IS THE CONSTITUTIONAL COURT SYSTEM DESIRABLE FOR NIGERIA? GLIMPSES OF THE AMERICAN AND EUROPEAN MODELS*

Abstract

The constitutional court system, a centralized system of constitutional adjudication was proposed in the 1995 Draft Constitution of Nigeria contrary to what has been its practice of decentralized system of constitutional justice. Even though this proposal was not adopted in the 1999 Constitution which eventually came into force, there continued to be calls for its establishment in Nigeria. The challenge however is whether, despite its success in other jurisdictions, it is suitable for the Nigerian legal system. This paper endeavours to answer this question by looking at the two main systems of constitutional review in the world commencing with a brief historical evolution of constitutional justice. It discusses the nature of the current Nigerian practice, the Nigerian proposal, the suitability of a distinct constitutional court for the Country and its practicality. It argues against the establishment of a constitutional court system being unnecessary and impracticable for the Country.

Keywords: Constitutional Court System, Nigeria, America, Europe, Judiciary

1. Introduction

The constitutional court system,[1] quite foreign to Nigeria, was proposed at the 1994 Constitutional Conference[2] and got into the 1995 Draft Constitution. It is a special court system in which a distinct constitutional court is established to have exclusive adjudicatory powers over constitutional issues, including judicial review and the determination of constitutional and legal rights.[3]As the Constitutional Court proposed in the 1995 Draft Constitution was never implemented, writing about it may seem irrelevant at first glance. Nigerians, who no doubt have over several decades become accustomed with our judicial system of resolving disputes, may find the subject of this paper rather strange. Indeed, when the Constitutional Court System was mooted for adoption in the Draft 1995 Constitution, not a few practicing lawyers wondered what the new proposal was all about. Therefore, this paper hopes to help give a glimpse of what the constitutional court is all about and whether it is relevant in the Nigerian legal system especially with the incessant call that the issue be revisited.

Moreover, the Constitutional Conference at which the idea was conceived may not be easily waived away. The 1995 Draft Constitution bears the semblance of a constitutional document negotiated by representatives elected for that purpose. The current 1999 Constitution of the Federal Republic of Nigeria, which was hurriedly passed into law by the Abubakar Abdulsalam Military Junta, was in the circumstances of its passage flawed by many defects which resulted in several constitutional issues for judicial determination. Some landmark constitutional decisions delivered especially by the Supreme Court of Nigeria have been an essentially healthy experience for the nation. On the other hand, the interpretation and application, or perhaps the misinterpretation and misapplication of constitutional provisions has also had the unfortunate effect of heating up the polity, as in a number of cases involving electoral petitions after the 2003 - 2019 elections and the lawsuits that followed the abduction of the Anambra State Governor, Dr. Chris Ngige and his eventual removal, the challenge of the electoral results of former President Musa Yar Adua, the incident that led to the ousting of the then President of the Court of Appeal Hon Justice Ayo Salami, the challenge of elections results of former president Goodluck Jonathan by General Buhari, a similar challenge of election results that brought in General Buhari by Atiku Abubakar, and other similar cases filed in court. There have been continued calls for a separate constitutional court to be established for the country with a special jurisdiction to handle such constitutional matters.

These experiences elicit the increasingly vital role that constitutional interpretation play to sustaining Nigeria's democracy, and indeed developing it, the reviews of the 1999 Constitution at the National Assembly notwithstanding. We have and may expect more strain to be exerted on our courts in view of the highly contentious issues touching Nigeria's federalism, which essentially is a constitutional issue. The courts are therefore playing an increasingly crucial and indispensable function of giving a constitutional face to Nigeria's federalism, with concerns of whether they are protecting constitutional rights bothering on constitutional issues.

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[1] Section 6 (5C) of the 1995 Draft Constitution of the Federal Republic of Nigeria provided for the establishment of this court system. This provision, however, was not adopted by the 1999 Constitution currently in force.

[2] The Constitutional Conference inaugurated on 27 June 1994. This conference produced the 1995 Draft Constitution.

[3] M A Glendon and M W Gordon and C Osakwe, *Comparative Legal Tradition in a Nutshell* (West Publishing Company, 1982) at 336.

In dealing with the subject of this paper, the origin of the concept of having a distinct court with exclusive jurisdiction over constitutional matters is examined. A brief exposé of the origin of constitutional justice with specific reference to the American and European Models is done, taking the United States and Germany as case studies respectively juxtaposed with the current Nigerian practice. This is because the decentralized system of constitutional justice is traced to the United States and Germany is reputed as having one of the most viable constitutional court system in the world. The emergence of the concept of constitutional justice in Nigeria, the basis for the proposal of a constitutional court system in the 1995 Draft Constitution of Nigeria and the suitability of a constitutional court for Nigeria is discussed. The writer argues that the establishment of a constitutional court is unnecessary for Nigeria.

2. Origin and Type of Constitutional Justice in the World

Generally, two core systems of constitutional justice are identified in the world.[1] They consist of what is termed the American Model which is employed in the United States and a host number of other countries[2] including Nigeria, where the model has been adapted to suit local requirements. The second is the European Model which has been adopted in a host of European countries such as Austria, Germany, France, Spain, and Portugal[3] and in nearly all Central and Eastern European nations since the political revolutions of 1986.[4] The functions of constitutional courts go beyond judicial review which from the America position, is seen as the 'ultimate power of any court to declare unconstitutional and unenforceable any law or official action purporting to be authorized by law, or any other action by a public official that the court deems to be in conflict with the constitution.'[5] Currently, this is just one of the forms of constitutional justice, an expression referring to the authority of a court of law to confine the exercise of legislative and executive powers within the limits allowed by the constitution.[6] It has also been defined to include 'the adherence to constitutional standards in decision making and execution in relation between individuals and governments.'[7]

The authority of the courts is founded on the constitutional concepts of separation of powers and checks and balances inherent in states that practice democracy. These concepts imply the equality of the arms of government, and carry with it the restraint of non-interference by one arm of government in the affairs of the other, while they correlate within the constitutional framework to contain each other within their respective constitutional spheres of function. Consistent with this constitutional concept, is the proclamation of the 1789 French declaration which stated that 'a society that lacks separation of powers has no constitution at all.'[8]

Amongst the three arms of government, the judiciary seems the least prominent. Nevertheless, its significance is well felt with respect to its mandate to implement constitutional justice.[9] With a grave responsibility to protect constitutional values, its independence must be preserved since it often acts as the 'acid test' of any democratic society, hence the need to ensure that the judiciary remains a distinct arm of government.[10] This is evidenced in most countries with written constitutions where fundamental rights and separation of powers are embodied as well as the powers between a central government and state units are demarcated. In such instances, the constitutions provide for a separate body aside from the legislature, to interpret constitutional rights. This arrangement

[1] A Carabas, Constitutional Justice in Europe and the United States of America. A Comparative View [2013] <http://lawyr.it/index.php/articles/international-focus/item/72-constitutional-justice-in-europe-and-the-united-states-of-america-a-comparative-view> accessed on 7 March 2020.

[2] *Ibid*.

[3] A Stone, *The Birth of Judicial Politics in France: Western European Constitutional Courts in Comparative Perspective* 1st ed. (Oxford University Press, 1992) 225 at 226.

[4] S W Shieve, Law and Policy in International Business: Central and Eastern European Constitutional Courts and the Antimajoritarian Objection of Judicial Review [1995] Vol. 22 *Law and Policy in International Business*, 120.

[5] D Kommers, The Federal Constitutional Court [1994] Johns Hopkins University, American Institute for Contemporary German Studies, Monograph Series, 46 at 57.

[6] L Favoreu, 'American and European Models of Constitutional Justice' in David S. Clark (ed.), *Comparative and Private International Law: Essays in Honor of John Henry Merryman* (Duncker & Humblot, 1990), 105.

[7] W O Egbewole, Constitutional Justice and Democracy: What Inputs and Linkages?, a paper delivered at the Pan African conference of presidents of constitutional courts and similar institutions on strengthening the respect for rule of law and democracy through constitutional justice which held on 26 – 28 November 2012 at Marrakech (Morocco). African Training and Research centre in Administration for Development and Hanns Seidel Foundation, accessed on 15 August 2014.

[8] S E Finer and V Bagdonnor and B Rudden, *Comparative Constitution*s 2nd ed. (Oxford University Press, 1995) 21.

[9] Ibid.

[10] Ibid.

safeguards the values entrenched in the constitution against infringement by legislative or executive acts which could become despotic and a source of grave abuse.[11] A variation of this is seen in England where the constitution is unwritten, and, the House of Lords, serves as both the upper house of parliament and its highest court with the speaker serving as both the Lord Chancellor and a senior judge.[12] The system of constitutional justice is broadly described as decentralized and centralized respectively referred to as the American and European models as discussed below.

3. The American Model

Only one model of constitutional justice existed in the world and that is the American Model developed by the United States which the democratic world has adopted.[13] The doctrine of judicial review on grounds of constitutionality emanating from its constitutional jurisprudence enabled judges to pronounce on the validity of executive and legislative actions based on the constitution.[14] The enduring 'paradox' of the court's power to exercise judicial review in America is that its constitution does not expressly provide that the judiciary exercise this power.[15] The exercise of judicial review in the United States however, had its basis in Britain through Justice Edward Coke who first mentioned the idea in the famous *Dr. Bonham's Case* of 1610.[16] Ironically, even though Cokes reasoning proposing the supremacy of the judiciary to pronounce on the legitimacy of parliamentary acts never received acceptance in England,[17] it achieved a place in America when it was first applied almost 200 years later, by John Marshal the Chief Justice of the American Supreme Court during the tenure of President Thomas Jefferson.[18] Without express constitutional authority, he held where legislation conflict with the Constitution, federal judges have the power to declare such legislation unconstitutional and void.[19] The famous case that gave rise to this principle is *Marbury v Madison*[20] decided in 1803 over 200 years ago. This principle was adopted in subsequent cases including *Dredscott v Standford*[21] and *Cooper v Aaron.*[22] The case of *Marbury v Madison* is regarded as the *locus clasicus* on judicial review.[23] This power is exercised not just by the Supreme Court but also by the other courts down the hierarchy of courts in the United States. This model of decentralized constitutional justice has been adopted by a number of countries in Europe, Africa, Asia, Central and South America and Canada.[24]

4. The European Model

The other distinct form of constitutional justice called the European Model materialized only in the 1920s.[25] This is a centralized system where a special court called the constitutional court is established. This model was first adopted by Austria.[26] The European separation of powers doctrine did not regard the judiciary a co-equal arm of government with the executive and the legislature.[27] Rather, it was seen as subservient to the body that incorporates the sovereignty of the state.[28] In the manner of speaking, statutes were regarded as the 'formal pronouncements of sovereignty' and the exercise of the power of the judiciary was not to interpret them, but to merely apply the statutes as it engages in deciding legal issues in cases before it.[29] It had no power to make

[11] K Asmal, Constitutional Courts: A Comparative Survey [1991] [1991] 24.3 *Comparative and International Law Journal of Southern Africa* 315.
[12] Ibid 28.
[13] D P Kommers and J E John Finn and G J Jacobsohn (eds) *American Constitutional Law: Essays, Cases, and Comparative Notes* 2nd ed. (Rowman & Littlefeilds Publishers Inc., 2004) 24. See also Andras Carabas (n4).
[14] Kommers (n16) 26.
[15] Carabas (n4).
[16] R F Cushman, *Cases in Constitutional Law* (Prentice Hall Inc. 1979) 5th ed. 4.
[17] Where, parliamentary supremacy held sway. Finer (n11) 40.
[18] J E Smith, *John Marshal Definer of a Nation* (Henry Holt & Company, 1996) 96-97.
[19] Carabas (n4).
[20] (1803) U.S. (1 Cranch) 137
[21] (1887) 19 Howard 393, 15 ed. 691.
[22] (1958) 358 U. S., 18.
[23] A A Kasumu, ed. *Judicial Interpretation of Constitution: The Nigerian Experience During the First Republic* (Heinemann Educational Books (Nig.) Ltd. 1977) 67.
[24] T Karakamisheva-Jovanovska, Different Models for Protection of Constitutionality, Legality and Independence of Constitutional Court of the Republic of Macedonia' [2010] <https://www.venice.coe.int/WCCJ/Rio/Papers/MKD_Karakamiseva_E.pdf> accessed on 7 March, 2020.
[25] Favoureu (n9).
[26] Ibid
[27] Ibid.
[28] Ibid.
[29] Ibid.

pronouncements over the acts of the legislature.[30] This was the practice in Germany from the eighteenth century.[31] Simply put, judicial interpretation of statute was explicitly prohibited by the constitutions of these countries.[32] This formed the basis for creating an avenue to cater for the inevitable phenomenon of implementing constitutional justice.

With respect to constitutional review in Europe in the earlier part of the twentieth century, the most ground breaking experiment is credited to have occurred in Austria.[33] Hans Kelsen, a prominent professor of law and legal theorist is credited to have produced this model which explains why the court is sometimes called the 'Kelsenian Court'.[34] He operated from the point of view that a constitution should occupy a position higher than statutes and that this position must be protected.[35] It was clear to him that the American model of judicial review will not be politically accepted since the political elites then were suspicious of the judiciary and would not support the idea of the ordinary courts' bestowal of such vital powers.[36] He therefore innovated the idea of a distinct court, separated from the ordinary courts, with powers to perform the functions of constitutional review, thus the establishment of the Austrian constitutional court which had a special jurisdiction to exclusively decide constitutional controversies.[37] This innovation by Kelsen which is distinct from the general judiciary, and is a centralized court of constitutional justice is known today as the standard example to the European Model of constitutional judicial review in opposition to the American Model.[38]

This model, sometimes called the Austrian model is known in contemporary times as the European Model because after World War II, it was adopted in the constitutions of several West European Countries e.g. Italy in 1948, Germany in 1949, France in 1958, Cypress in 1960, Turkey in 1961, Portugal in 1976, Spain in 1978 and Poland in 1958).[39] At the moment, nearly all-Central and Eastern European states have established distinct constitutional courts after the 1989 political revolution.[40] There were unsuccessful efforts before the World War II to establish this court in Czechoslovakia in 1920 and in Spain, in 1931.[41] The federal constitution of Austria provided for a distinct constitutional court in 1920 which was however revised in 1929. The Austrian constitutional court is the oldest so far.[42]

The America Model was not adopted in Europe for a couple of reasons. First, Judicial power in Europe was observed as too obscured to be given the crucial responsibility of judicial review and, unlike the unitary United State judicial system in which the Supreme Court oversees all the subordinate courts, the European judicial system usually have more than one apex court.[43] For example in France, the court *decassation* has jurisdiction over ordinary civil and criminal appeals, while the Council of State serves as the apex court for appeals on administrative matters.[44] In Germany, the judiciary has a number of Supreme Courts of justice with each of them serving as apex courts for administrative, criminal, ordinary civil, labour, tax and social matters respectively.[45] It is a system of specialized jurisdiction of each division.

After the 1989 revolution, this centralized system of judicial review already being practiced by Western European states, gained adoption in the Central and Eastern European States.[46] This step was taken for a few reasons. First,

[30] A S Sweet, Why Europe Rejected American Judicial Review - and Why it May Not Matter, [2003] Yale Law School Faculty Scholarship Repository Yale Law School Scholarship Series 1-1-2003 2744.
[31] Ibid 2745.
[32] Ibid., 2744.
[33] Sweet (n33) 2766.
[34] Ibid 2765.
[35] Ibid 2766
[36] Ibid.
[37] Ján Mazák 'The European Model of Constitutional Review of Legislation' [2006] (1) <https://www.venice.coe.int/SACJF/2006_02_Venice_Strasbourg/report_mazak.htm> accessed on 7 March 2020.
[38] Ibid 228.
[39] Favoreu (n9).
[40] Shieve (n7).
[41] Asmal (n14) 219.
[42] Ibid.
[43] Shieve (n7) 1204 – 1205.
44 Ibid. See also Karakamisheva-Jovanovska (n27).
[45] Asmal (n14) 317.
46 Shieve (n7) 1201. See also D Piqani, Constitutional Courts in Central and Eastern Europe and their Attitude towards European Integration [2007] No. 2 Vol.1 EJLS, 1.

is the need to align with their European counterparts, second is that they are civil law countries like the countries in Western Europe.[47] Unlike the practice in Common law countries, the judges of the regular courts are professional civil servants whose training is confined to technical statutory application.[48] They were regarded as not having satisfactory experience and education in 'policy-oriented decision making to accomplish the task of judicial review'.[49] It was generally perceived that they could not be trained within the limited time available for them to take on the task of judicial review.[50] The third explanation pertains to the role of regular court judges during the communist rule.[51] They did not enjoy the confidence of the people who viewed them as corrupt and ineffectual and were unduly influenced by states officials in their rulings.[52] For Germany specifically, judges who worked in collaboration with the Nazi government could not have protected the infringements of the constitutional rights of the citizens.[53] Determined to gain the confidence of the public, the persons who drafted the constitution, completely separated the court from the regular judiciary and formed a specialized court staffed by respected legal scholars.[54]

5. Brief Evolution of the Concept of Constitutional Justice in Nigeria

Nigeria, a creation of British administration,[55] adopts a system of constitutional justice that is essentially a heritage from Britain and a product of common law.[56] Like other democratic countries with written constitutions, Nigeria, adopted the system of constitutional review practiced in the United States.[57] Constitutional justice in Nigeria embraces judicial review of legislative and executive action as well as any infringement of the provisions of the constitution. Over the years, Nigerian constitutions have consistently retained constitutional supremacy from the 1963 constitution to the latest.[58] These constitutions have also conferred on the courts the power to hear any matter with respect to the violation of its provisions and its interpretation thereof, with matters bordering on the Federal and State government being the exclusive reserve of the highest courts.[59] Nigerian courts have therefore, exercised these powers in several cases from the earliest of such cases such as *A. T. Balewa v Chief Senator T. A. Doherty*,[60] and *E. O. Lakanmi & Or. v A. G. (Western State) and Ors*,[61] where subsidiary legislations were declared void to the extent of inconsistency with provisions of the constitution. There are a host of more recent cases to buttress this point.

6. The Proposed Constitutional Court under the 1995 Draft Constitution of the Federal Republic of Nigeria

Why the adoption of a decentralized constitutional court was muted for Nigeria is tied to the antecedents that led to its proposal. At the height of mounting intolerance against military government in Nigeria was the episode of a constitutional conference, directed by the Constitutional Conference Commission[62] in which citizens engaged in constructive discussions on the way forward. Delegates to the conference where given the responsibility to examine 'all facets of the problems confronting the country in order to work out an accepted framework that will ensure lasting unity and effective governance of the country'.[63] The scope of the delegate's responsibilities

47Shieve (n7) 1205 & 1206. See also D P Kommers, An Introduction to the Federal Constitutional Court [2001] 2 German Law Journal.
48 Ibid.
49 Ibid.
50 Shieve (n7) 1204.
51Piqani (n) 3.
52Ibid.
53 Shieve (n7) 1207 – 1208.
54 Ibid 1207 – 1208.
55 S G Ehindero *The Constitutional Development of Nigeria 1849 – 1989* (Ehindero Nigeria Limited, 1991) 1.
56 T A Aguda *Principles of Practice and Procedure in Civil Actions in the High Court of Nigeria* (Sweet and Maxwell 1976) 2.
57 In *Mabury v Madison* (Supra). See also Kasumu (n26) 68.
58 A B Kasumo *The Supreme Courts' Attitude Towards some Aspects of Individual Freedom and Right to Property* (Heinemann Educational Books (Nig) Limited 1977).
59 D O Aihe *Cases and Materials on Constitutional Law* in Nigeria (University Press Limited 1979) 2.
60 (1961) All NLR 604.
61 (1971) I. U.I. L.R. at 201.
62 This was during the period of the last military regime in Nigeria before its return to its current democracy called the Fourth Republic.
63 'Constitutional Conference Debates' Official Report of Proceedings Printed by National Assembly Press Abuja Vol. No. 18 (27th June 1994) at 002. The conference was inaugurated on 27 June 1994 and the inaugural speech was presented by the Chairman of the Constitutional Conference Commission, Hon. Justice Kawu (Rtd) on behalf of the Head of State General Sanni Abacha.

specifically included the judicial system of the Country.[64] The conflicting orders from various high courts across the country with respect to the release of the June 12 election results heated the polity and eroded the confidence of the populace in the judiciary.

The Constitutional Conference Commission claimed that the recommendations made by Nigerians set the tone for its agenda amongst which was the recommendation for a constitutional court system.[65] This was observed to be the major addition to the Nigerian judiciary.[66] The Judicial Committee explained that the major reasons for establishing the constitutional court are:

> a. The conflicting judgments delivered in several high courts throughout the length and breadth of the country following the June 12th annulment was an eloquent testimony to the polarization of the judiciary along ethnic, tribal, religious and political lines;
>
> b. there is the nagging need to promote and sustain the yearnings of the people for an impartial and courageous judiciary that will command the confidence of the local and improve the international image of the country.
>
> c. it will contain or at least curtail the excesses of the executive and legislative arms of government as it will give the citizenry unfettered access to seek redress in the event of any infringement of their constitutional rights; and
>
> d. the delay being currently experienced in the regular courts in the hearing and determination of constitutional and Fundamental Human Rights cases as a result of the chronic congestion in the high courts will be substantially minimized and the cost of litigation correspondingly reduced.[67]

At the end of deliberations, the 1995 Draft Constitution was published and included the establishment of a centralized constitutional court for Nigeria, as in the European Model.[68]

With the background of how these two models emerged and how they are defined as well as the practice in Nigeria, it is vital to have a cursory look at how they are implemented in the countries where they are practiced specifically, in the United States and in Germany in juxtaposition with the current Nigerian practice.

7. Brief Case Studies

United States Supreme Court: A Paradigm of the American Model

Nigeria and the United States are constitutional democracies; they operate the presidential system of government and are both Common law countries where the decentralized system is prevalent. Aside from the fact that the decentralized system of constitutional justice is applied in both countries, there exists certain distinctiveness. This is with regards to the fact that while there is no clear-cut provision in the United States Constitution empowering the courts to exercise judicial review of executive and legislative actions, there exists one in the Nigerian constitution. Article VI of the Constitution of the United States provides that the Constitution and the Federal Law made under it 'shall be the supreme law of the land'. Section 1 of Article III provides that 'The judicial power shall be vested in one Supreme Court and in such inferior courts as congress shall from time to time ordain and establish….'

[64] Ibid. (18th July 1994) Vol. 8 at 0307.
[65] Ibid.
[66] This was made by Hon. Justice Mamman Nasiri, the Deputy Chairman of the Constitutional Conference and Chairman of the Constitutional Drafting Committee, in presenting the Report of the Committee. Ibid. No. 63 (9th January 1995) at 479 and 480.
[67] Report of the Constitutional Conference Containing the Resolutions and Recommendations, Federal Republic of Nigeria Vol. 11 [1995] 93.
[68] Specifically, sections 6 (5c), 248, 29, 250, 251, 296-299 and 302 addressed this, covering its establishment and other incidental issues related to it.

Section 2 of Article III which lists the judicial powers of the United States Supreme Court does not expressly confer jurisdiction of judicial review of legislative and executive acts on the Supreme Court. Nevertheless, the Supreme Court assumed such a jurisdiction in the case of *Marbury v Madison*. Consequently, any court of general jurisdiction is seen to have power to declare on the constitutionality of matters.[69] The function of the United States Supreme Court is to decide disputes.[70] Accordingly, where questions with respect to constitutionality occur in actual cases before it, it will give a ruling on it[71] and will not give 'abstract or advisory opinions'.[72] Litigation, under the American system, is entirely concrete and not abstract. That is, where a case or a controversy is in court, it may cause the 'examination of the constitutionality of a law'.[73] For instance, a party may raise an objection in the course of a proceeding in court which is bordered on the constitutionality of an issue:[74] since in the United States, the institution of a matter in court bestows on the court the responsibility to decide all aspects of the same dispute 'without distinguishing between civil, administrative or constitutional question raised'.[75] All these, equally apply to the Nigerian situation. Section 6 (1), (2) and (6) (b) vest judicial powers on federal and state judges on 'all matters between persons, or between government or authority and to any person in Nigeria …' Even though federal and state courts operate in both countries but are structured differently, it is not a significant difference as both federal and state courts in the two countries rule on constitutional questions. As in the United States, judges in Nigeria are regarded as sources of law. The decision of a court in the United States, on the objection of unconstitutionality has limited effects. It is binding only on the parties involved in the case, and on all courts in the jurisdiction subject to the judgement of the court that made the ruling. The rule of judicial precedent applies.

Constitutional Court of the Federal Republic of Germany: A Paradigm of the European Model

For the European Model, the German Constitutional Court called the Federal Constitutional Court is used as a case study. This is because this Court, which is a major policy-making institution in Germany's system of government, within a space of a few decades evolved into 'the most active and powerful constitutional court in Europe'.[76] The German Constitution known as the Basic Law for the Federal Republic of Germany[77] is the foundation upon which its social and political order is built and sustained.[78] Its Constitutional Court which was established by the Basic Law is a good illustration of a centralized system of court whose responsibility is exclusively on hearing and ruling on matters on the constitutionality of law and thereby acting as the arbiter of the constitution. The Federal Constitutional Court is held in high regard in the structure of the state. Its status is above the utmost civil courts, and it is on equal standing with the major legislative and executive organs of the federation.[79] Essentially all of its authority comes from the Basic Law.[80] The Federal Constitutional Court was established in 1951. Kommers, a professor of government and international studies at the University of Notre Dame, enumerated[81] its jurisdiction which comprise of forfeiture of basic right,[82] constitutionality of political parties,[83] review of election result,[84] impeachment of federal president, [85] abstract judicial review,[86] federal/state conflicts,[87] other public law conflict,[88] removal of judges,[89] intra-state constitutional dispute,[90] concrete judicial

[69] Finer (n 11) 29.
70 Ibid.
71 Ibid.
[72] Ibid.
73 Favoreu (n 9) 112.
[74] Ibid 112.
75 Ibid.
[76] D P Kommers, *The Federal Constitutional Court in the German Political System* (1994) C.P.S. University of Notre Dame 490.
77 23rd May 1949 amended by the Act dated 27 October 1994 [Federal Law Gazette 1p. 3126]. Ibid.
78 Ibid.
[79] Asmal (n14) 320.
80 Article 92 of the Basic law.
81 Kommers (n8) 54 & 55.
[82] Article 18.
[83] Article 26(2).
[84] Article 61.
[85] Article 41.
[86] Article 93(1) (2).
[87] Article 93(1) (3) and 84(4).
[88] Article 93(1).
[89] Article 98.
[90] Article 99.

review,[91] public international law actions,[92] state constitutional court reference,[93] applicability of federal law,[94] and constitutional complaints.[95] 95 percent of the entire cases instituted at the constitutional court consist of constitutional complaints.[96] The federal constitutional court act[97] states most of the court's authority.[98] Details of the Constitutional Court's structure, size and tenure of its justices are regulated by the Federal Constitutional Act.

Most of the jurisdictions enumerated above are exercised by the Supreme Court of Nigeria and the Federal Supreme Court of the United States as well as other federal and state courts/tribunals in both countries in a decentralized form. No doubt, the German Constitutional Court as well as some other constitutional courts in other jurisdictions such as South Africa are reputed to be effective, they are however not essentially necessary for Common law countries such as Nigeria and the United States since the legal cultures differ, and based on their legal culture, the role of the constitutional court is already adequately perform by existing institutions. In civil law countries such as Germany, these functions are not performed by other courts hence the need for a special court type to fill this very essential task.

The function of the Constitutional Court differs from that of other courts in Germany. It is the only court in Germany 'where dissenting opinions are permissible'.[99] This court is endowed with vast powers by the Basic Law to exclusively adjudicate on constitutional conflicts between branches and levels of government. It stands alone as a court of first instance as well as a court of final arbiter and is regarded as the apex court in Germany. Quite impressively, the Constitutional Court has evolved beyond the expectations of many into the 'most active and powerful judicial body in Europe'.[100] The court's ruling in two significant cases bordering on the constitutional status of political parties was of tremendous impact.[101] The New-Nazi Socialist Reich Party in 1952 and the Communist Party in 1956 were declared as unconstitutional.[102] However, the distinctive impact and value of this court in Germany does not place it over the decentralized system in Nigeria and the United States. Even though there is a broad categorization of the centralized system of constitutional justice, different jurisdictions practicing the centralized system adopt forms that are distinct to them. For instance, the German Constitutional Court sits in two independent divisions i.e. two senates called the first senate restricted to matters on basic rights and second senate restricted to 'constitutional and political disputes'.[103] The South African Constitutional Court on the other hand has only one chamber with 11 judges. It is the final arbiter on appeals with constitutional questions from the regular and specialized courts and must confirm any ruling on constitutional issues by lower courts.

The constitutional court proposed by 1995 Draft constitution of Nigeria was a court of first instance on all constitutional matters including disputes on electoral matters arising from any electoral law before the holding of any election. It was conferred with original jurisdiction on all matters with constitutional questions. Therefore, the jurisdiction to try such matters by the regular courts was expunged.[104] In other words, the regular courts would have lost their powers to try all aspects of the same disputes without distinguishing between civil, administrative and constitutional questions raised in the matter. Though basically reflecting the European Model, the proposed constitutional court exhibited notable similarities and differences with the American and European models in aspects of jurisdictional monopoly, constitutional court uniqueness, separation of constitutional litigation from ordinary litigation, referral to a constitutional court, the nature of constitutional litigation, and effects of constitutional court judgments.[105] The details of these aspects, including the details of its powers, composition, organisation, strengths and weaknesses in comparison with the two main models is enormous and will not fit into

[91] Article 100(1).
[92] Article 100(2).
[93] Article 100(3).
[94] Article 93(2).
[95] Article 93(4a).
[96] Ibid 55.
97 12 March 1951 (Federal Law Gazette p. 243), published on 11 August 1993 (Federal Law Gazette p. 1473).
[98] Ibid 11. Article 94(e) of the Basic Law validates the presence of this Act.
[99] Finer (n`11) 30.
[100] Kommers (n8) 58.
[101] Finer (n11).
[102] Ibid.
[103]Dr. Gotthard Wöhrmann 'The Federal Constitutional Court: an Introduction' <https://germanlawarchive.iuscomp.org/?p=363> accessed on 7 March 2020.
[104] Section 250(1) of Nigeria's draft Constitution.
[105] These categorizations were generally made by some articles already acknowledgement here.

the confines of this paper. It is vital to also note that there are hybrids of these two main models[106] and South Africa may best be described as a hybrid system since it has a centralized constitutional court and other regular courts which hear cases on constitutional issues.

8. The Suitability of a Constitutional Court System for Nigeria

No doubt, to enhance checks and balances on the arms of government, the judiciary must be 'insulated from undue influences from other arms of government.'[107] However, the question is whether the constitutional court system, despite its record of successes in other countries is the best option for Nigeria. If the proposed Constitutional Court is anything to go by, its adoption in Nigeria would have led to a major jurisdictional re-organization of the entire judicial system including the Supreme Court which will be ripped of its original jurisdiction on specified matters.[108] Based on Nigeria's court structure and legal system, the constitutional court system was irrelevant for the reasons enumerated below notwithstanding the reasons given for its establishment.

The jurisdictions that were sought to be transferred to the proposed constitutional court are powers being exercised by the regular courts and tribunals. The courts that fall under this category include the several High Court divisions in each of the thirty-six states of the Country including the Federal Capital Territory; Federal High Courts in the various states of the Country, Customary Courts of Appeal in the various state of the Country; the Court of Appeal and the Supreme Court. These courts in Nigeria entertain matters with constitutional questions. The enormity of the matters that will therefore be transferred from these numerous courts to the constitutional court necessitate the question whether the fourth reason stated above [109] for its being established is not defeated. With this scenario in mind a single court taking on this enormity would rather create more congestion. Commenting on another reason given for its establishment which is the reduction of the "the cost of litigation",[110] it suffices to state that the procedures for applying for a stay of proceedings in order to institute an action in a constitutional court to have the constitutional question determined before returning to complete the main action in a regular court will be rather cumbersome, expensive and definitely time wasting for the litigant. Even worse is where there are no constitutional courts situated within the state where the litigant resides.[111] With respect to the third reason proffered for the need for a constitutional court,[112] this paper states that the solution sought in the multiplicity of institutions is unneedful since the judicial institutions on ground already cater for this. The hiccups experienced by these institutions can at best be addressed by adequately equipping and strengthening them for maximal effectiveness particularly in areas of the enhancement of the execution of court judgements and access to justice and the independence of the judiciary.

A number of factors which do not particularly apply to the Nigerian situation explain why quite a high number of countries adopted the constitutional court system. First, countries coming out of stormy political mayhem have sort solutions in adopting a centralized system of constitutional justice. Examples of such countries are South Africa and Korea both of which adopted the constitutional court system. Even though this reason may explain why a similar system of constitutional justice was proposed for Nigeria at the end of several years of oppressive military interregnum, credence must be given to other additional factors that required the adoption of this court system in these countries. In Korea for instance, the jurisdiction of its existing courts prior to its adoption of a constitutional court did not include the function sort to be performed by its Constitutional Court.[113] This is not so for Nigeria since other courts right up the hierarchy of its Supreme Court already performed this function. In addition, Korean history had precedence for the European Model[114] and gravitated towards a centralized system of constitutional review. Though it had a stint with the American Model, it later adopted the European Model after years of 'turbulent political upheavals.'[115] In addition, the judges were also not open to activism as their

[106] Karakamisheva-Jovanovska (n27).
[107] M Shapiro *Courts: Comparative and Political Analysis* (The University of Chicago Press, 1981) 32.
[108] Though appeals could go to the Supreme Court from the then proposed constitutional court, this right was made exercisable only on its final decisions.
[109] Report of Constitutional Conference (n 70).
[110] Ibid.
[111] Section 49(4)(i) Draft Constitution provides financial aid for the less privileged has its own challenges.
[112] See page 14 above.
[113] Ibid.
[114] Ibid.
[115] J M West and D Yoon, The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex? [1992] 40. 1 *The American Journal of Comparative Law* 51 and 52. According to these authors, there was a problem with recruiting eligible persons to work as key officers until after several years of the establishment of the constitutional court.

counterparts in Common law countries. For instance, a good number of the serving justices of the Korean Supreme Court 'when faced with the prospect of being called upon to resolve highly controversial constitutional questions' were explicitly resistant to the extension of their jurisdiction to include constitutional review.[116] The unwillingness of the Korean Supreme Court to lead in the drive towards 'defining the content of constitutionality' was seen to be as a result of its 'uncertainty about judicial activism'[117] which many judges viewed as 'an objectionable distinctive feature of the common law tradition'[118] which was applicable in Nigeria.

Countries that established constitutional courts were civil law countries and had to adopt this system to fill a lacuna because their existing courts did not perform the functions the constitutional courts were set up to perform. In Germany, the constitutional court system was established because there was a lacuna in this context. The regular court judges were more or less figureheads and did not perform judicial functions.[119] In the real sense, their responsibilities were simply to apply the law. They were not to, and could not interpret the content of the law.[120] Thus it was necessary to establish a constitutional court which had the power to interpret the law and the power to make binding decisions on the acts of the legislature and the executive to be in line with constitutional standards. These factors do not apply in Nigeria.

South Africa is a civil law country[121] with a common law influence. The adoption of a constitutional court was therefore in place when the then current judges were viewed by the public as working to foster the inequalities and prejudices of the overthrown Apartheid government.[122] By virtue of its Common law practice, judges in Nigeria engage in judicial activism and exercise full powers to interpret the law. They function in a system where the doctrine of *stare decisis* and judicial law making operate. All these point to the fact that the adoption of a constitutional court system is unnecessary for Nigeria. It is a relief therefore that it was never established due to its being expunged from the 1999 Constitution.

9. Conclusion

The American and European models of Constitutional justice are distinct. In terms of court structures and functions, the decentralized system of constitutional justice works well for civil law countries which need them since the functions of the judges of the ordinary courts usually exclude the role of the constitutional court. On the other hand, the constitutional court is unnecessary for the centralized system of constitutional justice as practiced in Nigeria since their judges already perform these functions. Hence, the current Nigerian practice be maintained and, improved upon to elevate the judiciary to the status where the confidence of the public in the judiciary will be achieved and meet '*the yearnings of the people for an impartial and courageous judiciary'*.[123]

[116] Ibid at 76 and 77.
[117] Ibid.
[118] Ibid.
[119] Glendon (n3) 80 – 81.
[120] Ibid.
[121] Asmal (n14) 317.
[122] J Sarkin, The Political Role of the South African Constitutional Court [1997] 114 *South African Law Journal* 134.
[123] Report (n70).