule to the Constitution.[857]

4.4.4.2. Investments and Securities Tribunal

This tribunal was established[858] by the Investments and Securities Decree[859] to be composed of nine "*Capital Market Assessors*" with a chairman from amongst them who must be a legal practitioner of not less than 15years standing knowledgeable in matters relating to the capital market .[860] The jurisdiction of the tribunal relates to capital market disputes and it sits on appeal over the decisions of the Securities and Exchange Commission.[861] Parties before the tribunal are entitled to legal representation.[862] The judgments of the tribunal are enforced when filed in a federal high court or a high court.[863] Appeal against the decision of the tribunal is made to the Court Of Appeal.[864]

Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be."

[856] Section 285 (2) Constitution of Nigeria.
[857] "*2. (1) A Governorship and Legislative Houses Election Tribunal shall consist of a Chairman and four other members. (2) The Chairman shall be a Judge of a High Court and the four other members shall be appointed from among Judges of a High Court, Kadis of a Sharia Court of Appeal, Judges of a Customary Court of Appeal or members of the judiciary not below the rank of a Chief Magistrate. (3) The Chairman and other members shall be appointed by the President of the Court of Appeal in consultation with the Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be."*
[858] Section 224 (1) of the Investments and Securities Decree.
[859] 4 of 1999 Cap. 124, Laws of the Federation of Nigeria, 2004.
[860] Section 225of the Investments and Securities Decree.
[861] *Ibid* s 236.
[862] *Ibid* s 238 (1).
[863] *Ibid* s 241.
[864] *Ibid* s 243.

4.4.4.3 Tax Appeal Tribunal

This tribunal was established in 2009 by virtue of the Federal Inland Revenue Service (Establishment) Act 2007[865] and the Tax Appeal Tribunals Establishment Order 2009[866] thereby replacing the Body of Appeal Commissioners' Tribunal and the Value Added Tax Tribunal.[867]

The jurisdiction of this tribunal set up for the quick dispensation of tax disputes covers all disputes related to all applicable tax laws contained in the fifth schedule to the Federal Inland Revenue Service Establishment Act.[868] This tribunal is headquartered in Abuja and has additional offices in all the geopolitical zones and is established in eight zones in Nigeria. The tribunal is presided by about 40 appeal commissioners made up of retired judges, lawyers and accountants with good degree of knowledge on tax matters and law.[869]

4.4.5. Other Methods of Resolution of Disputes outside the Court Structures

4.4.5.1 Truth and Reconciliation Commission

The Human Rights Violations Investigation Commission referred to as the "*Oputa Panel*"[870] was inaugurated by president Olusegun Obasanjo in 1999[871] at

[865] *Ibid* s 59(1).
[866] See the Federal Government Official Gazette 296, Vol. 96 of 2nd December, 2009. Endorsed by the Finance Minister.
[867] Tax Appeal Tribunal http://tat.gov.ng/ Whistle Blower (accessed on 4th November 2011)
[868] *Ibid*. The applicable tax laws include *"Companies Income Tax Act, Petroleum Profit Tax Act, Personnel Income Tax Act, Capital Gains Tax Act, Stamp duties Act, Value Added Tax Act, Taxes and Levies (approved list for collection) Act, as well as other laws, regulations, proclamations, government notices or rules related to these"* "TAT and its relevance to Nigeria's tax system" http://www.tribune.com.ng/index.php/taxation/21849-tat-and-its-relevance-to-nigerian-tax-system (accessed on 9th May 2012).
[869] *Ibid* "TAT and its Relevance to Nigeria's Tax system".
[870] Named after its chairman, the honourable justice Chukwudifo Oputa a retired Supreme Court justice.
[871] 14th June.

the beginning of the fourth republic with a term of reference[872] related to human rights violations experienced in the past. This was couched after the Truth And Reconciliation Commission of South Africa and its establishment was stirred by the seeming positive developments of the South African prototype. It was composed of a chairman and seven other members including a clergy. Its final report was submitted to the President in 2002 but it was never made public.[873] The commission had public hearings in venues across the country of about 150 cases featuring about 10,000 testimonies and it referred a number of cases for further adjudication.[874] The function of the panel was impeded as it could not compel the attendance of some past rulers. Governor Rotimi Ameachi of Rivers State has attempted to replicate this panel in his state in respect of the Niger Delta Crisis.[875]

4.4.5.2 Alternative Dispute Resolution Methods

After more than one and a half centuries of the existence of the conventional court systems in Nigeria, despite the measure of its success in meeting the need of the society by providing equilibrium linked to its role of stabilizing the polity through its adjudicatory functions, it was not devoid of factors that dimed its effectiveness. These factors relate to delays due to a number of reasons like heavy cause lists, costs beyond the reach of the average man to access justice, formalities associated with an intimidating atmosphere, uncertainties, technicalities, and sadly, corruption in certain cases. Consequently, alternative mechanisms to the conventional method of dispute resolutions called Alternative Dispute Resolution (ADR) began to be explored and eventually, were adopted in

[872] This is to *"establish the causes, nature, and extent of human rights violations - in particular the assassinations and attempted killings - between January 15, 1966 and May 28, 1999, to identify perpetrators (individuals or institutions), determine the role of the state in the violations, and to recommend means to pursue justice and prevent future abuses."* See http://www.usip.org/publications/truth-commission-nigeria (accessed 10th November, 2011).
[873] *Ibid*.
[874] *Ibid*.
[875] http://www.usip.org/publications/truth-commission-nigeria (accessed 10th November 2011).

Nigeria. These mechanisms had been in application in other countries long before they were formally adopted in Nigeria. ADR has been defined as "*a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercessor and assistant of a neutral and impartial third party. In some jurisdictions and more commonly, (most jurisdictions), it excludes not only litigation but all forms of adjudication*"[876] These alternative mechanisms are arbitration, mediation and conciliation, and negotiation. The regulatory law for arbitration in Nigeria is the Arbitration and Conciliation Act.[877] The main attraction for the ADR is its focus on the preservation of interest and relationships rather than rights.[878] To submit to any of these mechanisms and be bound by its judgments, both parties must agree in writing which may be included as a clause in the contractual agreement that may have led to the dispute in the first place.

The adoption of these ADR options is steadily gaining grounds in Nigeria and has achieved an official stamping by the judiciary of some states like Lagos State and the FCT through the adoption of a multi door courthouse located within the court premises.[879] This was as a result of the collaborative efforts of the Negotiation And Conflict Management Group and the state government.[880] The Multi Door Courthouse has also gained adoption in additional jurisdictions like Rivers State with a number of states on the way. Hence the amendments of the civil procedure rules of the states that have adopted this practice, to enhance the

[876] Idornigie P O 564. Where reference was made to Brown H & Marriott A *ADR Principles and Practice* (1999).
[877] Cap. A18 LFN 2004.
[878] Idornigie P O "Alternative Dispute Resolution Mechanism" in *Modern Civil Procedure Law* (ed Afolayan A F & Okorie P C) (2007) 563 and Efevwerhan D I 239.
[879] "*The multi door courthouse is a courthouse or dispute resolution centre designed to encourage courts and communities to find ways to offer citizens alternatives to court rooms trial for resolving disputes*'" as defined in Oba C O "Practice and Procedure of the Multi Door Courthouse" in *Modern civil procedure law* (ed Afolayan A F & Okorie P C) 586 where reference was made to Kanowt L *Case and Materials on Alternative Dispute Resolution, American Case Book Series* (1985). This is a concept birthed in the United States.
[880] Idornigie 583 and Oba C O 587.

promotion of amicable settlements of cases using the ADR methods.[881] The Constitution empowers the Chief Judge of each state to make practice directions for ADR practice.[882]

4.5. Conclusion

The brief narration of the Nigeria legal system and the history and evolution of court structures in Nigeria, gives a background for a better appreciation of the court systems and more particularly, the court structures that have evolved through the years culminating in the current setup. The current court structure was discussed under the broad categorization of courts of high jurisdiction and courts of lower jurisdiction and a further categorization as federal courts, state courts and specialized courts. Further, under other methods of adjudication in Nigeria, tribunals, truth and reconciliation commissions and alternative dispute resolution methods were briefly discussed.

[881] For e.g. Order 25 Rule 2 (c) of the High Court Civil Procedure Rules, Lagos tate. See Oba C O.
[882] Sections 259 & 274 of the Constitution of Nigeria.

Chapter Five

The essence of this chapter is twofold. First, it is to make a comparative analysis of the court structures in Nigeria and South Africa. To properly grasp the seeming differences and similarities of both countries, the comparison is carried out against the background understanding of the connection between these courts and the judiciary, and the principles and guidelines that structure the makeup of the judiciary. The basic understanding of the legal culture of the legal systems of these two countries within which these court systems operate is also vital. These have been dealt with in the earlier chapters. This chapter is therefore centered on the comparisons and the general performance of the courts in these two countries which are addressed in 5.1. Further still in this chapter is the analysis of the phenomenon of the changes proposed or in the process of adoption in both countries. This is addressed in 5.2.

5.1 Comparative Analysis of the Current Court Structures in Nigeria and South Africa.

To commence a comparative analysis of the court structures of both countries, it is important to reiterate that the mere seeming absence of a court known by a particular designation in a court system does not necessarily support the premise that the functions of that particular court is absent in the court system. This function may be performed either by another court going by a different designation or by another institution entirely different from that of the former court system. The comparison is therefore taken under the following subheadings.

5.1.1 Arrangement of Federal and State Courts

While Nigeria has federal courts and state courts, South Africa on the other hand has federal, provincial and regional.[883] In Nigeria, while the federal courts of superior jurisdiction include the Supreme Court, Court of Appeal, Federal High Courts, other specialized courts, and the High Court of the Federal Capital Territory (FCT), Customary Court of Appeal and the Sharia Court of Appeal of the FCT, the state courts include the High Court, Customary Court of Appeal and the Sharia Court of Appeal of each state of the federation. The activities of both the federal courts, and the state courts of superior jurisdiction in Nigeria are regulated by the NJC including the payment of their remuneration directly from the Consolidated Revenue Fund of the Federation. The Code of Conduct for Judicial Officers enforced by the NJC applies to all the judges of the federal and State courts including magistrates. The only implication is that judicial officers of these state courts are appointed and removed by their respective governors who are also responsible for the payment of the remuneration of the lower cadre judges. Though these courts of superior jurisdiction are state courts with territorial jurisdictions limited to the geographical boundaries of their respective states, their jurisdiction over the 36 states are uniformed and clearly defined by the Constitution. However, each state legislature enacts the civil procedure rules applicable to each state high court which in actual sense are similar in content. The procedures applicable in criminal litigation however cut across several states and are applicable in both federal and state courts. All courts in southern Nigeria apply the Criminal Code and the Criminal Procedure Code while all courts in northern Nigeria apply the Penal Code and the Criminal Procedure Act.

For the magistrate courts which are state courts, each state is at liberty to set jurisdictional limits which must not conflict with the jurisdictions accorded to

[883] Except for instance the Rental Housing Tribunal which is operated by the respective Provinces and Municipal government.

particular courts under the Constitution. The State High Courts though headed by state chief judges, do not in any way form a distinct judiciary.

In South Africa on the other hand, at best, the Constitutional Court, Supreme Court of Appeal and the specialised superior courts by virtue of their setup and jurisdiction, can be described as federal courts. The respective provinces participate in the determination of the jurisdiction of these federal courts through the contribution of their representatives in the Council of Provinces. The High Courts however are provincial and regional courts. Despite this, each province may not enjoy the liberty to make landmark innovations to its respective justice system without being constrained by the limitations to pull all other provinces along who may either reject those changes or delay the acceptance of the changes.[884] This however is not the situation in Nigeria where each state of the federation can introduce some limited innovations to enhance the court's role in justice delivery. There seems to be no adverse consequence for the practice adopted by each country which perhaps was made in the circumstance, for convenience and a desire for Nigeria for instance, to adopt a structure that incorporates some degree of independence for its diverse states to adopt practices that best suit their purpose without the limitations of other states.

In Lagos State in Nigeria for instance, such landmark innovations were achieved. Lagos State adopted a specialised court system for its high court. Each division of the High Court has a particular specialty and they include the land division, general civil division, criminal division, commercial division, and family and probate division. Several additional judges were appointed by the state to meet this need. The innovation of the Multi-Door Court House– a court assisted ADR in Nigeria was first adopted by the Lagos State judiciary. In respect of its criminal jurisdiction, within the limits of the applicable laws, Lagos State also

[884] Unknown source.

amended its Magistrates' Courts Law[885] to establish an even jurisdiction for all magistrate courts within the State. All these have enhanced to a large extent justice delivery and encouraged expertise through the specialised divisions.

5.1.2 Responsibility for Allocation of Jurisdictional Limits

In both jurisdictions, their constitutions define the extent of the criminal and civil jurisdictions of the superior courts and relegated the determination of the jurisdiction of the magistrate courts and other courts established by other legislation to the legislature. In South Africa, however, the power of the legislature in defining the jurisdictions of the magistrate courts is limited by the clear prohibition of the jurisdiction of magistrate courts in constitutional matters by the Constitution. This constitutional limitation is absent in Nigerian magistrate courts who are at liberty to determine constitutional questions within the limits of their powers. This distinction between the two countries is no doubt influenced by their respective legal heritage where judges under Civil Law which is applicable in South Africa were to merely apply the contents of the law in the circumstance of a case without exercising the liberty to interpret the law in application to the facts of a case which judges including magistrates are empowered to do in Nigeria. Where the jurisdiction of courts are to be determined by legislature, in South Africa, while it is the federal legislature that assigns specific jurisdiction to these courts, in Nigeria, the federal legislature determines only the jurisdiction of the federal courts and state courts of superior jurisdiction and the lower courts of the FCT; but the jurisdictional limits of all courts of lower jurisdiction are determined by the respective state legislatures. There are therefore no uniformed jurisdictional limits in the magistrate courts of the 36 states of the federation and the FCT.

[885] 2009 which was signed into law on 16th January, 2010. See s 93 (1)

5.1.3 Jurisdiction over Constitutional Questions

The appellate and exclusive jurisdiction of the Constitutional Court of South Africa on constitutional matters, which is reflective of its semi centralised system of constitutional justice, finds no direct replica in the Nigeria court structure which adopts a decentralised system of constitutional justice. However this is not indicative of the absence of the functions of this court in the Nigerian court structure. All courts of record in Nigeria from the cadre of the magistrate court upwards entertain matters with constitutional questions. Appeals on all issues including constitutional issues in a matter before the court are made up the hierarchy of the courts right to the Supreme Court which also exercises certain exclusive jurisdiction similar to that exercised by the Constitutional Court. Another distinction in the constitutional justice systems of both countries is the fact that in South Africa, only courts from the cadre of the High Court may entertain matters with constitutional questions and appeals on constitutional questions must have their final destination in the Constitutional Court including any pronouncement against the validity of the conduct of the President and all parliamentary and provincial acts.

At the moment, South Africa has two distinct apex courts i.e. the Constitutional Court which has its seat in Johannesburg and the Supreme Court of Appeal which seats in Bloemfontein and is the final arbiter on all matters except on matters of constitutional questions which go to the constitutional court from the supreme court of appeal. This is quite contrary to the situation in Nigeria which has a single apex court as a final arbiter on all matters including maters with constitutional questions with the head of this court functioning as the chief judicial officer i.e. the Chief Justice of Nigeria. The Supreme Court of Nigeria which has a total of about 15 justices combines the original jurisdiction and

appellate functions performed by both the Constitutional Court and the appellate functions of the Supreme Court of Appeal in South Africa.

Of noteworthy is the situation that pertains to the orders of invalidity related to constitutional matters made by all superior courts in South Africa. The Constitution[886] provides that all such orders of invalidity with respect to constitutional matters made by all superior courts must of necessity be confirmed by the Constitutional Court before they can be enforced. Pending the confirmation of such orders, the courts may provide for interim measures with respect to the order of invalidity or suspend the proceedings of the suit pending the determination of the order of invalidity by the Constitutional Court. In Nigeria however, every court competent to make orders of invalidity with respect to constitutional matters, need no confirmation from any court for the enforcement of such orders. Where such orders are made, they remain valid and enforceable until they are reversed by a higher court on appeal. The enforcement of such orders may be stayed however, when an appeal is filled pending the determination of the appeal.

5.1.4 Appeals

The seat of the Supreme Court of Nigeria is in Abuja the Federal Capital Territory and it hears appeals from all divisions of the Court of Appeal which is an intermediary appellate court which hears appeals from decisions of high courts and such other courts of coordinate jurisdiction with the high court on all subjects of law including matters with constitutional questions. There are 16 Court of Appeal divisions with about 58 justices in Nigeria spread across the six geopolitical zones.[887] All decisions of the Court of Appeal are appealable to the Supreme Court as of right or with the leave of the court. However, decisions

[886] Section 167 (4).
[887] Information from the NJC.

from election tribunals with respect to the validity of elections of persons to the National Assembly, any State House of Assembly, as a governor or deputy governor of any State of the federation do not go beyond the Court of Appeal.

The consideration of a matter by a reasonable number of qualified arbiters at different levels gives room for a more thorough reflection. The presence of a distinct intermediary appellate court is absent in the South African court system. The arrangement that may be akin to this is the function of the High Court to in certain circumstances sit on appeal over the decisions of the High Court by constituting a court of 3 number judges sitting. Despite this, there is a subsisting lacuna for other courts of coordinate jurisdiction with the High Court in South Africa. Since the appellate function of the High Court does not extend to decisions of these other courts, and these courts are not empowered to constitute a similar sitting with appellate jurisdiction, such intermediary appellate court akin to the Court of Appeal in Nigeria is absent in South Africa. But on constitutional matters, the Supreme Court of Appeal may perform such function since appeals could be made from the decisions of the Supreme Court of Appeal to the Constitutional Court. All decisions of the High Courts in Nigeria are appealable to the Court of Appeal. The High Courts in Nigeria are not empowered to be constituted to sit on appeal over decisions of any judge of the high court either on question of fact or law or both.

Similar to the function of the Court of Appeal in Nigeria with respect to election matters is the electoral court in South Africa established by the Electoral Act and serves as an appeal court vested with the power to review[888] decisions of the Electoral Commission with regard to election matters and may hear appeals from the decision of the said commission.[889] However, though it is a court of superior

[888] 73 of 1998. s 18 Electoral Commission Act.
[889] Section 96 Electoral Act.

jurisdiction, it is at par with the status of a high court and therefore lower than the status of the Court of Appeal in Nigeria.

Unlike in Nigeria, South Africa has the Labour Appeal Court which is at par in jurisdiction with the Supreme Court of Appeal. It hears appeal from decisions of the Labour Court which is at par with the High Court. The Labour Appeal Court is the final court of appeal on all labour related issues[890] except issues with constitutional questions which will go from this court to the Constitutional Court. Therefore, as far as labour issues are concerned, the Labour Appeal Court and not the Supreme Court of Appeal is at the apex thereby creating a tripartite apex court system unlike the single apex court system practiced in Nigeria. In Nigeria, the National Industrial Court performs a similar function over labour issues as the Labour Court in South Africa. Appeal from the decisions of the National Industrial Court goes to the Court of Appeal. It should however be noted that there is a proposal in the superior court bill to merge the Labour Court as a branch of the High Court and the Labour Appeal Court as a branch of the Supreme Court of Appeal.

The Constitution of South Africa prescribes that in making appeals, a court can be skipped to proceed to a higher court. The reason given for this practice is the avoidance of the occurrence of injustice. For instance, appeal may lie from the decision of the High Court on constitutional matters straight to the Constitutional Court without passing through the Supreme Court of Appeal. This is done with leave of the Constitutional Court to prevent the occasion of injustice. There is no such procedure in the Nigerian court system except that a litigant is given the opportunity to either apply for expeditious trial by filling an affidavit of urgency or may apply for the matter to be transferred to another judge where he has reasons to believe that the matter may not be handled

[890] Section 167 Labour Relations Act.

judiciously i.e. in an unbiased way which has nothing to do with the qualifications or experience of the judge.

In South Africa, the Judge President or the most senior judge in a division may transfer an ongoing matter in the High Court to commence *denovo* before more judges in the High Court. This practice is absent in Nigeria.

In both Nigeria and South Africa, the High Courts hear appeal on decisions of courts of lower jurisdiction and also discharge supervisory functions over the lower courts. In both countries when sitting on appeal over the decisions of courts of lower jurisdiction, two judges of the High Court form a quorum. Appeals from the decisions of magistrate courts and other courts of lower jurisdiction in Nigeria can go to the High Court, Customary Court of Appeal or the Sharia Court of Appeal depending on the subject of the appeal.

The court structure in South Africa is devoid of a Customary Court of Appeal and a Sharia Court of Appeal. In Nigeria, the Customary Courts of Appeal and Sharia Courts of Appeal hear appeals from decisions of lower courts in civil matters involving questions of customary laws, and for the Sharia Court of Appeal, involving questions of islamic personal law. In South Africa, appeals involving these questions are not dealt with separately. They are made to the regular high court.

Another distinction pertaining to appeals between Nigeria and South Africa is the appellate jurisdiction of the Federal High Court in Nigeria to hear appeals on decisions of Appeal Commissions,[891] Immigration and Prisons Services Board[892] and any other body set up by any federal act pertaining to any of the matters

[891]Set up by the Companies Income Tax Act.
[892] Set up by the Immigration and Prison Services Act.

related to the jurisdiction conferred on it by the Federal High Court Act. In South Africa, the closest to this is the Special Income Tax Court established to hear appeals from decisions of the Commissioner of the South African Revenue Service.

Like in the case of the Competition Appeal Court in South Africa, a court of superior jurisdiction established by the Competition Act with power to review and hear appeals from the decisions of the Commission and the Competition Tribunal which hears matters within the purview of the Competition Commission's responsibilities which are with respect to restrictive practices and mergers,[893] in Nigeria, the Investments And Securities Tribunal was established by the Investments and Securities Decree[894] with jurisdiction over capital market disputes and it sits on appeal over the decisions of the Securities and Exchange Commission.[895] However, the judgments of the tribunal can only be enforced when filed in a federal high court or a high court.[896] Appeal against the decision of the Tribunal is made to the Court of Appeal.[897]

In both Nigeria and South Africa, certain courts of lower jurisdiction exercise appellate powers. While in South Africa, the magistrate court hears appeal from decisions of the Courts of Chiefs and Headsmen, the magistrate court in Nigeria sometimes hears appeal from the lowest grade of the Customary Court. Additionally, in Nigeria, the Upper Area Court though a court of lower jurisdiction in addition to its original jurisdiction, hears appeal from the decisions of Area Courts.[898] Appeals from the decisions of the Upper Area Courts, depending on their contents, go to either the Sharia Court of Appeal (on islamic questions), or the High Court (on questions of law), or the Customary

[893] 89 of 1998. See s 36.
[894] S 224 (1) of the Investments and Securities Decree.
[895] Ibid s 236.
[896] Ibid s 241.
[897] Ibid s 243.
[898] Efevwerhan D. I. 61.

Court of Appeal (on customary law questions). The decision of the Short Process Court in South Africa is not appealable but is subject to review.

5.1.5 Qualifications of Judicial Officers

Only qualified legal practitioners are appointed judges of superior courts in Nigeria except for a few instances. These few instances refer only to the appointment of some judges of the Customary Court of Appeal where "*considerable knowledge of and experience in the practice of customary law*" is considered as a criteria, the Sharia Court of Appeal where the attendance and obtaining of an acceptable qualification in islamic law from an institution recognized by the NJC is also considered, and one third of the judges at the National Industrial Court who must not be qualified legal practitioners. Usually, the minimum qualification is ten years post call for the least court in the cadre of courts of superior jurisdiction. At the Court of Appeal where the justices also sit over appeals from the Customary Court of Appeal and the Sharia Court of Appeal, they are all required to be qualified legal. However to cater for the expertise needed to adjudicate on customary laws and sharia, at least three of the justices to be appointed to the Court of Appeal must in addition to being qualified legal practitioners be learned in customary laws and an additional three in sharia respectively. There is no similar criterion for the justices of the Supreme Court who must all be qualified legal practitioners.

In South Africa, four of the justices of the Constitutional Court must have been serving judges. The others need not have had the experience of adjudication. In responding to the criticism by judges against the participation of political parties in the appointment process of judges of the Constitutional Courts, which they claim will not be acceptable to the people, Arthur Chaskalson stated that such is the practice in every part of the world with respect to the appointment of judges

to the Constitutional Court. He further stated that experience in other countries show that the roles to be played by such courts is supported by its broad-based representative and acceptability of the "*major actors in the political process*".[899]

In South Africa, the Labour Court and the Labour Appeal Court, Land Claims Court and the Competition Appeal Court are composed of qualified legal practitioners. The Special Income Tax Court is composed of a high court judge, an accountant and a representative of the business community. The Special Consumer Court is composed of a high court judge and two other persons knowledgeable in relevant consumer subject.

At the lower cadre in Nigeria, all magistrates and most Upper Area Court judges are qualified legal practitioners. The judges of the Area Courts (which adopt rules of natural justice without being bound by technicalities) are generally non legal practitioners. However in one of the states in Nigeria,[900] they are being replaced by legal practitioners. Sharia Court judges are not qualified legal practitioners but must be learned in Islamic law. The Small Claims Court and Courts of Chiefs and Headsmen in South Africa are not presided by qualified legal practitioners. The juvenile courts in Nigeria are presided by magistrates who decide on legal issues that arise in the course of a case and other persons who may not be legal practitioners who decide on issues of facts.

Election Tribunals in Nigeria are presided over by judicial officers who ordinarily are qualified legal practitioners except for some of them who may be appointed from the Customary Court of Appeal and the Sharia Court of Appeal. The Investment and Securities Tribunal is composed of nine assessors with a

[899] Chaskalson A in his keynote address at the Conference. See Vijver V D (ed) 19-20.
[900] Plateau State.

chairman who must be a legal practitioner. In South Africa, the Electoral Court is manned by judges and two non judges.

Unlike the practice in South Africa where acting judges may be appointed to adjudicate on matters where there are vacancies pending the appointment of the substantial judge, acting judges are not appointed in Nigeria. Vacancies remain until judges are appointed to fill the position. A host of the specialised courts in South Africa are manned by already serving judges and magistrates who combine the responsibilities of running their courts and these specialised courts. In Nigeria, apart from the few instances where serving judges take up responsibilities in tribunals, and juvenile courts and act as coroners, substantial judges are appointed for specialised courts.

In South Africa, the training of judges comes in three categories. The pre appointment training which is usually in form of educational seminars for persons who aspire to be judges which began in 1999; the periodic orientation courses for newly appointed judges and the opportunities to work as acting judges for short terms for potential judges.[901] The first and third categories are not practiced in Nigeria. What obtains in Nigeria is the periodic orientation courses for newly appointed judges organised by the National Judicial Institute, and a short season of understudying an older judge by a newly appointed judge.

5.1.6 Jurisdiction

The Supreme Court of Nigeria combines the appellate jurisdiction of the Supreme Court of Appeal in South Africa and the original and appellate jurisdiction of its Constitutional Court. The Court Of Appeal in Nigeria which does not really have a replica in South Africa exercises only appellate jurisdiction

[901] Vijver V D (ed) 134.

except its original jurisdiction related to election petitions related to the office of the president or vice president of the country. The jurisdictional spread of the High Courts of both countries as conferred by their respective constitutions in both criminal and civil matters are similar. They cover all matters including matters with constitutional questions except those in the exclusive preserve of the higher courts and such matters that are assigned to other courts of similar status with the high courts. In Nigeria, both the Customary Court of Appeal and the Sharia Court of Appeal lack jurisdiction in criminal matters.

In both countries, the magistrate courts have territorial jurisdiction. They have limited jurisdiction in both criminal and civil matters though in northern Nigeria, the magistrate attends to only criminal matters but also sits as a district court judge for civil matters. In both countries, the extent of jurisdictions of the magistrate is determined by the cadre of the magistrate. While in South Africa, the demarcation is done by whether or not the magistrate is a regional magistrate or a district magistrate, in Nigeria the magistrates are graded except for Lagos State in Nigeria where there is only one grade of magistrates. In both countries, magistrates cannot entertain any case centred on succession of estates, interest and title to land, and a few other subjects.

In Nigeria, the jurisdiction of Customary Courts are limited to matters of custody of children, debt recovery and damages, administration of estate and land matters all related to customary law. They exercise criminal jurisdiction over offences created by law, rules and bye laws. The jurisdiction of Area Courts are also in these areas and include matters relating to islamic personal law.

Both countries have established specialised courts which exercise jurisdiction in specific area of the law to the exclusion of all other courts for speedier, less cost effective and sometimes specialised adjudication. However, in Nigeria, the

specialised courts are fewer than those established in South Africa. Basic to the Nigerian and South African system like in the English legal system is the distinction between civil and criminal jurisdictions of the courts reflected in the functions of the courts.

5.1.7 Geographical Spread of Courts

The Supreme Court in Nigeria sits in Abuja, the Federal Capital Territory. The Constitutional Court and Supreme Court of Appeal in South Africa sit in Johannesburg and Bloemfontein respectively. The Court of Appeal in Nigeria though headquartered in Abuja has sixteen divisions in all the six geopolitical zones of the country. In Nigeria, there are thirty-six high courts for each of the states of the federation and a high court for the FCT all with territorial jurisdictions limited to the respective states and FCT. The jurisdictions of all these high courts are similar and are as prescribed by the Constitution and in some instance, as determined by case laws. Each of these high courts has a chief judge and most have several other divisions spread across the local governments within the states and the FCT all manned by judges. The National Industrial Court is located in Lagos, Abuja, Enugu, Kano, Jos, Ibadan, Maiduguri and Calabar.[902]

In South Africa, the there are six provincial divisions and three local divisions of the High Court as well as the High Courts in the former independent TBVC states with territorial jurisdiction. The jurisdiction of the High Court is also as determined by the Constitution. Each division of the High Court is headed by a Judge President and such number of judges appointed by the president of South Africa. However when the Superior Courts Bill which was approved by cabinet

[902] Onyearu A O *The National Industrial Court: Regulating Dispute Resolution in Labour Relations In Nigeria.* http://www.gamji.com/article8000/NEWS8437 (accessed on 20th June 2012)

in December 2010 and presented before the parliament in June 2011 is passed into law, there will be a single high court for the entire country with divisions in all the provinces.[903]

In South Africa, the Labour Court sits at Johannesburg with jurisdiction over the entire country. The Land Claims Court is situated in Ranburg but may convene in any part of the Country for the convenience of the claimants. The Land Claims Court established by virtue of section 22 of the Land Rights Act[904] to hear and determine cases involving the restitution of lands or compensation of acquired or appropriated land to their respective owners[905] has jurisdiction all over South Africa and is situate in Ranburg but may convene in any part of the country for the convenience of the claimants. The Commercial Court has been established in Port Elizabeth, Durban, Johannesburg, Pretoria and a number of places. Where magistrate courts double as specialised courts, there are more jurisdictional spread for the specialised courts because there are several magistrate courts spread across the country. In addition to the regional and district magistrate courts is another category of magistrate court which sits periodically on circuit for a more geographical spread. This circuit magistrate court is not replicated in Nigeria. There are also several magistrate courts spread across Nigeria. The Customary Courts and the Area Courts are several and are spread across the country right to the grass roots. The Tax Appeal Tribunal is established in eight zones having a presence in all the six geopolitical zones of the country.[906] There are several small claims courts spread across South Africa.[907]

[903] <http://www.sabinetlaw.co.za/justice-and-constitution/articles/superior-courts-bill-tabled-parliament> (accessed 29 December 2011)
[904] 22 of 1994.
[905] See the Preamble to the Land Rights Act.
[906] In Abuja, Lagos, Ibadan, Benin, Enugu, Kaduna, Jos and Bauchi. See Tax Appeal Tribunal http://tat.gov.ng/ Whistle Blower > (accessed 11 April 2011)
[907] http://www.westerncape.gov.za/eng/your_gov/595/facilities/9373 (accessed 16th January, 2012)

5.1.8 Specialised Courts

Apart from the specialised courts in both countries, Nigeria and South Africa adopt a system where all other courts exercise jurisdiction that spread across several subjects in civil and criminal litigation however subject to certain statutory limitations. For instance, the high courts in both countries have jurisdiction to hear matters of both civil and criminal questions. Their jurisdictions are not restricted to particular subjects and appeals from the decisions of these courts go to superior courts in hierarchy which are not specialised.

No doubt South Africa has more specialised courts than Nigeria which include Special Income Tax Court, Land Claims Court, Commercial Court, Special Consumer Court, Electoral Court, Competition Appeal Court, Divorce Court, Maintenance Court, Children's Court, Family Court, Short Process Court, Equality Court, Small Claims Courts, Courts Of Chiefs And Headsmen, Community Courts, Child Justice Courts, Sexual Offences Courts and Special Criminal Courts. The specialised courts in Nigeria are much fewer and include only the National Industrial Court, Coroner's Court, Juvenile Court, Military Court, Tribunals, Customary Courts and Sharia Courts. The High Court in Lagos State in Nigeria has a peculiar setting from other high courts in other states in Nigeria. It operates a specialised division comprising of general civil division, criminal division, land division, commercial division, and family and probate division.

However, in both jurisdictions, apart from appeals from the Labour Court to the Labour Appeal Court, all appeals from these specialised courts go to courts whose jurisdiction is not limited to particular subjects of law but rather, have general jurisdiction spread across all subjects of law except of course the Constitutional Court for South Africa. Similar to the Labour Court in South

Africa is the National Industrial Court in Nigeria which exercises exclusive jurisdiction over all civil cases in the area of industrial disputes and other Labour Matters. The advantage here is for the speedier dispensation of labour disputes.[908] This also applies to the Tax Appeal Tribunal in Nigeria akin to the Special Income Tax Court in South Africa. The presiding officers in the later and the former include judges in the high court cadre and qualified accountants. There is no specialised court in Nigeria similar to the Land Claims Court in South Africa set up to hear and determine cases involving the restitution of lands or compensation of acquired or appropriated land to their respective owners.[909] All land matters in Nigeria are heard by the lower and superior courts of general jurisdiction including the customary courts where necessary. The jurisdiction of the commercial court established in South Africa to combat commercial crimes expeditiously is replicated in the regular courts in Nigeria and more specifically by the federal high court which performs this function in addition to its other functions. However, unlike the informal procedure adopted by the Commercial Court, the procedure adopted by the Federal High Court is formal. Similarly, the jurisdiction of the Competition Appeal Court in South Africa whose jurisdiction is with respect to restrictive practices and mergers[910] is borne by the Federal High Court in addition to its other jurisdictions. The jurisdiction of the Consumer Court in South Africa is replicated in courts of general jurisdiction in Nigeria. Both Nigeria and South Africa have distinct tribunals for the adjudication of election matters. The jurisdictions of the Divorce Court, Maintenance Court, Children's Court, Family Court, and Child Justice Courts in South Africa are borne by the regular courts in Nigeria and the juvenile court. The purpose and functions of the Short Process Court and the Small Claims Court in South Africa are regrettably not exactly replicated in Nigeria. These courts exist to cater for persons who cannot afford the cost of litigation in a formal court and the subject

[908] Annual Survey of the Violations of Trade Union Rights 2007.
[909] See the preamble to the Land Rights Act.
[910] 89 of 1998. See s 36.

matter of their claim does not exceed a certain amount. It provides for a speedier and less expensive process and for the small claims court, in an informal venue after working hours. Though the jurisdiction of the Equality Court is replicated in the regular courts in Nigeria, the procedure for the Equality Court is more simplified, less intimidating to the ordinary complainant who would need a lot of courage to take a step towards seeking redress. The jurisdictions of the Courts of Chiefs and Headsmen in South Africa are akin to that exercised by the customary courts and area courts in Nigeria. There is no distinct sexual offences court as is the case in South Africa which creates a safe and private environment for victims of sexual offences to be heard. The jurisdiction exercised by this court is performed by the regular courts in Nigeria. The special criminal court set up as a mobile court to try offences of public violence and unrest is also not replicated in Nigeria even though its jurisdiction is replicated in the regular courts in Nigeria. The Special Criminal Court (Amendment) Act 1958 was cited as an Apartheid legislation which established this court to exercise jurisdiction over treasons and violations of the provisions of Communism Act.[911]

5.1.9 Customary Court of Appeal and Sharia Court of Appeal

Both countries provide for a distinct court to cater for the adjudication of issues based on customary laws at the lower cadre. In Nigeria the Customary Courts, Area Courts and Sharia Courts adjudicate on matters pertaining to disputes arising from the customs applicable in the communities, as it is with the courts of Chiefs and Headsman in South Africa. However, South Africa does not have in its court structure, a distinct appellate court to cater for appeals arising from the decisions of these courts as is the case with Nigeria which has both the Customary Court of Appeal and The Sharia Court of Appeal. Worthy of note is the recent expansion of the jurisdiction of the Customary Court of Appeal of the

[911] <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01892.htm >(accessed Jan. 2012)

FCT to include original jurisdiction in the handling of chieftaincy matters which is a form of affirmation of the significance of traditional institutions and matters pertaining to succession to customary thrones in Nigeria.[912]

5.1.10 Tribunals

Unlike the current situation in Nigeria where the utilisation of tribunals for specific class of civil and criminal disputes has been greatly minimised, (by dissolving quite a number of tribunals then in existence and transferring the subject matters assigned to them to regular courts for adjudication[913] for example the Robbery and Firearms (Special Provisions) Decree[914] dissolved by the Tribunals (Certain Consequential Amendments, etc.) Decree),[915] South Africa still utilises a good number of tribunals for the adjudication of specific disputes. However in Nigeria, a few tribunals like the Election Tribunals,[916] the Investment and Securities Tribunal established[917] by the Investments and Securities Decree[918] and the Tax Appeal Tribunal are operative in Nigeria since the place of tribunals cannot be ignored.[919] As in Nigeria, South Africa on the other hand maintains the existence of tribunals for easy access to adjudication of specific classes of disputes like the Competition Tribunal,[920] National Consumer Tribunal,[921] Rental Housing Tribunals, Companies' Tribunal, and Water Tribunals. The Election Tribunals in Nigeria, for instance, have been highly commended for their handling of election matters giving the logistic problems and pressures it had to

[912] Address by the Chief Judge of the FCT and Chairman FCT Judicial Service Commission Hon Justice Gummi L H, OFR Delivered at The Commencement of the 2011/2012 Legal Year 9 & 10.

[913] Examples of dissolved tribunals are those established under these laws: Recovery of Public Property (Special Military Tribunal Decree 1984; Special Tribunal Miscellaneous Offences Decree 1984; Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree 1994 etc.
[914] 5 of 1984.
[915] 62 of 1999.
[916] See chapter four 4.3.4.1.
[917] S 224 (1) of the Investments and Securities Decree.
[918] 4 of 1999 cap 124, Laws of the Federation of Nigeria of 2004.
[919] Glendone M *et al Comparative Legal Traditions (Texts Material and Cases)* (1994)
[920] Established by the Competition Tribunal Act of 1985.
[921] National Credits Act 34 of 2005.

grapple with.[922] It is an indication that it will function much more effectively under a more enabling environment.

5.1.11 The Truth and Reconciliation Commission

A format of the Truth and Reconciliation Commission which is merely a medium through which crimes committed with political connotations under the apartheid era are appropriately addressed[923] found adoption in the Human Rights Violations Investigation Commission in Nigeria which establishment was stirred by the seeming positive developments of the South African prototype.

5.1.12 Alternative Dispute Resolution

Though these operate outside the conventional courts, it is important to state here that these practices are adopted by both Nigeria and South Africa.

5.1.13 Court Performance

One of the key measurable objectives of the Department of Justice and Constitutional Development in South Africa is "capacitating and restructuring the courts" and "integrating the justice sector".[924] The justice department has tried to achieve this. Through the department's initiative and efforts, there are currently about 202 small claims courts with a plan to establish a small claims court in each of the magisterial district in South Africa which currently numbers about 384.[925] In a bid to reduce the number of backlog cases in the courts, the department executed the case backlog reduction project in 2006 which established the backlog courts for district courts, regional courts and high courts respectively. These backlog courts successfully reduced the backlog cases in

[922] Ugochukwu B & Ononiwu C *The Judiciary and Democratic Transition in Nigeria* Lagos Legal Defence Centre 7.
[923] http://www.westerncape.gov.za/eng/pubs/public_info/C/32303 www.justice.gov.za/scc/scc.htm> (accessed 15th February, 2011)
[924] Department of Justice and Constitutional Development Annual Report 2009/2010. http.//www.info.gov.za/view/downloadfileaction?id=132703 (accessed 10th May, 2012)
[925] *Ibid.*

these courts i.e. cases that have been in court for more than six months, nine months and twelve months.[926] The number of backlog cases reduced during this period by the backlog courts totaled 16, 441 making about 16.7% of the total backlog cases.[927] The department also recognised the concern associated with the lack of adequate capacity of the courts to sustain its work load and proposes an upgrading of the courts' capacity to meet this need.[928]

In 2009/2010, 1, 044 346 new cases were filed in the high courts and magistrate courts collectively. The high courts and lower courts commendably, were able to dispose of 1 065 269 i.e. 20 923 cases in excess of the cases filed within the year. The outstanding number were part of old cases pending before the courts.[929] The Constitutional Court in the period under review received a total of 122 new cases, in addition to its outstanding 134 pending. The court gave judgment on 35 cases and dismissed 84.[930] The court has 11 judges and a minimum of 8 sit over a case. The Supreme Court of Appeal has 21 judges and the quorum for a case is made up of three to five judges.[931] In the period under review, the Supreme Court of Appeal had 431 cases out of which 39 were new cases and a total of 49 cases were determined.[932]

The following reports cover the enrolment and determination of criminal cases in South Africa under the same period. In addition to pending criminal cases before the high court, 1 252 new cases were instituted and 1 363 were disposed.[933] The number of new cases instituted at the regional courts are 81, 873 in addition to the old cases pending. A total of 87, 389 cases were resolved out of which 2 110

[926] *Ibid.*
[927] *Ibid.*
[928] *Ibid.*
[929] *Ibid.*
[930] *Ibid.*
[931] *Ibid.*
[932] *Ibid.*
[933] *Ibid.*

were resolved through ADR mechanism.[934] A total of 961 243 new cases were instituted in the district courts and 976 517 were resolved out of which 116 521 were through ADR mechanism.[935] For civil cases, the high court in addition to pending cases before it, had 24 412 new cases instituted and 10 574 cases were determined.[936] The lower courts had an enrolment of 331 112 new cases and 118 328 summons issued.[937]

The Department of Justice and Constitutional Development rather than rest on its oars with its current court structure adopted other extraneous measures which are factors that contributed to the improved efficiency of the court structure as it influences justice delivery. The justice department achieved its aim of improving justice delivery for the period under review by adopting a number of strategies and mechanisms like recruiting additional judges and support staff in the judiciary, physical structural acquisitions, developments and upgrading of court buildings, relevant training programmes for all category of staff, upgrading of the quality of its administrative functions, and sponsoring of relevant bill at the parliament that will create an enabling environment for the enhancement of justice delivery and the smooth operations of the court structure, etc.[938] These are steps worthy of emulation in Nigeria towards a similar improvement of the efficiency of its court structure at the same time as it seeks reformative measures to improve the outputs of its courts in justice delivery.

Currently, the Supreme Court in Nigeria has a total of 15 justices with plans to appoint 6 additional justices.[939] The Court of Appeal has 58 justices and 16

[934] *Ibid.*
[935] *Ibid.*
[936] *Ibid.*
[937] *Ibid.*
[938] *Ibid.*
[939] Information obtained from the NJC.

divisions spread across the geopolitical zones in the country.[940] The Federal High Court is present in all 36 states of the country.[941] The High Courts are present in every state with some states having divisions in a number of local government areas.

As at April to June 2011, there were a total of 1 384 cases before the Supreme Court[942] a figure considered to be too high against the ratio of the number of its justices. For the period January to December 2011, the total number of civil and criminal cases which includes both new cases filed and pending at the Court of Appeal was 23 092. 6 612 cases were disposed of leaving 16 480 pending.[943] For the Federal High Court, the total number of civil and criminal cases which includes both new cases filed and pending in the court is 77 805 with 24 569 disposed within the period leaving 53 236 cases pending.[944] For all the high courts in the country including the High Court of the FCT, there were a total of 201 735 number of civil and criminal cases which includes both new cases filed and pending 87 855 were disposed leaving 113 880 as still pending.[945] At the High Court of the FCT, there were 118 number of cases at the Abuja Multi Door Court House and 72 were disposed of leaving 46 pending.[946] For all the customary courts of appeal in the country which are in seventeen states including the Customary Court of Appeal of the FCT, there were a total of 4 154 number of civil and criminal cases which includes both new cases filed and pending.[947] A total of 1 792 were disposed of leaving 2 362 as pending. For all the sharia courts of appeal in the country which are in nineteen states including the Sharia Court of Appeal of the FCT, there were a total of 6 977 number of civil and

[940] See records at the National Judicial Council.
[941] *Ibid.*
[942] Summary of Pending Cases of Federal Courts in the 2nd Quarter 2011.
[943] National Judicial Council Performance Evaluation of Judicial Officers of Superior Courts of Records.
[944] *Ibid.*
[945] *Ibid.*
[946] *Ibid.*
[947] *Ibid.*

criminal cases which includes both new cases filed and pending.[948] A total of 2 223 were disposed of leaving 4 749 as pending.[949] The National Industrial Court had 570 cases and disposed of 122 leaving 448 cases pending.[950]

At the lower cadre, Plateau State for instance has 30 magistrate courts, 87 area courts and 6 upper area courts.[951] The FCT has 30 customary courts and 65 magistrates sitting in 11 magisterial districts. The customary courts within the FCT received a total of 1 526 cases and disposed of 708 leaving a total of 818 pending.[952] The area courts received a total of 7 924 cases and disposed of 5 645 leaving a total of 2 270 pending.[953] Lagos state currently has 108 magistrate courts (with 100 on the way)[954] representing seven magisterial districts and three sub districts. In the last legal year, there were over 6, 000 cases before the magistrate courts and a little less than half of this number were disposed of.[955] There are 49 customary courts in Lagos state and at the last legal year, over 5, 000 cases were before the court and a total of about 3, 500 were disposed of.[956]

Though it has been expressed earlier in this research that a number of extraneous factors contribute to the delay in the adjudication of cases in the courts in Nigeria, it is apparent from the figures given above that the capacity of the courts with regards to judges, personnel and court rooms in Nigeria both at the higher

[948] *Ibid.*
[949] *Ibid.*
[950] *Ibid.*
[951] Records at the Plateau state high court registry.
[952] Address by the Chief Judge of the Federal Capital Territory(Fct) and Chairman FCT Judicial Service Commission Hon. Justice L.H. Gummi, Ofr Deliverd at the Commencement Of The 2011/2012 Legal Year.
[953] *Ibid.*
[954] "Fashola Administration to Create over 100 Magistrate Courts in Lagos http://www.naija247news.com/index.php?option=com_content&view=article&id=3458:fashola-administration-to-create-over-100-magistrate-courts-in-lagos&catid=92:news&Itemid=275 (accessed on 21st June 2012).
[955] This information was obtained from the office of the Chief Registrar, Lagos State Judiciary, Nigeria.
[956956] *Ibid.*

and lower levels is insufficient to carry the work load.[957] The difference in the number of cases filed and pending in the courts in Nigeria quite out weights that of South Africa.

5.2 Analysis of the Changes Proposed in Nigeria and South Africa to Enhance Justice Delivery

There have been a number of proposals to effect changes in the justice sector and particularly with regards to the court structures of both Nigeria and South Africa. These proposals aimed towards enhancing justice delivery span the reorganisation and establishment of the lower cadre courts right up to the highest courts of the land. The South African court structure must have an edge over the makeup of the Nigerian court structure to be worthy of emulation by the later. At the moment, even the proposals made for structural reorganisation of the court structure of South Africa seeks a departure from its current structure and a move towards an arrangement similar to what currently obtains in Nigeria. Incidentally, Nigeria also seeks some reforms to its court structure some of which indicate similar trends with the current practice in South Africa. The dilemma this situation causes may be resolved by a careful identification and consideration of the proposed reforms in each jurisdiction against the background of their respective history and legal systems. At the centre of the modification sought in South Africa is the deliberate departure from all structures that promote inequity amongst the population and the installation of structures that enhance the implementation of the bill of rights contained in the Constitution.[958]

[957] This had been mentioned as a factor that contributes to court congestions and invariably delay in the dispensation of cases in Court. Ardo B "Causes for and Remedies for Court Congestion" in Osibanjo Y & Kalu A (eds) (1990) *Law Development and Administration in Nigeria* Ibadan: Federal Ministry of Justice Lagos p 487.
[958] Chakalson A "Transformation of the Personnel of the Judiciary" (1994) 13-24

The constitutional basis for the structural judicial review for South Africa had long been predicated by the provision of item 16 (6) (a) of the 6th Schedule to the Constitution of South Africa which states that-

> *'As soon as is practical after the new Constitution took effect, all courts including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution.*

The Republic of South Africa Superior Court Bill[959] endorsed by the Cabinet in 2010 and currently before the Parliament[960] which admits that the current democratic dispensation inherited a fragmented court structure derived from and set up to '*serve the segregation objectives of the apartheid dispensation'*[961] contains proposals for structural adjustments to be effected on the current court structure. The main purpose of the bill is-

> *To rationalise, consolidate and amend the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa; to make provision for the administration of the judicial functions of all courts; to make provision for administrative and budgetary matters relating to the Superior Courts; and to provide for matters incidental thereto.*

[959] <http://www.sabinetlaw.co.za/justice-and-constitution/articles/superior-courts-bill-tabled-parliament > (accessed 29th December, 2011)
[960] By the Department of Justice and Constitutional Development.
[961] *Ibid.* See preamble.

In other words, the importance of the proposals contained in this bill was acknowledged more so is the inevitable role of the courts which cannot be ignored.

The Constitution Seventeenth Amendment Bill also before the Parliament seeks constitutional amendments to reflect and consolidate the changes proposed in the Superior Court Bill. These proposals also include the proposal for a single apex court with the Chief Justice as the head of the judiciary charged with managerial powers over judicial functions and the administration of all courts;[962] consequently, the Supreme Court of Appeal to be subservient to the constitutional court in hierarchy;[963] a single high court for the entire country with divisions in all nine provinces and other local divisions where necessary to establish specialist divisions of the high court; the words 'lower courts' to replace 'magistrate courts'; and to include the officers of lower courts under the responsibility of the Judicial Service Commission.[964] The bill also aims to provide a single consolidated legislation for all superior courts;[965] and where necessary,[966] that the Constitutional Court and the Supreme Court of Appeal may sit and hold hearings at venues other than Johannesburg and Bloemfontein as determined by the Chief Justice[967] or President[968] respectively whenever it appears expedient to do so.[969] The Bill proposes to establish circuit courts to promote access to court, and permits the conduct of court activities on Saturdays, Sundays and public holidays when necessary.[970] The bill also proposes to

[962] Sections 4 & 8 Superior Court Bill.
[963] *Ibid s* 5.
[964] Superior Court Bill tabled in Parliament < http://www.sabinetlaw.co.za/justice-and-constitution/articles/superior-courts-bill-tabled-parliament > (accessed 29 Dec 2011)
[965] *Ibid*.
[966] Section 6 Superior Court Bill.
[967] Section 4 (1) (b).
[968] Section 5 (1) (b).
[969] Currently, the Supreme Court of Appeal goes on circuit therefore the proposal for circuit court is not an entirely new innovation.
[970] Section 9 (1).

incorporate the responsibilities of the Magistrates Commission to be part of the Judicial Service Commission to enable the Magistrate Commission function as an off shoot of the Judicial Service Commission thereby synchronizing processes for appointment and other related matters pertaining to judges of superior courts and magistrates.[971] Speaking in favour of the Superior Court Bill, The Justice Minister explains that it is aimed at making justice more affordable and within reach for everyone.[972]

There have been diverse reactions to the proposals for structural changes in the Superior Court Bill. The legal fraternity commended the administrative independence that will be achieved for the courts through the provisions of the Superior Court Bill that vest the administration of all the courts on the Chief Justice.[973] This will create a notch for the judiciary as a separate arm of government insulated from any control and direction from the Justice Minister who is an appointee of the executive.[974] The dual responsibilities of the Chief Justice of managing judicial functions and administrative functions of all courts will forestall threats to judicial independence. This is contrary to the contents of the earlier Superior Court Bill[975] proposed under Thabo Mbeki which was criticised as having loopholes which empowers the Justice Minister to handpick judges thereby curtailing judicial independence.[976] The Chief Justice's managerial and administrative functions over the courts extend even to the county courts

[971] Submission in Response to the Proposed Superior Courts Bill and the Constitution 19th Amendment Bill <http://www.joasa.org.za/aricles/Submissions%20on%20Amendment%20Bills.pdf > (accessed 29 Dec 2011)
[972] 'Superior Court Bill Tabled in Parliament< http://www.sabinetlaw.co.za/justice-and-constitution/articles/superior-courts-bill-tabled-parliament> (accessed 29 Dec 2011).
[973]'Superior Court Bill Meets with Praise and Caution< http://www.polity.org.za/article/superior-courts-bill-meets-with-praise-and-caution-2010-05-07> (accessed 29 Dec. 2011)
[974] Department of Justice and Constitutional Development Annual Report 2009/2010 <www.info.gov.za/view/downloadfileaction?id=132703 (accesssed 10 May 2012)
[975] As expressed by Pierre de Vos a constitutional law expert.
[976] 'Superior Court Bill meets with Praise and Caution< http://www.polity.org.za/article/superior-courts-bill-meets-with-praise-and-caution-2010-05-07>(accessed 29 Dec. 2011)

and magistrate courts.[977] This appears as quite an achievement for the judiciary in notching its place as a vital organ of government however, the feasibility of this broad responsibility presents a daunting challenge which may not be insurmountable. In contrast to the practice in Nigeria, this responsibility is shared between the Chief Justice of the federation and Chief Judges of States. As far as state courts in Nigeria are concerned each of the Chief Judge of the thirty-six states is responsible for th courts within the state and this alleviates the burden of the Chief Justice of the federation.

The establishment of the Constitutional Court as the apex court of the land is seen as a betrayal of the agreement reached at Kempton Park to maintain two apex courts.[978] This was criticised as a departure from the European structural model to the American model.[979] This analogy is incorrect. America practices the decentralised system of constitutional justice while the European system provides for a distinct constitutional court which often is at the apex of the judiciary as is the case in Germany. The single apex court phenomenon was also criticised as concentrating too much judicial power on a single court which may be politically influenced and also overburdened with much workload.[980] In comparison to the situation in Nigeria, the Supreme Court of Nigeria is at the apex of the judiciary and bears more responsibilities than the Constitutional Court because its jurisdiction extends to both constitutional and non constitutional matters. However, the justification of the Supreme Court as the apex court in Nigeria over the Constitutional Court in South Africa could be that all its justices are legal practitioners and professional judges who have been trained in the administration and adjudication of justice without allegiance to any political party. The appreciation of placing only career judges at the apex

[977] *Ibid*.
[978] *Ibid*.
[979] As expressed by Mtshaulana *ibid*.
[980] Ibid.

court and as the chief justice is borne out of the appreciation of the training, experience, culture, tradition, sobriety, integrity and dignity for the profession developed over several years to project and actually imbibe a discipline fit for an impartial umpire which the population have developed confidence for. However, the peculiarity of the South Africa episode to an extent appears to justify the elevation of the Constitutional Court and the head of such a court to meet the "*need to transform the law to infuse ordinary lives with the values of equality, respect for dignity and procedural fairness and the price to pay for that is less certainty*"[981] in the contents of judicial precedent to be developed[982] since the population had lost confidence in the judiciary which they believed, upheld the apartheid regime.

Jimi Adesina describes the intent of the Superior Court Bill in the reorganisation of the courts as an attempt to lessen any interference that may stand in the way of administration of justice for the country.[983]

The Judicial Officers Association of South Africa raised serious objections to the use of the term "magistrate" to describe judges of the lower courts on the grounds that the term is not a true reflection of their training and responsibilities, being demeaning, incompatible with its usage in other developed economies and not in line with the proposed reform for a single judiciary were all duly qualified adjudicative officers are given their due regard.[984] The term "Regional Court

[981] Superior Court Bill Meets with Praise and Caution<http://www.polity.org.za/article/superior-courts-bill-meets-with-praise-and-caution-2010-05-07> (accessed 29 Dec. 2011).
[982] The judges of the constitutional court ,the majority of whom are not professional judges may stumble over some legal issues the result of which will be some degree of uncertainty in their judgments which by virtue of being the apex court will be established as judicial precedents for the lower courts.
[983] Adesina J O *Misreading the Superior Court Bill* <http://www.grocotts.co.za/content/misreading-superior-court-bill-13-07-2010> (accessed 12/29/2011).
[984] Submission in Response to the Proposed Superior Courts Bill and the Constitution 19th Amendment Bill< http://www.joasa.org.za/aricles/Submissions%20on%20Amendment%20Bills.pdf> (accessed 29 Dec 2011).

Judge" and "District Court Judge" were proposed in their stead.[985] In Nigeria, all magistrates are qualified legal practitioners and going by the premise in South Africa, may seek a change of name to depict their appropriate status.

Carole Lewis, a judge of the Supreme Court of Appeal had reservations about the way and manner the proposal for a single apex court making the Supreme Court of Appeal subservient to the constitutional court was conducted.[986] While admitting the need for a single apex court, she proposed that the single apex court can be a hybrid of the two current apex courts on the grounds that the dichotomy between constitutional matters and other matters is an illusion. She stated that the retention of the designation "constitutional court" for the single apex court is misleading as its jurisdiction is sought to be extended to include other matters of public interest.[987] She proposed that the proposed Constitutional Court should be made up of mainly serving judges appointed from the existing courts; that cases ascending to the apex court be filtered through the hierarchy of courts, and that since the structural changes achieved in the judiciary so far reflects a pluralist distribution in the appointment of judges, judges who have grown through the ranks should not be side tracked.[988] She decried the none consultation of stake holders like judges, lawyers and members of the public in the considerations of adopting a single apex court for the country.[989]

The South African legal system adopts the principle of judicial precedence. Only four out of the eleven number of judges appointed as judges in the Constitutional Court must have been serving judges thereby leaving non professionally trained judges to make up the majority. The Constitutional Court at the apex

[985] *Ibid*.
[986] Lewis C "Reaching the Pinnacle: Principle, Policies and People for a Single Apex Court in South Africa" (2005) 21 SAHR 512.
[987] *Ibid* 522.
[988] *Ibid* 519 & 522.
[989] 524.

presupposes that decisions of the court create precedents that bind all other courts. It may be argued that the presence of the experienced judges serve as a guide but it must be noted that the inexperienced judges who are in the majority and may lack a clear appreciation for jurisprudential conceptions are at liberty to adopt a position suitable to their convictions. Though there are other qualified judges in the panel of judges, more legally trained minds put together give an assurance of a thoroughly considered decision based on a clear appreciation of all judicial principles and jurisprudential facets. The specialist divisions sought to be established at the high court as proposed in the Superior Court Bill is akin to what operates in the Lagos State judiciary where the judges are assigned specific areas of specialisation. However, there is a distinction between the two in that it is the specific court in Lagos State and not the division that is assigned an area of specialisation and the judges may be rotated round the courts.

There was an outcry from a number of sources including Ferial Haffajee the editor in chief of City Press and Prof. Anton Harber of the journalism and media studies of the University of Witwatersrand against the proposal of a media appeals tribunal by the ANC to adjudicate on cases relating to the media to curb its defamatory excesses.[990] This proposal was criticised as having the effect of empowering the government to curb the freedom of the press by placing limitations on what could be printed against it.[991] The ANC has been accused by the DA of working against the principles of an independent judiciary by trying to set up a judiciary that will reflect its ideology and function in its favour.[992] Some members of the legal profession have criticised the high number of politicians present in the Judicial Service Commission which may impede its autonomy whether real or perceived and reflect the view of "*the majority party in Parliament*"

[990] Media Appeals Tribunal Should be abandoned says panel. <http://www.polity.org.za/article/media-appeals-tribunal-should-be-abandoned-panel-says-2010-08-12> (accessed 9 May 2012).
[991] *Ibid*.
[992] The DA's Judicial Review: *Threats to Judicial Independence in South Africa.* <http://www.da.org.za/docs/621/judicial%20review_document.pdf> (accessed9 May 2012).

which is the ANC.[993] In South Africa, out of the 23 members of the Judicial Service Commission, 15 are political representatives. This should call for concern. In Nigeria on the other hand, only 2 out of the 24 members of the NJC are none legal practitioners and most of the appointments are ex officio. However the Chief Justice of Nigeria who himself is the chairman of the Council has been criticised for wielding too much power in the NJC since he nominates about 60% of the total number of the members.

The Traditional Courts Bill introduced in 2008 which empowers the Justice Minister to appoint a traditional leader without any impute from the community to adjudicate on disputes by hearing and giving judgment after consultation on the applicable customs and customary law was greatly criticised by civil societies and academics like Dr. Sindiso Mnisi Weeks.[994] These criticisms are centered on the Bill as being an obstruction to the traditional adjudicatory structure by displacing the communities of their role in the resolution of disputes, and giving so much power to the leader who may not conscientiously deal with his conflict of interest.[995] The bill also stripes the defendant of the right to a legal representative and denies the defendant the option of being tried by a regular court.[996] The argument by the Department Of Justice And Constitutional Development- the sponsor of the Bill that it seeks to entrench the traditional concept of restorative justice[997] is not in itself convincing weighing the criticisms against the fact that the community courts already adopt the system of restorative justice and the courts of chiefs and headsmen already exist to perform

[993] See Olivier M and Baloro J Towards a legitimate South African judiciary: *Transformation, Independence and the Promotion Of Democracy and Human Rights*, *Journal for Juridical Science* 26 (1): 31-50 36 contained in The DA's Judicial Review: *Threats to Judicial Independence in South Africa*.' <http://www.da.org.za/docs/621/judicial%20review_document.pdf > (accessed 9 May 2012).
[994] Senior Researcher Law Race and Gender Research Unit University of Cape Town. Traditional Court Bill, Out of Step < http://mg.co.za/article/2012-02-17-traditional-courts-bill-out-of-step> (accessed 10 May 2012).
[995] *Ibid*.
[996] *Ibid*.
[997] Activists Berate Traditional Courts Bill in South Africa. <http://www.restorativejustice.org/RJOB/activists-berate-traditional-courts-bill-in-south-africa.

these functions. Further to this is the point that alteration of traditional concepts by divesting the community of its role in determining disputes and imposing an appointed choice in order to adjudicate on these disputes distorts traditional structures and hampers the validity of the hegemony necessary for the well being of a traditional community.[998]

In Nigeria, the current Chief Justice has reiterated the need for the judiciary to go through some reforms which are underway. In 2008, there was a proposal[999] for the establishment of a capital market court as a specialised superior court to cater for the adjudication of disputes arising from transactions at the fast growing capital market with appeals going from this court straight to the Court Of Appeal.[1000] This proposal was made despite the existence of The Investment and Securities Court whose decision has to be first endorsed by the High Court before it can be enforced. No doubt, the establishment of this court will promote a speedier and cost effective process since the endorsement of the high court will be done away with. This suggestion was fully endorsed by the then Chief Justice[1001] and the Attorney–General of the federation but is yet to see the light of day.[1002] Another proposal to court structure reform in Nigeria is with respect to the establishment of a family court with criminal and civil jurisdiction, with adequately trained personnel to man the court, and with simple court procedures to provide a more viable environment for child justice in compliance with international and regional documents with regards to speedy trial, adequate legal representation and conducive environment.[1003] A specialised division of the

[998] *Ibid.*
[999] Soniyi B CJN, AGF Back Specialist Court for Stock Market ="http://odili.net/news/source/2008/may/30/"http://www.burstnet.com/cgi-bin/ads/cb6127a.cgi/v 2008/05/30 (accessed 24th January 2011).
[1000] *Ibid.*
[1001] Justice Idris Legbo Kutigi .
[1002] Aondoakaa M [SAN].
[1003] This feature: (October 2003) Child Justice Reform in Nigeria. Article 40*: The Dynamics of Youth Justice and the Convention on the Rights of the Child in South Africa.* Vol.5 No.3. This proposal was made out of the efforts of the 'National Human Rights Commission (NHRC), Constitutional Rights Project

high court in ecommerce related issues with adequately trained judge and court personnel was also proposed to enhance adequate adjudication of matters related to ecommerce since this is absent at the moment.[1004]

Access to Justice, a nongovernmental organisation in Nigeria, did submit a memorandum[1005] were proposals were made for the strengthening of judicial independence, accountability, performance, enhancing access to justice, the rule of law, and the financial autonomy of the judiciary.[1006] One of its recommendations is towards reforming the procedures adopted in the recruitment and discipline of judicial officers. The practice in other jurisdictions like the USA, England, Canada, Scotland and South Africa, where more open and transparent methods which are merit based are utilized, were proposed for adoption in Nigeria.[1007] These methods include elections and advertisements of vacancies as opposed to the system of nomination utilised in Nigeria which denies interested suitably qualified persons the opportunity of being considered for such appointments if they are not nominated. Another recommendation is centred on lessening the power of the chief justice of Nigeria in selecting about 60% of the members of the NJC.[1008]

(CRP) the United Nations Children's Fund (UNICEF) and Penal Reform International (PRI). The child justice practice in South Africa was one of the practices considered in making this proposal.

[1004] QE-Commerce in Nigeria: *How To Move Forward Legal Framework for the Introduction Of E-Commerce.* <Http://Www.Paulusoro.Com/Publications/Ecommerce.Pdf> (Accessed 24 Jan 2011).

[1005] In response to the invitation by the Nigerian Bar Association Technical Committee on the Review of the 1999 Constitution.

[1006] Plugging Yawning Gaps: P*roposals for Reforming and Strengthening the Nigerian Judiciary, Enhancing theRrule of Law and Expanding Access to Justice in Nigeria* a memorandum submitted to the Nigerian Bar Association Technical Committee on the Review of the 1999 Constitution.

[1007] *Ibid.*

[1008] The recent saga involving the CJN and the president of the court of appeal upon which the president of the court of appeal was suspended by the NJC a body composed of persons, at least 60% of which are handpicked by the CJN posed a crisis of integrity and fairness.

In a memoranda submitted by the NJC to the National Assembly, a good number of proposals were made.[1009] Some of the proposals include the direct deduction of funds meant for the state judiciaries through the NJC directly to the state judiciaries without passing through the states accounts. Another proposal made is with respect to the appellate jurisdiction of the Supreme Court. It was proposed that since the capacity of the Supreme Court cannot sustain it case load, the appellate jurisdiction should be limited to only final decisions excluding decisions on interlocutory matters on ground of facts. These proposals at the moment are yet to be considered for implementation.

5.3 Conclusion

In the first part of this chapter, a comparative analysis of the court structures in Nigeria and South Africa was made under categories of arrangement of federal and State courts, responsibility for the allocation of jurisdictional limits, jurisdiction over constitutional questions, appeals, qualification of judicial officers, jurisdictions, geographical spread of courts, specialised courts, tribunals, truth and reconciliation commission, and ADR. The analysis showed that the functions performed by most of the courts in South Africa are replicated by the courts in Nigeria though it goes by a different name. However there are areas that need emulation by both countries to enhance the justice delivery of the courts. A cursory look at the court performance of both Nigeria and South Africa was also done with regards to the ability of the courts to dispense with cases filed before them. The number of pending cases indicates the need for measures that would address and enhance the performance of the courts for Nigeria. The second part of the chapter concludes by analysing the changes proposed in

[1009] Memoranda from the National Judicial Council, Abuja to the National Assembly on 1999 Constitutional Amendments.

Nigeria and South Africa to enhance the effectiveness and efficiency of their courts.

Chapter Six

6.1 Observations, Proposals and the way forward.

The preceding chapter was focused on the comparism and contrasts between the court structures of Nigeria and South Africa including the analysis of the proposed reforms for both systems. Flowing from that, this concluding chapter will centre on the outcome of the analysis done. Martin Shapiro expressed a dilemma associated with a study of this nature in comparative law in two respects. The first is where a comparative study of this nature rests with the identified contrasts and similarities of the two systems without further proffering suggestions as to what should be adopted by each of the system studied as best practice.[1010] The second is with reference to the implementation of the outcome of the research where recommendations for the adoption of certain identified qualities of one of the system by the other are discountenanced on the grounds that the practice currently adopted is intricately connected to the peculiarities and factors that form the makeup of the system recommended to make a reform. While the two dilemmas stated above are acknowledged, it is however pertinent to state that in this research, recommendations are made from the comparism of the court structures of Nigeria and South Africa. Further to that, the suggestions made from this study should also not be discountenance because they are made after careful analysis of related factors.

The categorization of courts into federal and state courts in Nigeria which gives the states certain autonomy to determine what steps to take to enhance the role of their courts towards justice delivery creates an opportunity to take certain innovative steps like the achievements in the Lagos State judiciary. The advantage in this for Nigeria is that the High Courts in Nigeria are not tied by the limitations experienced in the South African provincial high courts which must pull the other provinces along in order to take landmark innovative steps to

[1010] Shapiro M Vii.

enhance the role of their respective courts in justice delivery. These other provinces may reject or slow down the pace of the innovations. It is therefore suggested that the practice in Nigeria be retained. There is nevertheless a risk associated with the power given to states to create courts by the 1999 Constitution which may create a situation that betray and conflict with the principles of the constitution. A good example is the establishment of sharia courts with criminal jurisdiction in northern Nigeria when the Constitution clearly states Nigeria as a secular state and prohibits a state religion. The solution to this may be a clear definition of the areas of prohibition in the powers given to the states to establish courts.

There is a disadvantage in the dichotomy of federal and state courts with respect to funding. Though the federal judiciary in Nigeria enjoys complete independence from the executive and legislature with respect to funding, the state judiciaries are dependent on their respective state government for funding related to capital budgets and capital and recurrent budgets for their support staff which is not always paid and may lead to strike actions which impede the work of the state high courts and other subsidiary courts. It is therefore suggested that the proposal for a constitutional amendment whereby the funds due to the state judiciary are all deducted from source be effected.[1011]

While in South Africa the federal legislature determines the jurisdictions of both superior and inferior courts, in Nigeria, the federal legislature determines the jurisdiction of only superior courts and inferior courts in the FCT. The jurisdictions of the inferior courts in the states are determined by the state legislature. The advantage of this practice is the liberty for each State, to reflect a system that will best suit its situation. Certain factors that determine for instance

[1011] Memoranda from the National Judicial Council, Abuja to the National Assembly on 1999 Constitutional Amendments.

commercial activities in the states are not uniform. Therefore some states have more commercial activities than others and may choose to increase the financial jurisdictional limits for their magistrate and other lower courts provided it is not inconsistent with federal legislation. This has helped to enhance the role of the courts in the dispensation of justice in Nigeria.

On the issue of having a distinct constitutional court akin to that in South Africa, the functions of the constitutional court is already replicated in the Nigerian Supreme Court and other courts including the magistrate courts in Nigeria which are presided by qualified legal practitioners and can determine constitutional questions except for those in the exclusive preserve of the Supreme Court which also is the final arbiter on constitutional matters. Besides, the factors that warranted the need for a constitutional court in South Africa are not prevalent in Nigeria. The legitimacy of the judiciary in Nigeria was not severely questioned as was the experience in South Africa. Additionally, the Nigeria legal system is made up of mainly Common Law which incorporates the practice of judicial activism. The judges ordinarily interpret the law and are not bound to the exact letters of the law. This is unlike the situation in South Africa where the Civil Law influence does not create an environment suitable for such level of activism for the judges. It is therefore proposed that the current system of constitutional justice practiced in Nigeria be retained. The Nigerian Supreme Court adopts the appellate jurisdiction of the South African Supreme Court of Appeal and both the original and appellate jurisdiction of the Constitutional Court. Besides, the current proposal for a single apex court for South Africa is similar to the current structure in Nigeria but the qualification and training of the judges who will sit in the South African apex court are not entirely similar to the qualifications of the justices that sit in the Nigerian apex court.

It is proposed that the appellate system practiced in Nigeria be retained. First is the opportunity to have two appeal possibilities from the decisions of the High Court or any court on the same level with the High Court to the Court of Appeal and then the Supreme Court. There are several cases in which the Supreme Court overturned the decisions of the Court Of Appeal which would have occasioned injustice to the litigants. This is not so in South Africa to the extent discussed in the preceding chapter. It is also proposed that the Customary Court of Appeal and the Sharia Court of Appeal in Nigeria be retained. These courts are absent in South Africa. The judges that sit in these courts are trained legal practitioners and persons learned in customary laws and the sharia law which gives them the training and experience expected of persons who should hear appeals in these subjects. Appeals from lower courts in South Africa on customary laws go to the High Courts whose judges are not necessarily trained nor have acquired experience in these subjects. Again, since the appellate jurisdiction of the magistrate courts and the upper area courts in Nigeria is akin to that exercised by the magistrate courts in South Africa, the practice in Nigeria should be retained.
With the exception of some of the judges in the Customary Court of Appeal And The Sharia Court of Appeal in Nigeria, all judges of superior courts in Nigeria are qualified legal practitioners. This is unlike the situation in South Africa where some of the judges in the superior courts are not qualified legal practitioners. This also is the case in the Constitutional Court were only four of the 11 judges were serving judges before their appointment. The appointment of non legal practitioners into higher cadre courts may result into a non legally trained person appointed as the chief justice of the country who will of necessity be appointed from the highest court in the land. The appointment of non legal practitioners as judges in superior courts as is practiced in South Africa may be placing a lot in the hands of persons who despite their experience and competence in their respective fields are not adequately trained for the function of the application of jurisprudential concepts and who may lack the requisite expertise and

knowledge to competently deliver the occasion of justice. At the lower courts in both countries, this could be afforded for the reason that these lay judges may be better versed in the customary laws applicable by virtue of experience and usage and their judgments are subject to several appeals to be considered by legally trained legal practitioners. The implication for non legal practitioners who are judges in the Customary Court of Appeal and the Sharia Court of Appeal is that they cannot be promoted beyond these courts because only qualified legal practitioners are appointed to courts higher in hierarchy to them. In Nigeria, where the federal high court and the magistrate courts use assessors, their role is purely advisory and they have no say in the final judgment. This is unlike the situation in South Africa where they preside with judges and contribute to the judgments. It is therefore suggested that the practice of appointing legal practitioners as judges in the superior courts and in some lower cadre courts as practiced in Nigeria be retained. The juvenile courts in Nigeria however, are presided by magistrates who decide on legal issues that arise in the course of a case and other persons who may not be legal practitioners and who decide on issues of facts.

The continued existence of customary courts in Nigeria manned by lay persons has been expressed by Okanny Martin Chukwu to be invaluable to the judiciary. They summarily carry the burden of about 90% of civil and criminal matters in the country as they extend justice to the rural dwellers.[1012] According to him, the people trust these lay judges, and the matters filed in these courts are uncomplicated, fast and cost effective.[1013] He expressed that it will also be a daunting challenge to replace the lay judges with experienced professionals in the field whose training may not be necessary for the functions of these

[1012] Okanny M C 1984 221-226.
[1013] Okanny M C 221-226.

courts.[1014] The absence of the application of stringent rules of evidence and other procedural rules simplifies the functions of these courts.[1015] The Honourable Justice A. O. Adeyemi (retired) who was a judge of the high court expressed that the lower cadre courts be left for lay persons to man.[1016] Incidentally Britain still maintains lay judges in their lower courts who sit with their colleagues from different works of life with a pool of experiences utilised in the adjudication of disputes which role is seen by the judiciary as invaluable.[1017] To this extent, it is proposed that the practice of appointing mainly lay persons as judges at these lower courts be retained. However for the higher cadre of the lower courts in Nigeria, the lay judges are being replaced by qualified legal practitioners since they sit over more complicated cases. It is therefore proposed that the current practice in Nigeria appointing qualified legal practitioners for the higher cadre lowers courts and leaving lay persons for the lower cadre courts as proposed by Honourable Justice Raje M. O. who retired as a judge of the customary court of appeal be retained.[1018]

On geographical spread of courts, it is proposed that the system where for instance the Land Claims Courts can sit in other provinces outside its seat in Ranburg for the convenience of the claimants should be adopted by some federal courts like the National Industrial Court where it could sometimes convene in areas where it has no presence for the ease of its claimants. The existence of the periodic circuit magistrate court in addition to the regional and district

[1014] Okanny M C 221-226.
[1015] Orire A "An Examination of the Judicial Functions of the Magistrates' Courts, District Courts, Area Courts and Customary Courts" in in Osibanjo Y & Kalu A (eds) (1990)*Law Development and Administration in Nigeria* Ibadan: Federal Ministry of Justice Lagos p 476.
[1016] Adeyemi A "An Examination of the Judicial Functions of the Magistrates' Court, District Courts, Area Courts and Customary Courts" in Osibanjo Y & Kalu A (eds) (1990)*Law Development and Administration in Nigeria* Ibadan: Federal Ministry of Justice Lagos p 449-450.
[1017] Okanny M C 221-226; *Report of the Customary Courts Reform Committee* (1978) 6 mentioned in Okanny M C.
[1018] Raje M O "A Comment on the Paper Titled 'An Examination of the Judicial Functions of the Magistrates' Courts, District Courts, Area Courts And Customary Courts"' in in Osibanjo Y & Kalu A (eds) (1990)*Law Development and Administration in Nigeria* Ibadan: Federal Ministry of Justice Lagos p 455-456.

magistrate court in South Africa may not be replicated in Nigeria due to the high number of magistrate courts with wide coverage that already exist in each state in Nigeria[1019] with more in the process of establishment.[1020]

The specialised courts in South Africa no doubt in addition to creating expertise, help to alleviate the workload of the regular courts but for the fact that the regular judges and magistrates often double as judges of these specialised courts therefore defeating the advantage of a reduced work load. Besides the proposal in the Superior Court Bill to collapse these specialised courts into the mainstream courts which may be an indication of the realisation of the distractions these regular court judges face by manning these specialised courts.

Responding to the goal to achieve a reduced work load for Nigerian judges as well as reduce the problems of delay in the adjudication of cases as experienced in courts, the adoption of specialised courts may be welcomed if already serving judges will not be grafted to man these specialised courts. It is therefore proposed that some of the specialised courts akin to those in South Africa could be adopted if separate judges will be recruited for the specialised courts without adding to the responsibilities of already serving judges which will not alleviate the problems of delay.

For Nigeria, for the purpose of solving the problem of delay in the adjudication of matters in higher courts, the increase of the jurisdiction of the lower courts to ease the workload of the high courts might have been proposed, but for the reason that the lower courts already carry the bulk of the cases and do not necessarily share the wealth of experience of the higher courts to adequately

[1019] Plateau State has 30, the FCT has 65 and Lagos State has 108
[1020] "Fashola Administration to Create over 100 Magistrate Courts in Lagos http://www.naija247news.com/index.php?option=com_content&view=article&id=3458:fashola-administration-to-create-over-100-magistrate-courts-in-lagos&catid=92:news&Itemid=275 (accessed on 21st June 2012)

adjudicate on some matters. Rather, to achieve this, it is proposed that additional judges be appointed at the higher courts to speed up the duration of cases. Another proposal is the emulation of the practice of engaging acting judges in South Africa to keep the work going pending the appointment of substantial judges in the event of a vacancy. The advantage of engaging acting judges also enables the appointees to gain experience which is considered as an advantage for substantial appointments. These appointments when done in addition to the pre trial conference and front loading systems currently adopted by the various high courts will greatly enhance the duration of cases before the courts. Additionally, more court rooms should be built and the consequential appointments of additional judges and court personnel should be embarked upon as is being accomplished in South Africa to alleviate the delays experienced in the dispensation of cases in Nigeria.

There are indeed contributory factors from extraneous bodies responsible for the delays experienced in courts. Other factors that cause delay in respect to criminal trials are identified by Honourable justice L. H. Gummi[1021] as the uncertainty as to the appropriate prosecuting authority which sometimes becomes a subject of litigation in courts and could extend for years before it is determined. Also is the case of missing case files between the offices of the Director of Public Prosecution and the Police, inadequate preparation by the prosecution and, the constant transfer of police officers who are prosecutors from one station or another which also contributes to the delay in the determination of criminal matters experienced by the courts.[1022] The solution to this is the proposal of a regular stake holder's forum between all agencies that contribute to the effectual and efficient success of the justice sector for the exchange of valuable ideas and the illumination of the inter-related consequences of the actions or inactions of each of these agencies on

[1021] The current Chief Judge of the High court of Justice, Federal Capital Territory, Abuja, Nigeria.
[1022] National Judicial Policy Justice Sector Coordination Memorandum 1, 2, 5 & 6.

the functions of the court for the objective of enhancing the functions of the courts and meeting the needs of the populace.[1023]

The Justice Department in South Africa achieved its aim of improving justice delivery for the period under review 2010/2011 by adopting a number of strategies and mechanisms like recruiting additional judges and support staff in the judiciary, physical structural acquisitions, developments and upgrading of court buildings, relevant training programmes for all category of staff, upgrading of the quality of its administrative functions, and sponsoring of relevant bill at the Parliament that will create an enabling environment for the enhancement of justice delivery and the smooth operations of the court structure, etc.[1024] Nigeria could emulate this.

A disadvantage to the system of operating a system of specialised courts is the situation where judges who sit in specialised courts like in Lagos State are elevated to superior courts which are not specialised and these judges are expected to adjudicate on all dispute before them irrespective of the subjects. These judges will definitely experience some deficiency in the discharge of their duties. The proposal for Nigeria here is to either retain a non specialised court system or adopt the specialised system operative in Germany where each specialised court is established in hierarchy from the lowest court to the highest court with each having a supreme court so the judges can improve on their specialty as they ascend the hierarchy.

In Nigeria, the decision to abolish the old system of tribunals that were established outside the regular hierarchy of courts - and whose judgments could not appealed - was rightly made. The tribunals currently operating in the

[1023] Ibid 5 & 6.
[1024] Ibid 5 & 6.

country should not be increased. The Tax Appeals Tribunal was set up to improve the administration of tax in Nigeria and has earned the confidence of the stake holders with respect to the fact that disputes arising from tax laws and issues related to it are being handled by experts and are determined expeditiously.[1025] This is also the situation in South Africa. The tribunals in South Africa create easy access to litigants who have grievances, rather than being lumped under the jurisdictions of the high court and magistrate courts. The benefit here for litigants is that their cases are determined faster and is cost effective and sometimes free.

Where a Truth and Reconciliation Commission is sought to be established in Nigeria akin to the South African practice, it should statutorily be endowed with the necessary powers required to produce effective results.

From the figures contained in the previous chapters in relation to court performance, it is apparent that the current courts from the Supreme Court right down to the courts of lower jurisdiction are grossly inadequate to cater for the number of cases filed in Nigeria. To address this, it is proposed that the system of appointing judges to sit over backlog cases which have been pending in court should be adopted for the Nigerian courts. This practice has helped the judiciary in South Africa to greatly reduced backlog cases.

"*Approximately 93% of all criminal cases are heard and finalized in the lower courts; 80% and more of all cases (i.e. criminal and civil) are also dealt with and finalized in the lower courts...*"[1026] The small claims court in South Africa exist to cater for persons

[1025] TAT and its relevance to Nigeria's tax system' http://www.tribune.com.ng/index.php/taxation/21849-tat-and-its-relevance-to-nigerian-tax-system (accessed 9th May, 012).
[1026] Submission in Response to the proposed Superior Courts Bill and the Constitution 19th Amendment Bill http://www.joasa.org.za/aricles/Submissions%20on%20Amendment%20Bills.pdf (accessed 29th December, 2011).

who cannot afford the cost of litigation in a formal court and the subject matter of their claim does not exceed a certain amount. It provides for a speedier and less expensive process in an informal venue after working hours. In Nigeria, the area and customary courts which are grass roots courts replaced the native courts established during colonial times.[1027] They were established to provide, fast, low-cost and easy means of adjudication without recourse to technicalities and with emphasis on substantive justice. They are akin to the informal lower courts in South. However it is proposed that a court similar to the small claims court which sits after working hours in an informal setting and manned by a lay person be adopted in Nigeria.

On training of judges, Nigeria, should in addition to the periodic orientation courses and the practice of a newly appointed judge understudying an older judge for a short term, adopt other methods of training practiced in south Africa which include pre appointment training usually in form of educational seminars for persons who aspire to be judges. The opportunities to work as acting judges for short terms for potential judges should also be considered.[1028] The former however may not agree with the methods of appointment of judges in Nigeria which commences with the nomination of the candidate by other judges. Here, the candidate is not supposed to be aware of the vacancy in the first place.

The appointments into the judiciary to reflect an even distribution of the various population groups in South Africa is a similitude to the practice in countries that adopt a system of constitutional pluralism where power is disperse in a political unit, among the different people groups to ensure due representation in the structure of power.[1029] In Nigeria, the practice of constitutional pluralism is

[1027] Eri U *Law and Procedure in the Area Court* (2000) 5&6.
[1028] The Judicial Institution in Southern Africa 134.
[1029] Akande J "Constitutionalism and Pluralism" in *Essays in Honour of Judge Taslim Olawole Elias* (1992)

entrenched to ensure the protection of the interest of the minority.[1030] This is emphasised in the even distribution of elective seats in the lower cadre legislature and in the appointments of judicial officers even in the high cadre of the federal courts to reflect the geopolitical zonal representations within the country while striving to maintain quality. The federal character provision in the constitution inserted for building a sense of belonging to all population groups validates this practice of constitutional pluralism.[1031] This is quite in order and the practice in Nigeria should be retained.

On a final note, it is my view that subject to the salient observations highlighted in this paper, and the proposals made so far, the present hierarchy of our courts are quite in tune with the current democratic dispensation in Nigeria, and have the potential to fulfill its role of the resolution of conflicts, law making and social control under the current constitution.

6.2 Conclusion

This concluding chapter which flows from the preceding chapter has made a number of proposals for the current court system operative in Nigeria. The conclusion reached here is that Nigeria and South Africa do not exactly operate similar legal systems with the Common Law applying in Nigeria and Civil Law with Common Law influence applying in South Africa therefore they need not have similar court structures. The seeming absence of particular courts in South Africa from the Nigeria court structure does not necessarily mean that the functions of the particular courts are absent in Nigeria as they are carried out by other courts. It was also established that though there are rooms for improvements in the Nigerian court systems, caution should be exercised in the

[1030] *Ibid.*
[1031] *Ibid.*

changes to be made. Proposals were made as to how this could be done. The proposals entail the retention of the main current court structure in Nigeria, a few modifications of some of the current structures in Nigeria via the adoption of one or two structures and practice in South Africa, and some innovations to enable the Nigerian court system deliver optimally.

The Nigerian judiciary despite its daunting challenges and logistic setbacks has strived to execute its functions. It therefore portends that given the enabling environment, and conducive factors, it shows the potentials of achieving much more effectively in the dispensation of justice.[1032]

[1032] Ugochukwu B & Ononiwu C *The Judiciary and Democratic Transition in Nigeria* (2000) 7.

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