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*The Role of the Judiciary in Combating Corruption:
Aiding and Abetting Factors in Nigeria*

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The Role of the Judiciary in Combating Corruption; Aiding and Inhibiting Factors in Nigeria¹

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1.0. Abstract

It is consensually agreed among scholars based on empirical facts and researches in socio-economic field that corruption is one of the greatest hindrances to the development of any country. As part of the efforts to combat the menace of corruption, laws and institution have been put in place. Consequently, judges, by virtue of their position in the society have an important role to play to ensure the effectiveness of those laws and institutions. However, the Nigerian judiciary has failed to live up to its responsibility in the role of combating corruption in the country. Even the Nigerian judiciary itself is accused of corruption. This paper discusses the factors that are necessary to assist in building an effective, vibrant and corrupt free judiciary. Salient factors that hinder the judiciary in the performance of their role to combat corruption are highlighted. The paper finally suggests the need to reform Nigeria's judicial sector and to set in motion all the machinery necessary for the purpose of creating a formidable judiciary in the country.

INTRODUCTION

2.0. The Concept of Corruption

Corruption is undoubtedly one of the greatest social diseases in contemporary times. It has been defined variously depending on the focus of the researcher.² However, despite the differing

¹Being a discussion paper presented at the National Association of Law Teachers Conference held at University of Ilorin between 22nd and 25th of April, 2013.

²A wide sweeping definition of corruption is provided by Macrae as the arrangement that involves an exchange between two parties which: (1) has an influence on the allocation of resources either immediately or in future; and (2) involves the use or abuse of public or collective responsibility for private ends. Transparency International defines corruption as the misuse of public power for private benefit such as bribing of public officials, kickbacks on public procurement or embezzlement of public funds. See generally the following authors Macrae, J. Underdevelopment and the Economics of Corruption: A Game Theory Approach. World Development

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definitions, it is not difficult to recognize. The negative impact of corruption in the society may assume such proportions capable of threatening the foundations of society and justice. The economic growth of a nation may be stunted by corruption. According to Paulo Mauro³, this may occur when one looks at various acts of corrupt practices *vis a vis* the effect it produces on the economy. For instance, where corruption takes the form of tax evasion or the improper use of discretionary tax exemptions, the resultant effect on the economy is loss of revenue. This invariably leads to lower quality of public infrastructure and services. It may also affect the composition of government expenditure as corrupt government officials are more likely to choose to undertake types of expenditure that allows them to collect bribes or manipulate prices. Corruption in the form of diversion of funds has tendency to discourage investors, and thus may reduce the effectiveness of aid flows and contributes to the unconscionable growth of State debts and the decline of budgetary revenues. It acts as a stumbling block to the growth of small businesses and social endeavours. All of these usually lead to the paralysis of State's institutions.⁴

Corruption is not peculiar to Nigeria or Africa alone. Both developed and developing countries, black and white races are engaged in the crime. Its peculiarity only lies in the levels at which the countries operate and the applicable sanctions which vary from one country to another.⁵ As a result of this, the crime of corruption is frowned at by the United Nations, and it is universally legislated against *via* the *United Nations Convention against*

(1982). 10 (8): 677-687. Jing Runtian, Zhang Gaoliang, Teng Tianli "News on Corruption in the Wall Street Journal and the Corruption Perception Index" *Journal of Comparative International Management*, Vol 9, Issue 1, June 2006, pg 36+

³ M. Paolo, "The Effects of Corruption on Growth, Investment and Public Expenditure", (1996) IMF Working Paper.

⁴ C. Lilia, *Corruption and Quality of Governance: The case of Moldova*. Available at SSRN: <http://ssrn.com/abstract=269626> or <http://dx.doi.org/10.2139/ssrn.269626>.

⁵ See, Justice M.M.A. Akanbi, "The Challenges and Prospects of Anti-Corruption Crusade", in Y. Akinseye-George and G. Gbolahan, (eds.), *The Pursuit of Justice and Development: Essay in Honour of Hon. Justice M. Omotayo Onalaja* (Lagos, Nigeria, Diamond Publications Ltd., June 2004), pp118-135, at 120. See also, S. Akinbiyi, *Ethics of the Legal Profession in Nigeria*, (Ogun State, Nigeria, Augustus Publication, 2003), p. 204.

Corruption, 2003.⁶ It is the joy of all States of the world to stamp out corruption, and Nigeria is no exception to this hope. In the same vein, Nigeria is also a party to the African Union Convention on Preventing and Combating Corruption which was adopted in 2003⁷ which it signed and ratified in 2006.⁸ It is pertinent to note that the United Nations Convention against Corruption does not define corruption however; the African Union Convention on Preventing and Combating Corruption defines corruption as the acts and practices including related offences proscribed in the Convention. The offences covered by the Convention include bribery domestic or foreign, diversion of property by public officials, illicit enrichment, money laundering and concealment of property.⁹

Even though Nigeria has joined both the world body and her sister African countries to combat corruption through legislative enactment, the eradication or prevention of corruption can only be done with the total support of all the organs of government – Legislature, Executive and above all the judiciary. However, the judiciary, as the custodian of the law plays the most important role in the fight against the menace of corruption. It is in the light of the above that this paper attempts an examination of the role of Nigerian judiciary in the fight against corruption.

3.0. The Legal Framework to Combat Corruption

While pinpointing the effect of corruption, and the need to curb it, the *United Nations Convention against Corruption, 2003* in its preamble stated that it is of great concern that corruption poses problems and threats to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law. It calls for international cooperation in combating the menace of corruption. In view of the fact that corruption is no longer a local or regional matter but rather has evolved into a transnational phenomenon with potential negative effects on the socio-economic and

⁶ The Convention was adopted by the United Nations General Assembly resolution 58/4 of 31 October 2003. Nigeria signed the Convention on 9th December 2003 and ratified it on 14th December 2004.

⁷ It was adopted in Maputo in July 2003.

⁸ Nigeria signed on 16/12/2003 and ratified same on 26/09/2006.

⁹ See Article 1 of the African Union Convention on Preventing and Combating Corruption

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political sectors, it no doubt deserves comprehensive and multi-faceted approaches.¹⁰ These invariably include the provision of necessary Legislative mechanism, an effective Executive and a virile and competent Judiciary. Even though our focus is on the role of judiciary in combating corruption, we shall briefly appraise the available legislative mechanism which the judiciary is called upon to apply as a prelude to our discussion of the role of the judiciary in combating corruption.

There is need to acknowledge the fact that the acts and conduct amounting to corruption as covered by African Union Convention in Combating and Preventing Corruption in its article 4 (1) are very broad and encompassing and as such may be sufficient to stand as the sole legislative enactment on corruption. However, we quickly note that, in line with the Article 5 of the Convention, state parties are enjoined to promulgate laws to cover such acts and conducts at the national level in order to guarantee effective enforcement. The said Article 5 (1) provides that:

State Parties undertake to adopt legislative and other measures that are required to establish as offences, the acts mentioned in Article 4 paragraph 1 of the present Convention.

In line with the above, the imperativeness of having in existence and recognition of other legal framework to combat corruption in Nigeria cannot be over emphasized. It is therefore necessary to mention some of those legislative enactments in Nigeria which aim at combating corruption.

The legal regime for combating corruption in Nigeria is very rich in terms of laws. However, one may not be wrong to say that most of the laws are duplicative or repetitive. Prominent among laws against corruption include the Penal and the Criminal Codes, the two primary criminal legislations in Nigeria¹¹ that legislate against the offence of corruption and abuse of office.¹² There are other laws that are national and have uniform application in the

¹⁰ Preamble to the United Nations Convention against Corruption, 2003.

¹¹ Criminal Code Act, Cap C38, Laws of the Federation of Nigeria, 2004, Penal Code of Northern Nigeria

¹² See generally, Sections 98-111, in particular, Sections 98, 98A, 98B, and 99 of the Criminal Code Act, 2004. The *Corrupt Practices and Other Related Offences Act, No. 6 of 2003*. This Act aims at prohibiting and prescribing punishment for corrupt practices and other related offences, and to establish an Anti-Corruption Commission.

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legal regime on corruption in Nigeria, it is of more paramount importance that the judiciary being the body that is responsible for the enforcement of these laws needs to be appraised with the aim of fortifying same to ensure effective service delivery in terms of the fight against corruption.

4.0. The Role of Judiciary in Combating Corruption

According to Alao Aka-Basorun,

[The] role of the judiciary is that of guardian of the constitution. This role ... puts the judiciary in a taller and stronger position than the executive and, or legislative. For an organ which alone can pronounce the acts and deeds of the legislative and executive unconstitutional, illegal, null and void and of no effect, must by implication be the supervisor of the other arms of state and must of necessity be superior to the supervised.¹⁶

The above is not an overstatement and very relevant to the matter under discussion. It is trite that in any given society, laws play the role of prescribing certain ethical standards, social expectations and rules of conduct for every citizen to comply with. This may be in form of civil or criminal regulation of conducts. The normative role of the legislature ceases after a bill has been passed to law. The executive's responsibility is to implement such laws including the apprehension of deviants or those who wilfully disobey such laws. The third arm of government is the judiciary whose primary responsibility is to interpret and apply the laws, and also to resolve disputes between two or more persons. The Judiciary punishes any conduct that is at variance with the expectations of the law of the land. It awards penalties for breaking them in order to ensure a fair and orderly society. One prominent area of criminal laws which effect is pervasive and thus require stiff laws and penal sanctions is corrupt practices. Therefore, it is unarguable that the Judiciary has an important role to play in the prevention and combat of corruption internationally and nationally.

The Anti-Corruption Act also acknowledges the role of the judiciary as being the body responsible for trying and making decisions regarding any offence of corruption under the principal legislation by *inter alia* empowering the court

¹⁶ A. Aka-Basorun, "The Supreme Court and the Challenges of the '90s" in Akinseye-George (ed.) *Law, Justice and Stability in Nigeria: Essays in Honour of Justice Kayode Eso*, 1993 at p.113.

entire country. These include the Corrupt Practices and Other Related Offences Act, 2003.¹³ Economic and Financial Crimes Commission Act 2004, (hereinafter referred to as EFCC), Code of Conduct for Public Officers, Money Laundering Act, Advanced Fee Fraud Act among others.¹⁴

It is rather unfortunate that most of these laws and Commissions exist only on paper and have not made any noticeable nor significant positive impact on the reduction of the menace of corruption and corrupt practices in Nigeria. Though there is no accurate statistical data of those convicted of corruption under the Criminal and Penal Codes, there is no doubt that the two codes with regards to the prosecution of offenders for the offence of corruption are moribund. Making a similar comment on the ineffectiveness of these laws, Rtd Justice Akanbi, former chairman of the Independent Corrupt Commission (ICPC) had this to say:

In spite of the galloping rate of corruption between 1980-1999 (a period of twenty years) before the Anti-Corruption Bill was passed, no single reported case of corruption was brought before the regular high courts or magistrate courts. No recorded conviction in any of the superior courts as defined by the Constitution.¹⁵

The euphoria that greeted the passing of ICPC law reinvigorated the hope of the Nigerian populace that the law would provide an ideal platform for the country to purge itself of corrupt public officers. It is however amazing that in spite of the promising nature of the law and its complementary commission, very little achievement has been recorded after thirteen years of its operation. In the same vein, the Economic and Financial Crimes Commission has not recorded any monumental success in its bid to curb corrupt practices and as of now the Act has only succeeded in celebrating the corrupt leaders rather than having them punished for their crime. While there is need to re-evaluate the

¹⁴See the comprehensive list of various laws on corruption in the paper titled *Combating Corruption in Nigeria, the Role of Judiciary* delivered by Bazuaye *et al* of Faculty of Law University of Benin, at National Association of Law Teachers conference held at University of Ilorin between 22nd and 25th April 2013. p.1-3.

¹⁵ Justice M.M.A. Akanbi, note 5 above at p.122. According to Justice Akanbi, as of 2004, not less than 518 cases have been processed for investigation, 287 cases investigated, with some being cases of governors. He further stated that a number of Local Government Chairmen have been investigated, 17 cases in court as at the time, and in all, 39 accused persons are facing different charges of corruption in courts.

to make an order for the forfeiture of any property which is proved to be the subject matter of the offence of corruption or has been used in the commission of such offence.¹⁷ It also provides that any person arrested in respect of corruption shall be produced before the Court for the purpose of being prosecuted at the instance of the Attorney General of the federation.¹⁸ Measures recommended for the control of corruption are diverse and are usually dictated by the causes. While corruption can also be eliminated by thoughtful government interventions, our working definition of corruption presupposes the violation of legal standards which leads to prosecution or challenge of the action in court.¹⁹ This makes the courts an indispensable and ubiquitous means of combating corruption. However the success of the judiciary in controlling corruption is determined by the absence or presence of some factors. We shall discuss these factors in seriatim.

4.1 Judicial independence

The *United Nations' Declarations on the Basic Principles on the Independence of the Judiciary*, 1985 stipulates that:

The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law without any restrictions, improper influences, inducements, and interferences, direct or indirect from any quarter for any reason.²⁰

Confirming this position, the Nigerian Court of Appeal held in the case of *Denton-West v Muoma*²¹ that "...the importance of a competent, independent and impartial judiciary in preserving and upholding the rule of law cannot be over-emphasized. There is no doubt that public confidence in the independence of the court, in the integrity of judges that man such courts, and in the impartiality and efficiency of the administration of justice as a whole, play a great role in sustaining the judicial system of nation."

¹⁷ See Section 47 (1) of the Act.

¹⁸ See Section 26 (2) of the Act.

¹⁹ Note that the definition of corruption as covered by the African Union Convention on Preventing and Combating Corruption is closely related and similar to the local legislative enactments in Nigeria. The coverage is broad enough to accommodate all the local enactments so far promulgated in Nigeria.

²⁰ See Declaration A/RES/40/32 of November, 1985.

²¹ *Denton-West v Muoma* (2008) 6NWLR (pt. 1083), 418 at pp. 451-52. Per Saulman JCA.

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It is for reason of sustaining public confidence in the courts therefore, that the independence of judiciary is often measured or described in relation to the amount of control (undue, inappropriate or illegal) internal or external²² exerted over the judges. Internal independence refers to the ability of judges to determine cases without undue regard to administrative hierarchies within the court particularly without interference from senior members of the bench. External independence refers to the ability of the judges to judge cases without interference from the elected members of government, administrative agencies or even the society.

4.1.1 Judicial Independence and Judicial Impartiality – Interrelated Concepts

There is no doubt that an institutionalized and independent judiciary is a necessary condition for democratic legitimacy.²³ As rightly suggested that even in a political regime that has a self-restraining executive and military, an active civil society with vigorous non-governmental organizations and media, a functioning economy, and a culture that values the rule of law and freedom itself, an independent judiciary is still much needed to assure minorities, majorities, individuals, and even criminal defendants that rulers will not oppress them.²⁴

Judicial independence has no single all-encompassing definition and as such it has been defined variously by many jurists in various ways.²⁵ However the

²² P. Randall, "Judicial Independence in China: Common Myths and Unfounded Assumptions". *LaTrobe Law School Legal Studies Research Paper* No. 2008/11. p.3.

²³ See, e.g., *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (Peter H. Russell and David M. O'Brien, eds.) (Charlottesville, Va.: Univ. of Virginia Press, 2001).

²⁴ *Ibid.*

²⁵ It has been defined as the ability of courts and judges to perform their duties free of influence or control by other actors. See S. L. David, "Judicial Independence" *The International Encyclopedia of Political Science*. B. Bertrand, D. Berg-Schlosser & M. Leonardo. Eds. Sage Publications, 2011. Also, an Independent Judiciary is defined as one in which judges enjoy tenure during good behavior, a salary sufficient to shield them from pressure from either government or private parties, sufficient prestige that the hope of promotion to a more prominent post is not a large motivator, a system of perquisites . . . that is hard for the government to manipulate, and rules regarding jurisdiction over cases that are resistant to executive and legislative meddling, among others. See M. K. Daniel & G. M. Paul, *The Value of Judicial*

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common denominators in any given definition generally features separation of the judiciary from the other two arms of government and factors that could enhance impartial judgement. Independence of judiciary therefore is defined as the extent to which a court may adjudicate free from institutional controls, incentives, and impediments imposed or intimidated by force, money, or other extra-legal, corrupt methods by individuals or institutions outside the judiciary, whether within or outside of government.²⁶ The normative fundamental principle of judicial independence is that the judiciary must be independent from both the executive and legislative arms of government. Thus the judiciary must be seen as a constitutional priesthood loyal to the sovereign will-the Constitution at all times even in the face of majoritarian excesses, executive encroachment, and legislative self-aggrandizement.²⁷ Thus, Judges must be completely neutral in order to be able to discharge their assigned constitutional duties. In the words of United States Supreme Court Justice Anthony M. Kennedy: "*The law makes a promise of neutrality. If the promise gets broken, the law as we know it ceases to exist. All that's left is the dictate of a tyrant, or perhaps a mob.*"²⁸

As indicated earlier, a normative feature of judicial independence is impartiality. As a result both judicial independence and impartiality are co-existing dependant concepts. In rendering impartial decisions, judges are

Independence: Evidence from Eighteenth Century England, 7 AM. L. & ECON. REV. 1, 2-3 (2005).

²⁶ L. B. Theodore, *Comparative Judicial Politics: The Political Functioning of Courts* (New York: Rand McNally, 1970).

²⁷ As Montesquieu rightly noted, the separation of powers between judicial and executive branches is far more important than any separation between legislative and executive branches-the only check on an executive branch is a resolute judiciary through which any ordinary citizen can protect his or her civil rights. See Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws*, Great Books in Philosophy Amherst, N.Y.: Prometheus Books, 2002.

²⁸ Standing Committee on Judicial Independence, American Bar Association, Report of the Commission on Public Financing of Judicial Campaigns (July 2001) (quoting Justice Anthony Kennedy of United States Supreme Court Speech at the ABA Symposium on Judicial Independence), available at <http://news.findlaw.com/hdocs/docs/aba/abajudfinrpt072001.pdf> accessed 15th April 2013.

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required “to rely upon their knowledge of law, experience and sense of justice in dealing with any matter before them.”²⁹

4.1.2 Appointment and Promotion of Judges

To this end, the appointment of judges, promotion, transfer, emoluments and assignment of cases should be done in a depoliticised manner³⁰. It is an indubitable fact that the issue of the appointment and promotion of the judicial officers may aid or hinder their independence. It is pertinent to note that in many countries of the world, the appointment, promotion and emoluments of judges are dictated by the executive and legislature. An example is the case of Nigeria, where the appointment of Chief Justice, the justices of the Supreme Court and the heads of the Courts of Record is done by the President (or Governor of a state) on the recommendation of the Judicial Council and subject to the confirmation of the Senate or States House of Assembly in the case of federal and state courts respectively.³¹

It is arguable that where the appointment of judicial officers is being undertaken by the executive or tied to the executive's prerogative, the dictum of who pays the piper dictates the tune becomes the order of the day. Judges may therefore owe their appointment and promotion and other matters of their welfare to the dictate and at the mercy of the executive. A peep into other jurisdictions reveals that appointment of judges may be handled by the judicial body itself. An example is that of India where though the power to appoint judges rests technically with the President by virtue of Article 124 and Article 217 of India's Constitution which grants the president power to appoint Supreme Court judges and high court judges respectively, the position has changed and at present; the appointments and transfers of judges are decided by a forum of the Chief Justice of India and the four senior-most

²⁹ I. Sherrilyn, “Racial Diversity on the Bench: Beyond Role Models and Public Confidence”, 57 Wash & Lee L. Rev. 405, 469 (2000).

³⁰ Is the subject of a number of international instruments such as UN Basic Principles on the independence of the judiciary (1985), Universal Charter of the Judge (1998), IFES Regional Best Practices: A Model Framework for a State of the Judiciary Report for the Americas (2003) which have been described by Randall Peerenboom *supra*.

³¹ Ss.231, 238, 250 and 271 of the 1999 Constitution of the Federal Republic of Nigeria

judges of the Supreme Court. This is known as the Collegium System.³² The composition of which, is determined by seniority and cannot be shaped by either the legislature or executive.³³ Similarly, in Israeli judiciary, judges are appointed and promoted by the nine member Judicial Appointments and Promotion Statutory Committee. The Committee consists of the three branches of government and the Bar Association, but the judiciary constitutes the largest bloc. The names of the candidates are published before selection and a successful candidate must have gained the support of three quarters of the selection Committee.³⁴

Where appointment and promotion are removed from the hands of the executive, the judiciary becomes more fortified with power to determine cases before them without any fear or favour. It is a fact that majority of the corrupt practices come from the executive being the largest arm of the government which is most responsible for initiation of policies and implementation of same. A judge must therefore be separated from the other arms of government to ensure proper and credible adjudication of cases that come before them.

4.2 Adequate Remuneration

Another factor that may ensure the effectiveness of the judiciary is the payment of adequate remuneration, wages and allowances to judges. Related to this is the provision of adequate infrastructural facilities with which judges would work. Thus, the judiciary must be well-funded. It has been observed that an underfunded judiciary will be handicapped in performing its role. In the words of Pius Olayiwola Aderemi "...a judiciary that is not independent – a judiciary that goes cap in hand to beg for money to run its affairs can never

³² Abhinav Chandrachud, The Insulation of India's Constitutional judiciary. Economic and Political Weekly, March 27 2010, Vol. XLV No. 13.

³³ In a bid to ensure transparency and to insulate judiciary from political interference the appointment of judiciary was considered in detail in the popular case of *Supreme Court Advocates-on-Record Association v Union of India* AIR 1994 SC 268.

³⁴ M. S. Eli, "Judicial appointments and promotions in Israel - Constitution, Law and Politics" in M. Kate, & R. Peter, eds., *Appointing Judges in the age of judicial Power: Critical Perspectives*, (Toronto University Press, 2005).

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and should never be expected to discharge its sacred duty of dispensing justice in the ideal way it should.”³⁵

A poorly funded judiciary may not be free from political influence and cannot be pro-active. In some states, the salary of a Senior Magistrate is less than the take home pay of a newly employed bank worker. It should be noted that most corruption related cases like stealing, cheating *etc* do come before magistrate as courts of first instance especially with regards to certain provisions relating to corruption in the Criminal and Penal Codes. Of all the thirty six states in Nigeria, only few states do remunerate their judges and Magistrates very well by providing state of the art cars and housing. Example is Balyesa state, Rivers state and Lagos state in that order. It is however unfortunate that members of the magistrates some of who become promoted to the higher bench do not find things easy in term of remuneration. In Lagos state for instance, many magistrates get paid as low as N150.000 per month. A chief magistrate takes home less than N300.000.00 at the end of the month. The highest paid Chief Magistrate 1 earns less than N450.000 a month and such a person in most cases had been on the bench for between 20 and 25 years aside from the period of his practice as a legal practitioner. This explains the reason why most magistrates are corrupt since they need to engage in those acts that would bring in additional income to augment their salary. It is a possibility that such a person if eventually appointed into the higher bench would automatically carry those illegal acts of corruption he used to engage in to supplement his meagre salary while at magistrate to the higher bench. Thus, judges who undergo these illicit experiences and corrupt lifestyles cannot be reasonably expected to be above board on the judicial seat.

Accordingly, in our pursuit to attain an independent and impartial judiciary, we cannot escape the reality and consequences that each judge brings to the bench a sum of life experiences. This therefore brings to fore the fact that it is going to be a herculean task to actually recruit onto the bench poverty conditioned but corrupt free persons who have not been caught up in the web of corruption and who are not going to be easily contaminated by the virus of corruption that is prevailing in the country.

³⁵ Justice Pius Olayiwola Aderemi, “The Role of a Judge in the Administration of Justice in Nigeria” in J. A. Yakubu, (ed.), *Administration of Justice in Nigeria: Essays in Honour of Hon. Justice Muhammed Lawal Uwais*, (Lagos, Nigeria, Malthouse Press Limited, 2000), pp.79-100, at 81.

4.3 Need for Judicial Accountability/Impartiality

There is need to emphasise the fact that judicial accountability is different from judicial independence. According to Wynn and Mazur,³⁶ while judicial independence connotes an institutional immunity from inappropriate extra-legal pressures in the decision making process, judicial accountability seeks to call attention to the democratic ideal of responsiveness to public opinion. The challenge facing Nigeria therefore is how to create or bring about a judiciary that is both sufficiently insulated from the influence of the executive and at the same time that will be faithful to the law they interpret. This is where it would be necessary to consider those factors that are necessarily harbinger of judicial accountability. An incorruptible judge is one who is conscientious in all his dealings by discharging his duties and responsibilities free of any undue influence and would never succumb to pressure from any quarters. As such the judiciary has to be institutionalised by creating a conducive environment and factors that could assist in building the desired personality in the judges. This invariably extends to reforming the existing judicial sector in all its ramifications. It is submitted that reformation of the judicial sector should engage our primary assignment before the secondary assignment which should be directed towards the judges themselves.

It must be noted that the “independence and impartiality” are conjunctive and cannot be separated. Thus, in *Itsuelli v. Securities and Exchange Commission*,³⁷ Pemu, JCA. held *inter alia* that: Section 36(1) of the Constitution stipulates that:

such a court or tribunal shall be established by law and constituted in such a manner as to secure its independence and impartiality, The “independence and impartiality” are conjunctive. They must work together.³⁸

4.4

³⁶ Wynn, James Andrew and Jr. Mazur, Eli Paul, in their paper titled, *Judicial Diversity: Where Independence and Accountability Meet*. Albany Law Review. Vol: 67. Issue: 3. Spring 2004., p.775.

³⁷ [2012] 2 NWLR (pt. 1284), p. 329.

³⁸ Toriola Oyewo, *The Trial Judge and His Guides in Nigeria*, (Nigeria, Jator Publishing Company, 1999), p. 27.

4.5 Integrity of Judicial Officers

Aside from the independence of the judiciary and its impartiality as discussed above, the next factor that may aid or hinder the exercise of the role of the judiciary in combating corruption is the integrity of the individual judicial officers.

Judicial integrity connotes the respect that citizens have for judicial officers and the confidence the citizens have in the decisions of the judiciary. It is the adherence to truth, soundness, uprightness and purity.³⁹ According to Saulawa, JCA., in *Salvador v. INEC & Ors.*,

... There is no doubt that public confidence in the independence of the courts, in the integrity of Judges that man such courts, and in the impartiality and efficiency of the administration of justice as a whole, play a great role in sustaining the judicial system of nation.⁴⁰

Similarly, in *Baker v. Car.*,⁴¹ the Supreme Court of the United States held *inter alia* that “The Court’s authority ... possessed of neither the purse nor the sword ... ultimately rests on sustained public confidence in its moral sanction.”

Therefore, to have Judges of integrity, to combat corruption, there must be the appointment of Judicial Officers who are disciplined, dedicated to their job, upright, and are ready to exercise their constitutional role without fear or favour. In addition, there must be continuous moral/legal education organised for the judicial officers, and they must be modestly motivated to avoid being caught in the crime of corruption which they are required to combat. Saulawa, JCA remarked that:

It is not in doubt that the nature of the office and functions of a judge call for a very high sense of duty, probity, integrity and transparency, as such any judge so appointed, without possessing the above fundamental qualities, is no doubt bound to be a clog and obstacle to

³⁹ See, T. Osipitan, “Safeguarding Judicial Independence Under the 1999 Constitution”, in Y. Akinseye-George and Gbolahan Gbadamosi, (eds.), *The Pursuit of Justice and Development: Essay in Honour of Hon. Justice M. Omotayo Onalaja* (Lagos, Nigeria, Diamond Publications Ltd., June 2004), pp. 10-31, at 14.

⁴⁰ [2012] 7 NWLR (pt. 1300), p. 417.

⁴¹ (1962) 369 US 186.

justice. As someone would say, "a Judge with little or no learning can be a most dangerous clog in the administration of justice."⁴²

4.6 The Challenge of Recruiting Corrupt Free Individuals as Judges

In the Nigerian society, a person becomes a judge after he has practised for specified number of years and would indubitably have experienced and participated either actively or passively in the existing corrupt society and compromised legal regime. He cannot live in isolation. Therefore our Judges are not immune from society engulfed by corruption and its associated practices.

For the purpose of elucidation and to properly bring this argument into the focus of our understanding, in Nigeria, a lawyer is expected to have not less than ten years of post-qualification experiences before he is appointed onto the bench. During these years he knows readily that cases are not freely filed at the registry (without tips). Movements of case files from one table to the other before being finally assigned must be 'mobilised' to ensure prompt assignment. He experiences on periodic basis the sharp practices of courts' Bailiffs and Sheriffs which have become an indelible print on the image of our judicial sector. Apart from offering bribes to judges or seeking undue favour from him through lobbying, from inception that is the filing of the case up to the time of receiving the judgement of the court or compilations of records of proceedings in case of appeal against the court's decision, one thing that is constant are unacceptable practices that stink of corruption. No lawyer can claim to be above board while traversing the length and breadth of our judiciary. He must have been involved in these practices at one time or the other either willingly or otherwise.

Those lawyers (potential judges) grow and operate in this corrupt system before they too become judges. They already have a mind-set either to continue the system the way they found it or direct their actions towards change. It is therefore going to be a herculean task to expect persons who

⁴² Referenced in O. Tayo, "The Role of the Judiciary in Combating Corruption in Nigeria", being paper presented at the Serap Media Roundtable on Magistrate Courts Ethics, Integrity, and Improving Citizens' Access to Justice, (Premium Times, September 26, 2012). Also available online: http://premiumtimesng.com/opinion/101606-the-role-of-the-judiciary-in-combating-corruption-in-nigeria-by-tayo-oyetibo-san.html?wpmp_tp=1&wpmp_switcher=mobile.

have never operated within the realm of impartiality, justice and accountability to be suddenly civil, accountable and corrupt free by merely changing the gown he puts on in the bar to the regalia of the bench. He is still the same person.

4.7 Inadequacy of the Extant Law

Another challenge posed to the efficacy of the judiciary in tackling corruption cases are inadequate and ineffective laws. In situations where this is the case, the existing laws may be unequipped to apply to recent or more sophisticated shades of certain crimes.⁴³ Realities like cross border crimes, inflation of contracts, cyber-crime, money laundering *etc*, may render the existing laws inapplicable or inadequate.⁴⁴ Since a judge is expected to apply the law and the penalty prescribed for a particular offence, the resultant punishment may eventually become inadequate as a penal sanction. The punishment must necessarily be commensurate with the offence committed. This will not be the case unless the penal laws and sanctions are periodically reviewed to meet up with the exigency of the times. Otherwise, judges would be bound to apply obsolete laws containing ridiculous sanctions which would fail to meet up with the utilitarian function of the criminal law particularly the need to deter other members of the society.

4.8 The Introduction of Plea Bargaining

A plea bargain is the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court's approval. It usually involves the defendant pleading guilty to a lesser offence or to only one or some of the counts of a multi count indictment in return for a lighter sentence than that possible for the graver charge.⁴⁵

⁴³ Discussions on corruption frequently include offences that have received comparatively recent attention like money laundering, drug and human trafficking,

⁴⁴ The inapplicability and obsolescence of S.419 of the Criminal Code of Nigeria to advanced modes of fraud led to the promulgation of EFCC Act Cap E1 LFN 2004

⁴⁵ Black's Law Dictionary, 6th edition, St. Paul, Minnesota West Publishing Co. p. 1152.

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The EFCC was the law enforcement agency who at the federal level introduced the use of plea bargaining into Nigeria's criminal trial system.⁴⁶ Judges are a bit handicapped in the negotiation. After the court has been informed that the parties have reached an agreement, it only behoves on the judge to ascertain the voluntariness of the agreement, after which he enters a judgement which reflects the plea bargaining already entered into by both the prosecution and the defendant.⁴⁷

The system of plea bargaining has been used to resolve high profile criminal cases which involved the stealing of large sums of public money a fraction of which the defendants are only made to return.⁴⁸ For instance, Dieprieve Alamiesieigha, former Governor of Bayelsa State was convicted of stealing

⁴⁶ S. 13 (2) of the EFCC Act is instructive as the authority by which the EFCC resorted to plea bargaining. It provides:

Subject to the provision of section 174 of the constitution of the Federal Republic of Nigeria 1999 (which relates to the power of the Attorney General of the Federation to institute, continue or discontinue criminal proceedings against any persons in any court of law), the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit not exceeding the maximum amount of fine to which that person would have been liable if he had been convicted of that offence.

Unlike the controversially interpreted provision of the EFCC Act, The Lagos State Administration of Criminal Justice Law is explicit and provides for plea bargaining in Sections 75 and 76. Reproduced below are relevant portions of the sections.

S. 75 - Notwithstanding anything in this law or in any other law, the Attorney General of the State shall have power to consider and accept a plea bargain from a person charged with any offence where the Attorney General is of the view that the acceptance of such plea bargain is in the public interest, the interest of justice and the need to prevent abuse of legal process.

⁴⁷ See generally section 76 of the Administration of Criminal Justice Law of Lagos state 2011.

⁴⁸ See Oluseyi Olayanju, The Relevance of Plea bargaining in the Administration of justice system in Nigeria. LASU Law Journal. Vol. VIII. Nos. 2 & 3. Dec 2011/ Jan 2012.

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public assets worth over \$100 million and got away with imprisonment for two years and an order of asset forfeiture for only those assets that were traced. Lucky Igbinedion, former Governor of Edo State, was given a fine of less than \$20,000 on conviction also for theft of public assets and breach of public trust. Tafa Balogun, former Inspector-General of Police, a lawyer, stole assets worth over \$130 million and was sentenced, on conviction to imprisonment for a mere six months. And Mrs Cecilia Ibru, Chief Executive Officer of Oceanic Bank, was convicted of stealing assets worth over \$2billion and was sentenced to six months imprisonment, a term that was mostly served in one of the best hospitals in the country.

The above cases decided by the Nigerian judiciary through plea bargaining give the impression that plea bargaining is a means by which the rich who stole the lifeblood of the poor are made to return part of it and are then let off the hook.⁴⁹ One must admit that it is grossly unfair for a populace to hear of a goat thief being given 5 years imprisonment while those who steal millions of Naira belonging to the public get 6 months imprisonment on luxury beds. Thus it has been observed that despite the potential benefit the plea bargaining system offers to Nigeria's legal system, there are problems associated with its use in corruption cases as it has the tendency to lead to a further reduction of the confidence of the populace in the judicial system.⁵⁰

4.10. The Power of the Attorney General and Decision to Prosecute

In a bid to rid the entire country of corruption, as discussed above, there are various enactments that provide for the trial and prosecution of public officers in respect of certain corrupt practices and other related offences.⁵¹

⁴⁹*Ibid.*

Echoing the same sentiment, Justice Kayode Eso also remarked,

They bargain with the judges; they bargain with the accused person; then, they tell him, refund half of the money, go and serve three months in prison and the three months will, of course, be in the hospital" Sunday Vanguard, October 23, 2011, p 5.

⁵⁰Olayanju oluseyi op cit. note 48 above

⁵¹ Notable among such enactments which have been designed to stem out corruption from every fabric of national life and public offices are: Advanced Fee Fraud and Other Related Offences Decree 1995, The Corrupt Practices and Other Related

Unfortunately, with respect to most of these laws, the decision to prosecute solely rests with the Attorney General of the federation or of the State as the case may be. He wields the authority to institute, commence and take over the prosecution.⁵² He also can exercise the same authority to discontinue the case without giving any reason for doing so. This enormous power of the Attorney General may be mis-used or mis-applied in certain situations to suppress the possible prosecution of corrupt leaders or those who abuse their positions. In some cases, the prosecution may even decide to use an accused person as a mere witness to prosecute others.⁵³

offences Act 2003, Economic and Financial Crimes Commission Act, 2004, Criminal Code Act Cap 77 Laws of the Federation of Nigeria 1990.

⁵² One of the most considered of these powers is the provision of the power to prosecute cases granted to the Attorney General under section 174 of the 1999 constitution.

1) The Attorney General of the Federation shall have power:

a) To institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any Act of the National Assembly;

b) To take over and continue any such criminal proceedings that may have been instituted by any other authority or person: and

c) To discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.

2) The powers conferred upon the Attorney-General of the Federation under subsection (1) of this section may be exercised by him in person or through officers of his department.

3) In exercising his powers under this section the Attorney-General shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.

⁵³ See F.A.RAdeleke, *Leadership, Good Governance And Human Rights Issues In Nigeria*, Chapter 24 of the Book 'Legal Prisms – Direction In Nigerian Law And Page | 311

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In *Akpa v State*⁵⁴ the court emphatically stated that the prosecution is not under any regimental duty or any duty at all to charge all possible accused persons to court. There is also a practice whereby the prosecution, instead of charging a particular suspect, decides to call him as a witness to ensure the conviction of a particular accused person. The prosecution has an unfettered discretion to prosecute or not to prosecute a particular person and courts of law do not have the power to question it.⁵⁵

In *Gani Fawehinmi v Akilu*,⁵⁶ the applicant had applied for mandamus to compel the Attorney General to prosecute a government official for the murder of his friend, client and associate, Dele Giwa. The court construed the provision of section 160 of 1979 Constitution on the power of Attorney General. Honorable Justice Kutigi aptly explained:

It seems to me that the proper construction of the above section is that it gives the Attorney-General a discretionary power to do or not to do any of the things specified in the section "having regard to the public interest, the interest of justice and the need to prevent abuse of legal process"⁵⁷...Now, applying the above principles to this case, it is obvious that mandamus will not lie to compel the Attorney-General or an officer of his department to prosecute or not to prosecute an individual or group of individuals. The power is discretionary and I venture to say that even if the applicant/appellant herein has no other remedy.⁵⁸

Practice' Published by Faculty of Law, Usmanu Dan Fodiyo University of Sokoto March, (2012) p.355.

⁵⁴(2008) 14 NWLR. Pt. 1106, 72. 81-82.

⁵⁵*Ibid*, 82.

⁵⁶(1987)1 NWLR (pt 51) 475.

⁵⁷*Ibid*, at 573

⁵⁸ *Ibid*, at 574. See also the decision in *Layiwola & 3 Ors v The Queen*, where Abbot, Ag. C& F states:

It is without question the province of Law officers of the Crown (in this case the Director of Public Prosecutions) to decide in the light of what the public interest requires in any particular case, who shall be charged and with what offence. It is entirely a matter for this officer's quasi judicial discretion and, in our view, in order to secure the proper administration of justice, he must be left to exercise this discretion according to his own judgement. (1959) 4 FSC 109, at 119-120.

The constitution further empowers the Attorney General to stop any proceeding or case that might have commenced against any accused person. This is known as the power of *nolle prosequi*. In *State v S. O. Ilori & Ors*⁵⁹ the propriety of a nolle entered by the Attorney General was challenged by a private prosecutor whose prosecution had been terminated by the State's Attorney General. In its decision, the Supreme Court stated that the Attorney General of the State must assume "sole responsibility" for the proper and effective exercise of this power, he has full discretion in arriving at what amounts to "public interest, the interests of justice and the need to prevent abuse of the legal process". The court explained that the words "shall have regard to" did not delimit the broad discretionary powers of the prosecutor under the common law or under the Nigerian Constitution.

Accordingly, the wide discretionary powers of the Attorney General can be used to shield bad leaders from prosecution. The power may be politicised or exercised to favour people in power or those who have influences within the society. Even where the accused is already standing trial, the fact that the Attorney General possesses unfettered power to enter *nolle* to bring the case to an end stands contrary to the principle of transparency and accountability.⁶⁰ This will no doubt encourage shielding people away from answering corruption charges levelled against them and the court has no option but to comply.

5 The Challenge of Judicial Corruption

Simply, judicial corruption involves a deviation from certain accepted standards of behaviour not only for material or non-material gains, such as the furtherance of personal or professional ambitions, but also involve moral turpitude and violation of judicial ethics all of which in the long run affect the independence and impartiality of the judiciary.

The assertion that Nigerian judges are corrupt is no longer news. Corruption is a virus that is no respecter of any level in the judiciary. From the lowest court to all the courts of records, cases or instances of corruption are legion. To perfect a bail after an accused has been admitted to bail by a judge, it is a known secret to all lawyers and courts registrars that a negotiated and agreed amount of money must exchange hands. Some magistrates or judges often

⁵⁹ (1983)1 SC NLR 94. See also *Nwankwo v. State* (1985) 6 NCLR 228, 239.

⁶⁰F.A.R. Adeleke note 46 above p 356.

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make the bail term stringent and difficult to fulfill as a result, any motion or application for liberalising the bail term would automatically be negotiated. It was also revealed in a survey conducted by the Economic and Financial Crimes Commission (EFCC) and National Bureau for Statistics with the support of United Nations Office on Drugs and Crimes, that "*Nigerian Courts of law receive the biggest bribes from citizens among all institutions in which corruption is rampant.*" Although, the report further stated that "... *bribery in the judiciary was less frequent than in many agencies....*"⁶¹

Some of our judges are now politicians who lean more to the party that control the state where they serve in order to curry favour from the executives in terms of promotion and other benefits. Some others prefer to toe the line of the Federal Government in order to successfully lobby for appointment into the election tribunal which has become a haven of money making for judges. A judge who handles electoral petition matters automatically becomes a billionaire overnight. While lamenting the state of corruption associated with election matters in Nigeria, Major General Ishola Williams (Rtd.), Chairman of Transparency International (TI) in Nigeria was noted to have remarked that "*All the Judges are just using the election tribunals to make money. All those who had gone through election tribunals are Millionaires today. I challenge them to say NO.*"⁶²

The above conveys the pathetic and unfortunate reputation of our judges - the body whose primary role is to combat corruption, and to generally administer justice. Foremost British lawyer and Judge, Lord Denning (M.R) remarked that "*judges should be beyond reproach and scorn. They should not be persons who can be questioned by the people with scorn that 'who made thee a ruler and a judge over us'.*"⁶³

All these anomalies have eroded the confidence of the people in the Nigerian judiciary. It is therefore suggested that in order to have a judiciary devoid of corruption, and to have one that will uphold the sacredness of the courts to

⁶¹ Referenced in Tayo Oyetibo, "The Role of the Judiciary in Combating Corruption in Nigeria", Premium Times, September 26, 2012.

⁶² Ibid.

⁶³ Lord Denning, *The Road to Justice*, (London, Stevens & Sons. Ltd., 1995), pp. 30-32, quoted in T. Osipitan, "Safeguarding Judicial Independence Under the 1999 Constitution", in Y.Akinseye-George and G. Gbolahan, (eds.), *The Pursuit of Justice and Development: Essay in Honour of Hon. Justice M. Omotayo Onalaja* (Lagos, Nigeria, Diamond Publications Ltd., June 2004), pp. 10-31, at 15.

enable it discharge its role of combating corruption, there is need for total reform and overhauling of the entire judicial sector.

5.1 Need for Reform

The reform may take the form of imposing legal and administrative sanctions on any corrupt judicial officer and those who are working within the sector. Such a reform was attempted in India in 2006, through the initiation of a bill called the Judges (Inquiry) Bill, 2006. The bill called for the establishment of India National Judicial Council to inquire into allegations of “misbehaviour” of judges. The term ‘misbehaviour’ was defined in the bill as

Wilful or persistent conduct which brings dishonour or disrepute to the judiciary; or wilful or persistent failure to perform the duties of a Judge or wilful abuse of judicial office, corruption, lack of integrity, or committing an offence involving moral turpitude; and includes violation of Code of Conduct

6 Conclusion and Recommendations

The judiciary is known to have a great responsibility in the combat of corruption. But, in order to enhance the performance of this role, the following recommendations are hereby made in view of the noticeable challenges facing the judiciary as above discussed:

Firstly, the condition of service of Nigerian judicial workers should be upgraded. Although, better conditions of service may not be an antidote to corrupt practices, but paying them well may achieve positive impact in that a non-greedy judicial officer may reject any overture for corruption. It is therefore recommended that the remuneration and other entitlements of judicial officers be improved simultaneously with the trend of inflation.

Related to the above is need for provision of conducive courtrooms equipped with modern infrastructure/technological equipment desirable in the judicial sector *e.g.* electrical/electronic gadgets to aid in the recording of court proceedings in order to make the determination of cases easier and faster and possibly eliminate the allegation that judges connive with accused persons to delay the process of justice.

The Nigerian government should allow the doctrines of rule of law and separation of powers among the three arms of the government to fully operate. It is through this that the independence of the judiciary will be achieved, and

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the judiciary will be able to discharge its role of combating corruption efficiently and effectively without any fear or favour.

The issue of appointment of judges should be depoliticized and should not be left in the hands of the executives. The Indian example earlier cited is recommended.

The present situation obtainable in Nigeria makes it unlikely for a judge to be able to hold against his appointor in a case before it which involves the latter. For fear of not being promoted or appointed to a higher bench or not being able to access necessary funds a judge may be unable to discharge his duties fairly. To guarantee the impartiality of judges, their appointment and promotion must be non-partisan. There should also be no social or ethnic or other extraneous considerations. A selection left in the hands of an independent body would serve as an insulator against the problem of extraneous considerations while appointing the judges.

What the judiciary is expected to do in a case of corruption brought before it is to ensure that justice is not only done, but manifestly be seen to be done. So, the court must acquit where such is warranted, convict, where the corruption matter before it so warrants, and sentence appropriately in accordance with the guiding principles, and relevant laws of the land. In the English case of *R. v. Sussex JJ. Ex Parte Mc-Carthy*,⁶⁴ Lord Hewart held that “*It is not only of some importance, but of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*”⁶⁵

Also, in the Nigerian case of *The Vessel M. V. Lupex*,⁶⁶ Tobi, JCA said: “*As far as we are concerned, the rich and the poor must receive equal justice in the Court. There cannot be one category of justice to the rich and another category to the poor. That is not justice. That is injustice.*”

In order for the judiciary to exercise its constitutional role as the last hope of the common man in combating corruption, there must be amongst others, the independence of the judiciary, integrity of its members, commitment to rule of law as against rule of man, as well as the observance of due process. These factors may aid or hinder the performance of the role of the judiciary in

⁶⁴ (1924) 1 KB. 256.

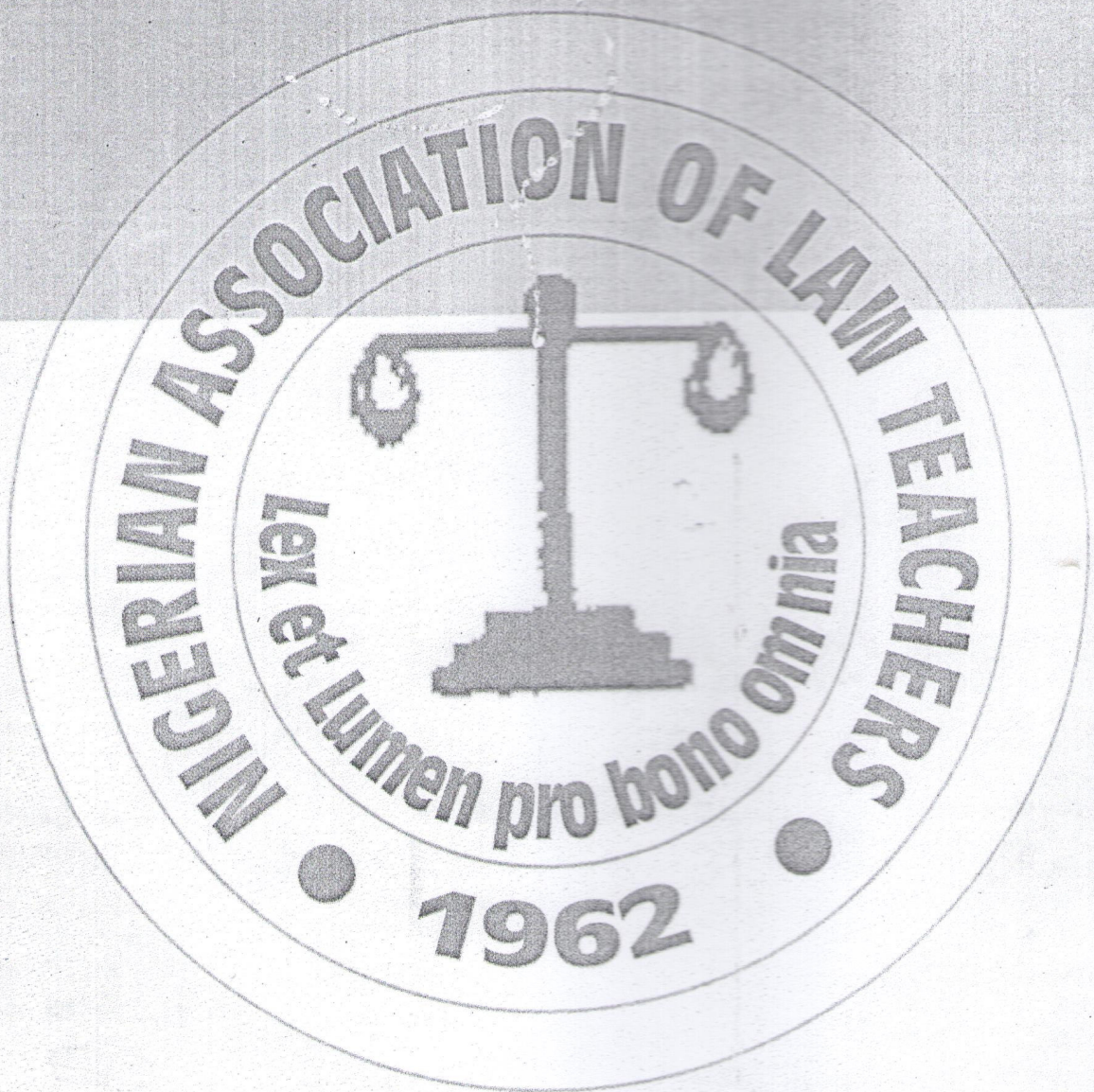
⁶⁵ *Ibid*, at p. 259.

⁶⁶ (1990) 2 NWLR (pt. 278) p. 670.

combating corruption and as expressed in the 1999 Constitution to the effect that *“the independence, impartiality and integrity of courts and easy accessibility thereto shall be secured and maintained.”*⁶⁷

Lastly, the Judiciary, as the last hope of common man should also purge itself of the corrupt elements in the body. Only when this is done will it be able to discharge its function of combating corruption efficiently and effectively.

⁶⁷ Section 17(1)(e) of the Constitution of the Federal Republic of Nigeria, 1999.



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