

THE IMPEACHMENT POWER OF THE LEGISLATURE UNDER THE NIGERIAN AND AMERICAN CONSTITUTIONS COMPARED

By

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Abstract

One of the constitutional powers of the legislature is the impeachment power. It enables the legislature, not only to check and restrain the exercise of executive powers, but also to remove the executive heads of government from office before the expiration of their official term, for gross misconduct. It is striking to note that the Nigerian Constitution, though, modelled on the American Constitution, failed to adopt the impeachment procedure under the American Constitution. Some scholars and legislators maintain that the extant procedure for impeachment under the Nigerian Constitution is ineffective because it is long and full of ambiguities. This article undertakes a critical and comparative analysis of impeachment procedures under the Nigerian and American Constitutions and concludes that the procedure under the Nigerian Constitution is still better suited for the political conditions in Nigeria. It should however be strengthened by providing clear grounds for impeachment and improving the quality and independence of the seven-man Panel of investigation.

Keywords: Impeachment, Legislature, Office-holder, Gross-misconduct, Constitution

1.1 Introduction

Once again, the wave of impeachment is blowing across Nigeria and indeed, many parts of the world.¹ The Governor of Adamawa State of Nigeria and the Deputy Governor of Enugu State have recently been removed from office, through impeachment.² The legislators

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¹ In the United States of America, a poll conducted by CNN in July 2014 showed that 57% of Republicans supported the impeachment of incumbent President Obama. See "CNN Poll: 33 Percent of Americans Want Obama Impeached" available at <http://www.newsmax.com/newsfront/CNN-Obama-Palin-Impeachment/2014/07/25/id/584827>. (visited 12th August, 2014. 4:15 p.m.)

² The Adamawa State Legislature impeached Governor Murtala Nyako on Tuesday, 15th July, 2014. See *The Punch*, Wednesday 16th, July, 2014; while the Enugu State Legislature Impeached the Deputy Governor, Sunday Onyebuchi on Tuesday 26 August, 2014.

in many other States in the country are also considering impeachment proceedings against their Governors and/or Deputy Governors.³ Furthermore, the issue of impeachment in Nigeria took a new dimension recently when the House of Representatives considered a Bill, which, according to the sponsors,⁴ sought to amend section 143 of the 1999 Nigerian Constitution “in order to clear the ambiguities in the process of removal of both the President and the Vice President from office on allegation of gross misconduct”.⁵ Essentially, the Bill sought to alter the present constitutional procedure, particularly, the aspect which empowers the Chief Justice of Nigeria to constitute a seven-man panel to investigate allegations of gross misconduct against the President and Vice President; and to vest the entire power to initiate and conclude the removal of the President and Vice President, in the National Assembly. Under the proposed procedure, the Senate would have had the power to try and convict the President or Vice President after he would have been impeached by the House of Representatives. Clearly, the Bill sought the adoption in the Nigerian Constitution, of the procedure in the Constitution of the United States of America, on the impeachment of the President and Vice President.

Though, the Bill was defeated at the House of Representatives,⁶ it is still necessary, against the foregoing background, to examine the procedural challenges of impeachment in Nigeria. The process of impeachment under the 1999 Nigerian Constitution and the Constitution of United States of America are also examined and compared to determine the desirability or otherwise of adopting the American procedure in Nigeria. Ultimately, this

³ In Imo, Edo and Rivers States the legislators are considering the impeachment of their Governors.

⁴ Mr. Yakubu Dogara and three other members of the House of Representatives of the Nigerian National Assembly.

⁵ See Ameh, J. “Reps Move to Simplify Impeachment Process of President” *The Punch*, 5th June, 2013, available at <http://www.punching.com/news/reps-move-to>, (visited 12th November, 2013, 2:45 p.m.)

⁶ A total of 297 members registered to vote for the alteration of section 143 of the 1999 Constitution, 172 voted for, 122 voted against, while 3 abstained. The required two thirds of 297 members was 198.

article examines the changes that are necessary to achieve an effective utilisation of the impeachment process in the consolidation and sustainability of democracy in Nigeria.

1.2 Nature of Impeachment Power

The term “impeachment” may be understood in both the technical/restricted sense and the general/popular sense. In the technical/restricted sense, impeachment refers only to the legal statement of charges against an office holder.⁷ It is similar to an indictment in criminal cases.⁸ Under the American Constitution, impeachment is the first of a two-step-process for the removal of a public officer from office. An office holder that has been impeached must be tried and convicted before he or she could be removed from office.⁹ Thus, the Black’s Law Dictionary¹⁰ defines impeachment as “the act (by a legislature) of calling for the removal from office of a public official, accomplished by presenting a written charge of the official’s alleged misconduct”¹¹

In the general/popular sense, “impeachment” denotes the removal of a public officer from office by the legislature before the expiration of his official term.¹² This is the sense in which the term is used and understood in Nigeria¹³ and which shall be adopted in this article, except otherwise stated. Indeed, in modern times, the term impeachment is often used to

⁷ “Impeachment in Illinois” available at <http://www.impeachment.senate.gov.net/Background>, (visited 12th March, 2014, 5:40 p.m).

⁸ *Ibid.* See also Hirsch, A. *A Citizens Guide to Impeachment*, Essential Books, Washington DC, (1998) available at <http://essential-book.org/books/impeach>., (visited 15th March, 2014, 5:30 p.m.).

⁹ *Ibid.*

¹⁰ Garner, B.A. (ed) *Black’s Law Dictionary*, Thomson Reuter, St. Paul Minesota, 9th Edition (2009) p. 820.

¹¹ Historically, impeachment was a political process, with the House of Representatives or Senate performing the function of a quasi-political court. See M. A. Owoade, “Impeachment of Chief Executives under the 1999 Constitution: New Problems, New Solutions” in *Journal of Constitutional Development* (2007) Vol. 7 NO. 4, p. 1.

¹² Impeachment procedure therefore refers to the procedure by which such removal is effected.

¹³ The Constitution of the Federal Republic of Nigeria, 1999 simply describes the procedure for removal of the President/Vice President and Governor/Deputy Governor from office in sections 143 and 118 respectively. The term impeachment is only used in sections 146(1) and 199(1) in relation to situations by which the Vice President could hold the office of the President and the Deputy Governor could hold the office of the Governor respectively.

describe the process whereby political executives are tried for misconduct by the representatives of the people, resulting in their removal from office.¹⁴

The impeachment power enables the legislature to check and restrain the exercise of executive powers. Thus, the executive heads of government must exercise their powers within constitutional limits or face removal from office by the legislature in the exercise of its impeachment power. To this extent, impeachment has remained a potent weapon in the hands of the legislature to curb the excesses of the executive arm of government.¹⁵ However, this power can be abused by an over-zealous, self-centered and unpatriotic legislature, acting without any regard for overriding national interests. Accordingly, Nwabueze¹⁶ warns that the power of impeachment is not meant to give to the National Assembly a control over the President's tenure or administration of the government.

1.3 Analysis of Impeachment Procedure under the Nigerian Constitution

Under the Constitution of the Federal Republic of Nigeria, 1999, the procedures for the impeachment of the President of Nigeria and State Governors are basically the same; except for the involvement of a bicameral Legislature¹⁷ in the impeachment of the President and a unicameral Legislature¹⁸ in the impeachment of the Governors. The procedures, as contained in sections 143 and 188 of the Constitution for the impeachment of the President and Governor respectively are adumbrated and analysed as follows:

¹⁴ Owoade, *Op. Cit.* at 1.

¹⁵ *Ibid.*

¹⁶ Nwabueze, B.O. *The Presidential Constitution of Nigeria*, C. Hurst & Company in association with Nwamife Publishers, London (1982) p. 142. See also Rossiter, C. *The American Presidency*, Harcourt Brace, New York 2nd Edition (1960) pp. 52 – 53. (arguing that impeachment is not an “inquest of office”, a political process for turning out a President whom a majority of the House and two-thirds of the Senate simply cannot abide. It is certainly not, nor was it ever intended to be, an extraordinary device for registering a vote of no confidence. If it were, then it would upset the balance of the scheme of government under the Constitution, and destroy the independence of the executive, replacing it with the principle of executive responsibility to the legislature which characterizes the parliamentary executive of the Westminster type).

¹⁷ The impeachment of the President is the responsibility of the National Assembly of Nigeria consisting of the two Chambers, the Senate and the House of Representatives.

¹⁸ The impeachment of a State Governor is the responsibility of the House of Assembly of the State consisting of only one Chamber.

1.3.1 Presentation of Notice of Impeachment to the Senate President or the Speaker of House of Assembly

The process of impeachment of the President or Governor is initiated by presentation of an impeachment notice to the President of the Senate or Speaker of the State House of Assembly, signed by not less than one-third of the members of the National Assembly or House of Assembly, stating with detailed particulars that the President or Governor is guilty of a grave violation of the Constitution or of other gross misconduct in the performance of his functions.¹⁹ The “gross misconducts” for which the President or Governor may be removed from office are restricted, under the Constitution, to acts done in the performance of his presidential or governorship duties.²⁰ Thus, misconducts which are not connected with the performance of the functions of his office, no matter how grave, would not constitute grounds for removal.²¹ What really constitutes gross misconduct or an impeachable offence? Both sections 143(11) and 188(11) of the Constitution of the Federal Republic of Nigeria, 1999 define “gross misconduct” to mean a grave violation or breach of the provisions of the Constitution or a misconduct of such nature as amounts in the opinion of the National Assembly or House of Assembly to gross misconduct. Unfortunately, this definition is not helpful as it is not precise as to the actions or inactions of the President or Governor that would make him liable for removal from office by impeachment. Surprisingly, the determination of what constitutes gross misconduct is made a subjective matter in the hands of the legislature. However, Akande²² proposes three possible constructions of the term “gross misconduct” within the meaning of section 143(11) of the Constitution as follows:

- (a) Any actions, which specifically violate the provisions of the Constitution, may amount to failure to meet legal obligations.

¹⁹ Constitution of the Federal Republic of Nigeria, 1999, s. 143(2).

²⁰ Joye, E.M. & Igweike, K. *Introduction to the 1979 Nigerian Constitution.*, Macmillan, London (1982) p.209.

²¹ *Ibid.*

²² Akande, J.O. *Introduction to the Constitution of the Federal Republic of Nigeria 1999*, Spectrum Books Ltd, Ibadan (2000) p. 244.

- (b) Any offences constituting criminal offences punishable under the criminal law of the land;
- (c) Any action, which gets the disapprobation of the National Assembly whether or not it amounts to a violation of the Constitution or a criminal offence.

The above exposition seems to capture the scope of “gross misconduct” for which the President may be removed from office. Therefore, gross misconduct for the purpose of impeachment is not limited to serious and deliberate contravention of the Constitution but may include offences and any gross immoral behaviour.²³ However, the wide and exclusive powers of the legislature to determine what constitutes gross misconduct seem to render the entire process vulnerable to subjective and partisan considerations, considering the low state of our political development.

1.3.2 Service of Notice on President/Governor and Members of National Assembly/State House of Assembly

The Senate President or Speaker of the State House of Assembly must within seven days of receiving the impeachment notice, cause a copy to be served on the President or Governor and on each member of the National Assembly²⁴ or State House of Assembly. The office holder, against whom the allegations are made, must, therefore, be confronted with the allegations and given the opportunity to react to them, in line with the tenets of fair hearing entrenched in our adjudicatory system.²⁵ Accordingly, the office holder, on receiving the notice of impeachment, shall be entitled to submit a reply to these allegations, to the Senate

²³ Nchi, S.I. *Separation of Powers under the Nigerian Constitution*, Greenworld Publishing Co. Ltd., Jos (2000) p. 140.

²⁴ Constitution of the Federal Republic of Nigeria, 1999, s. 143(3) or s. 188(3). The failure of the office holder to submit a reply to the allegations made against him will not affect the impeachment proceedings.

²⁵ *Ibid.*, s. 36(1), (providing that, in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality).

President or Speaker of the State House of Assembly, who must serve copies on each member of the National Assembly²⁶ or State House of Assembly, as the case may be.

1.3.3 Resolution of National Assembly or State House of Assembly on Whether or not to Investigate the Allegations

The Constitution stipulates that, within fourteen days of presenting the notice of allegation to the Senate President, and whether any reply has been made by the office holder or not, the National Assembly or State House of Assembly must resolve by motion, supported by two-thirds majority of all its members, whether or not the allegation is to be investigated.²⁷ No debate is allowed on the motion at this stage.²⁸ The requirement of two thirds majority in support of the motion to investigate, stresses the need for popular support of the impeachment process by the Legislature.

1.3.4 Appointment of Seven-Man Investigation Panel and Investigation of Allegations

Within seven days of passing the motion to investigate the allegations by the National Assembly or State House of Assembly, the Chief Justice of the Federation or Chief Judge of the State, at the request of the Senate President or Speaker of the State House of Assembly, shall appoint a panel of seven persons who, in his opinion, are of unquestionable integrity, not being members of the public service, legislative house or political party, to investigate the allegation.²⁹ This provision constitutes a significant departure from the position under the 1979 Constitution, which vested the power to appoint the Panel of investigation in the Senate President³⁰ or Speaker of the State House of Assembly, in obvious breach of the rules of natural justice.³¹ It is significant that the Chief Justice of Nigeria or Chief Judge of the State,

²⁶ *Ibid.*, s. 143(2)(b) or s. 188(2)(b).

²⁷ *Ibid.*, s. 143(3)(4) or s. 188(3)(4).

²⁸ *Ibid.*

²⁹ *Ibid.*, s. 143(5) or s. 188(5).

³⁰ Constitution of the Federal Republic of Nigeria, 1979, s. 132(5).

³¹ Hon, S.T. *Constitutional Law and Jurisprudence in Nigeria*, Pearl Publishers, Poret Harcourt (2004) p. 189 (maintaining that other relevant provisions of section 143 of the 1999 Nigerian Constitution still make the National Assembly the accuser, prosecutor and the judge; all rolled into one in the impeachment of the President and Vice President. It is the

as the case may be, is entrusted with the responsibility of constituting a seven-man investigating panel, which must be independent and unbiased. This provision does not merely involve the judiciary in the impeachment process, but also grants the Chief Justice or Chief Judge, discretion to determine those who are “persons of unquestionable integrity.” However, this discretion is limited by the requirement that the members should not be drawn from the public service, legislative house or political party. Considering the crucial role of the Panel in the impeachment process and the current posture of the National Judicial Council (NJC), with regard to corruption in the judiciary, the Chief Justice or Chief Judge cannot afford to toy with the exercise of his discretion in this regard.³²

The Constitution also guarantees the right of the office holder, whose conduct is being investigated, to defend himself in person and be represented before the panel by legal practitioners of his own choice.³³ This is a further recognition of the principle of fair hearing in the impeachment process under the Nigerian Constitution.

1.3.5 Submission of Panel’s Report/Findings to National Assembly or State House of Assembly

The Nigerian Constitution stipulates a period of three months for the Panel of investigation to conclude its work and submit its report to each House of the National Assembly or State House of Assembly, as the case may be. Where the report of the panel indicates that the allegation has not been proved against the office holder, no further proceedings shall be taken in respect of the matter.³⁴

accuser under section 143(2), is the investigator (hence prosecutor) under section 143(3) and (4); and is the ultimate judge under section 143(7) (b) and (9)).

³² Evidence of improper exercise of this power by the Chief Justice or Chief Judge, for example, by appointing card carrying members of political parties into the Panel of investigation could also constitute a ground for judicial review of the impeachment procedure.

³³ Constitution of the Federal Republic of Nigeria, 1999, s. 143(6).

³⁴ *Ibid.*, s. 143(7)(b) or s. 188(7)(b); Recently, the Seven-Member Panel investigating allegations of gross misconduct levelled against Governor Tanko Al-Makura of Nassarawa State, Nigeria, dismissed all the charges. See Ali Adoy, “Nassarawa Impeachment: How Governor Al-Makura won the Battle”, available at <http://dailypost.ng/2014/08/05/nassarawa-impeachment-governor-al-makura>. (visited 1st September, 2014, 2:20 p.m.).

1.3.6 Adoption of the Panel's Report by National Assembly or State House of Assembly

Where the Panel, in its report, affirms that any of the allegations against the President or Governor has been proved, then within fourteen days of the receipt of the report, the National Assembly or State House of Assembly shall consider the report, and, if by a resolution of each House of the National Assembly or State House of Assembly, supported by not less than two-thirds majority of its members, the report of the Panel is adopted, then the President or Governor shall stand removed from office as from the date of the adoption of the report.³⁵ Obviously, where the required votes of two thirds majority of all the members cannot be mustered to adopt the Panel's findings, then the impeachment exercise would be unsuccessful; and the office holder would continue in office.

By virtue of section 143(10) or 188 (10) of the Constitution, no proceedings or determination of the panel or of the National Assembly or State House of Assembly on any matter relating to such proceedings or determination, shall be entertained or questioned in any court. This provision constitutes an express ouster of the court's jurisdiction to entertain and adjudicate impeachment matters. However, judicial interpretation of the ouster provision indicates that it is not absolute, as the court can still determine whether the constitutional procedures for impeachment have been complied with.³⁶

On why Nigeria has witnessed the impeachment of many State Governors and Deputy Governor, while no Nigerian President has so far been impeached, Aihe maintains that because of the unicameral process of impeaching a Governor, it makes the procedure faster than that of impeaching a President.³⁷ Certainly, it would be easier for the House of Assembly which has a relatively fewer number of members³⁸ than the Senate³⁹ or House of

³⁵ *Ibid.*, s. 188(9).

³⁶ See *Inakoju v Adeleke* (2007) 4 NWLR (Pt. 1025) 423.

³⁷ Aihe, *Op. Cit.* at 67.

³⁸ For example, there are 26 members in the Akwa Ibom State House of Assembly.

Representatives⁴⁰ to muster the requisite majority votes needed to effect the impeachment of a Governor. On the other hand, the involvement of the two Houses of the National Assembly, each with substantial membership strength, makes the process for the impeachment of the President more strenuous and securing the necessary majority votes of members a near impossibility. In justifying the rigid procedure for the impeachment of the President under the Nigerian Constitution, Nwabueze,⁴¹ in his characteristic incisive and pungent manner, stated that: “The procedure for the removal of the President or Vice President by impeachment has been made extremely rigid in order to emphasise the gravity of the matter and to discourage a handful of disaffected members from embarking upon it for frivolous and purely partisan reasons”.

The effect of the foregoing observation is that, so far, apart from impeachment threats,⁴² the impeachment provisions of the Constitution have not been invoked against any Nigerian President or Vice President, whereas, many State Governors and Deputy Governors have had their constitutional term of office terminated prematurely through the impeachment process.⁴³

1.4 Analysis of Impeachment Procedure under the American Constitution

The American Impeachment process, places in the legislative branch the exclusive authority to remove the President, Vice President and other federal civil officers in the

³⁹ There are one hundred and nine (109) Senators in the Senate of the Nigerian National Assembly.

⁴⁰ There are three hundred and sixty (360) members in the House of Representatives of the Nigerian National Assembly.

⁴¹ Nwabueze, *Op. Cit.* p. 142.

⁴² See “Reps’ Impeachment Move Against Yar’ Adua Can’t Stand”, in *The Punch* Monday 27th July, 2009 p. 10.

⁴³ Some of the impeachments include those of Governors Rashidi Ladoja (Oyo State), Joshua Dariye (Plateau State), Peter Obi (Anambra State), Diepreye Alameyeseigha (Bayelsa State), Ayodele Fayose (Ekiti State). Ladoja, Dariye and Obi successfully challenged their removal and were re-instated, Alameyeseigha and Fayose did not challenge theirs. Other impeachments include the following deputy Governors: Abdullahi Arungu (Kebbi State), Iyiola Omisore (Osun State); John Okpa (Cross Rivers State) Enyinnaya Abaribe (Abia State) and Chris Ekpenyong (Akwa Ibom State)..

executive and judicial branches for misconducts. This is one of the checks and balances grounded in the American Constitutional structure.⁴⁴

Essentially, the impeachment process, under the American Constitution, consists of two parts, namely; Impeachment, which is the sole responsibility of the House of Representatives,⁴⁵ and Trial of impeachment, which is the sole responsibility of the Senate.⁴⁶

(i) Impeachment Stage

The responsibility and authority to determine whether to impeach and to draft articles of impeachment is vested in the House of Representatives.⁴⁷ Thus, impeachment will only lie where articles of impeachment are brought alleging that the office holder to be impeached has engaged in conduct amounting to treason, bribery or other high crimes or misdemeanors.⁴⁸ The articles of impeachment therefore constitute the formal allegations leveled against the office holder. The House of Representative must then vote on the articles of impeachment; and the impeachment of the office holder is secured by a simple majority of the members present and voting. Thereafter, the articles of impeachment are transmitted to the Senate for trial.

(ii) Trial of Impeachment Stage

The trial of an impeached office-holder is the responsibility of the Senate of the United States Congress.⁴⁹ Where the case involves the trial of an impeached President, the

⁴⁴ Bazan, E.B. "Impeachment: An Overview of Constitutional Provisions, Procedure and Practice" Congressional Research Service, 2010, available at <http://fas.org/sgp/crs/misc/98-186.pdf>, (visited 15th April, 2014, 6:10 p.m.).

⁴⁵ U S Const. art 1 s. 2 cl 5.

⁴⁶ *Ibid.* art 1 s. 3.

⁴⁷ Bazan, *Op. Cit.*

⁴⁸ U.S. Const. art. II s. 4.

⁴⁹ In the Senate trial, the House of Representatives is represented by House Managers, who act as prosecutors. They may be assisted by counsel. The impeached office holder is also entitled to the services of counsel.

Chief Justice of the United States will presides over the proceedings.⁵⁰ With regard to the trial of any other officer, the Senate usual presiding officer will preside as the Constitution is silent on the particular person to preside. Thus, if the Vice President does not preside, the President Pro Tempore of the Senate will preside.

Pursuant to the Rules that govern impeachment trials before the Senate, the Impeachment Trial Committee shall first hear evidence against the impeached office holder who is also entitled to give evidence. The Committee also has the right to compel the attendance of witnesses and to require witnesses to answer in the same way as they do in ordinary courts. The members must take an oath to perform their duty fairly and honestly.⁵¹ On completion of its work, the Trial Committee must submit a certified record of its proceedings to the full Senate and file its report summarizing the articles of impeachment and the evidence received.⁵²

In making its determination in an impeachment trial, the full Senate may rely upon the evidence collected by the Senate Impeachment Committee or may gather further evidence.⁵³ The determination whether to convict or acquit on any article rests with the full Senate, as does the determination, upon conviction of the judgment to be imposed.⁵⁴ The decision to convict on each of the articles of impeachment must be made separately; and conviction can only be secured by the concurrence of two thirds of members present.⁵⁵ A conviction on any one of the articles of impeachment brought against the office holder is sufficient to constitute conviction in the trial of the impeachment.

Where the office holder is convicted, the Senate must determine the appropriate judgment in the case. The Constitution of United States limits the judgment to either removal

⁵⁰ *Ibid.* art 1 s. 3 cl 6.

⁵¹ Mowoe, K.M. *Constitutional Law in Nigeria* Vol. 1, Malthouse Press, Lagos (1996) pp. 99 – 100.

⁵² Bazan, *Op. Cit.* p. 4.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ U.S. Const., art. 1 s. 3 cl. 6.

from office or removal and prohibition against holding any future offices of “honour, Trust or Profit under the United States”.⁵⁶ Based on precedents in the Senate since 1936, removal from office flows automatically from conviction on an article of impeachment.⁵⁷ However, a separate vote is necessary should the Senate deem it appropriate to disqualify the individual convicted from holding future federal offices of public trust. Such a vote requires a simple majority.⁵⁸

The American Congress regards impeachment as a power to be used only in extreme cases.⁵⁹ With regards to Presidents, the House of Representatives has passed articles of impeachments only in two cases. President Andrew Johnson was impeached in 1868 after violating the Tenure of Office Act.⁶⁰ However, he was acquitted by the Senate, falling one vote short of the necessary two thirds to remove him from office. The Tenure of Office Act was later found to be unconstitutional by the Supreme Court of the United States.

Bill Clinton was impeached on 19th December 1999 by the House of Representatives on articles charging him with perjury, lying to a federal grand jury by a 228 – 206 vote, and obstruction of justice by a 221 – 121 vote. The House rejected the other articles. The Senate vote to remove him from office fell short of the necessary two thirds, voting 45 – 55 to remove him on obstruction of justice and 50 – 50 on perjury.

Richard Nixon was not impeached. While articles of impeachment against him were passed by the House Judiciary Committee in 1974, Nixon resigned the presidency before the impeachment resolutions could be considered.

⁵⁶ *Ibid.* art 1 s. 3 cl. 7.

⁵⁷ Bazan, *Op. Cit.*

⁵⁸ U.S. Const. art 1 s. 3 cl 6. (also providing that conviction in impeachment trial does not foreclose criminal proceedings against the affected office holder).

⁵⁹ See Bloch, S.L. “Assessing the Impeachment of President Bill Clinton from a Post 9/11 Perspective” available at <http://scholarship.law.georgetown.edu/fwpo-apers/1>. (asserting that impeachment is a drastic measure to be contemplated only as a last resort), (visited 12th May, 2014, 5:30 p.m.).

⁶⁰ Act of March 2, 1867.

Impeachment can also occur at the state level. The State legislature⁶¹ can impeach state officials, including Governors according to their respective State Constitutions.

1.5 Impeachment Procedures in Nigeria and America Compared

The comparative analysis of impeachment procedures shall be undertaken under the following sub-headings:

1.5.1 Essential Nature of the Procedures

The procedure under the American Constitution is clearly designed as a two-stage-process, consisting of impeachment by the House of Representatives, and trial and conviction by the Senate. The process of removing a person from public office is entirely a legislative affair, by which the legislature becomes the accuser, prosecutor and judge in its own cause, in flagrant violation of the rules of natural justice. Unlike, the American procedure, the impeachment procedure under the Nigerian Constitution is not initiated in the House of Representatives, but by a notice of Allegation signed by at least one third of the members of the National Assembly. Both Chambers of the National Assembly are involved in considering the notice of allegation and in resolving, by motion supported by two thirds of its members, whether to investigate the allegation or not.

A unique and distinguishing feature of the procedure under the Nigerian Constitution is the provision for an independent Panel set up by the Chief Justice or Chief Judge to investigate the allegations made against the office holder. Thus, unlike the procedure under the American Constitution where the entire process is carried out by the legislature from inception to conclusion, the procedure under the Nigerian Constitution precludes the legislature from conducting investigations into the allegations leveled by it against the office holder. However, the Nigerian National Assembly must still resolve, by motion, supported by two thirds majority of members, to adopt or reject the report of the Panel of investigation.

⁶¹ The State Legislature also consists of two Chambers, namely, The House of Representatives and the Senate.

1.5.2 Involvement of the Judiciary

Under the United States Constitution, where the case involves an impeached President, the Chief Justice presides during the Senate trial of impeachment,⁶² thereby involving the judicial branch directly in the impeachment process. This is different from what obtains under the Nigerian Constitution, where the only involvement of the judiciary is in respect of the power of the Chief Justice of Nigeria or Chief Judge of the State to appoint a Panel of seven persons of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation against the public office holder.⁶³

The setting up of a panel or tribunal of investigation by the Chief Justice made up of members outside the Legislature is intended to act as a safeguard against the abuse of the process insofar as it provides for an independent, transparent, and non-partisan investigation into the allegations.⁶⁴ Though the independence of such panel has often been questioned,⁶⁵ this procedure preserves the principles of separation of powers and fair-hearing better than the procedure under the American Constitution.

Under the Constitution of Ghana, the Chief Justice sits as the Chairman of the investigating tribunal⁶⁶ which he sets up on the receipt of the notice of impeachment from the Speaker of Parliament to investigate the allegations made against the President.⁶⁷ Four other most senior Justices of the Supreme Court are members of the tribunal.⁶⁸ Clearly, this could

⁶² U.S. Const. art 1 s. 3 cl. 6.

⁶³ Constitution of the Federal Republic of Nigeria, 1999, s. 143(5) and s. 188(5).

⁶⁴ See Ndulo, M. "Presidentialism in the Southern African States and Constitutional Restraint on Presidential Power" (2001 – 2002) 26 *Vermont Law Rev.* 769 at 794 (also contending that referral to a tribunal/panel unduly complicates the procedure).

⁶⁵ *Ibid.*

⁶⁶ 1992 Ghana Const., art. 69(4) (providing for a tribunal made up of the Chief Justice as Chairman and four most senior justices of the Supreme Court).

⁶⁷ *Ibid.* art. 69(4).

⁶⁸ *Ibid.*

be regarded as a judicial trial of impeachment offences, which will affect the issue of fair-hearing if, for any reason, the affected public officer subsequently seeks judicial remedy.

1.5.3 Impeachable Offences/Gross Misconduct

While the American Constitution specifies the impeachable offences as treason, bribery or other high crimes and misdemeanors,⁶⁹ the Nigerian Constitution, does not clearly state what constitutes gross misconduct or impeachable offences. Rather, the Nigerian Constitution specifically provides that “gross misconduct means a grave violation or breach of the provisions of the Constitution or misconduct of such in the opinion of the National Assembly amounts to gross misconduct”.⁷⁰ Thus, the interpretation and determination of ‘gross misconduct’ are left to the whims and caprices of the legislature. Though, speaking in relation to the American impeachment process, Gerald Ford, then House Minority Leader, had similarly said that “an impeachable offence is whatever a majority of the House of Representatives considers it to be at a given moment in history”,⁷¹ it is pertinent to note that the language of the American Constitution limits the instrument of impeachment to a very particular class of cases, namely, “treason, bribery or other high crimes and misdemeanors”.⁷²

In *Inakoju v Adeleke*,⁷³ the Nigerian Supreme Court held that “gross misconduct” included, but was not limited to “grave violation or breach of the provisions of the Constitution, breach of oath of allegiance, corruption, false declaration of assets, breach of oath of office, and so on.” This interpretative effort by the Supreme Court, though

⁶⁹ U S Const. art. 11 s. 4.

⁷⁰ Constitution of the Federal Republic of Nigeria, 1999, s. 143(ii).

⁷¹ III Cong. Rec. H3 113 – 114 (1970) cited in Bowman III, F.O. & Sepinuck, S.I. “High Crimes & Misdemeanors’: Defining the Constitutional Limits of Presidential Impeachment” (1999) 72 *Southern California Law Review* 1577. Block opines that “it is likely that, after Representative Ford became President Ford, his views on impeachment changed; it is unlikely he continued to believe impeachments should be invoked so casually”. See Block, *Op. Cit.* p. 4.

⁷² See Bowman III & Sepinuck, *Op. Cit.* at 1519.

⁷³ (2007) 4 NWLR (Pt. 1025) 423.

commendable still leaves the situation obscure and unsatisfactory; requiring urgent intervention through constitutional prescription.

1.5.4 Judicial Review of Impeachment Process

In the United States of America, the congressional decisions to impeach, and to convict and remove, are almost certainly not reviewable by any court.⁷⁴ Thus, in *Nixon v United States*,⁷⁵ the Supreme Court of United States determined that the federal judiciary cannot review impeachment proceedings. In this case, Judge Nixon challenged, as unconstitutional, the procedure adopted at the Senate in his trial; contending that the full Senate must sit as judge and jury. He argued that the Senate's failure to give him a full evidentiary hearing before the entire Senate violated its constitutional duty to "try" all impeachments; therefore his conviction by the Senate was void. Both the District Judge and the Court of Appeal decided that the claim was not justiciable. In 1993, the Supreme Court held that the Senate had sole discretion to choose the procedures to be used for impeachment trial.

Louis Fisher⁷⁶ captured the non reviewability of impeachment decisions under the American Constitution thus:

If Congress decides that an office holder has committed "high crimes and misdemeanors", even if unindictable in the courts, and it builds a record to demonstrate that the individual acted in a manner harmful to the political system and must be removed, there is no recourse to the judiciary.

Unlike the Nigerian Constitution, there is no express provision in the American Constitution ousting the jurisdiction of courts to review impeachment matters. The American

⁷⁴ Bowman III & Sepinuck, *Op. Cit.* p. 1519 (arguing that a Congress disposed to do so can indeed displace a President for any reason that will garner sufficient votes and can act without fear that its decision will be overridden by any other governmental body).

⁷⁵ 506 US 224 (1963).

⁷⁶ Fisher, *Op. Cit.* p. 175.

Courts therefore generally rely on the political question theory to decline jurisdiction in such matters.⁷⁷

In Nigeria, prior to the Supreme Court decision in the case of *Inakoju & Ors v Adeleke & Ors*,⁷⁸ the courts generally took refuge under section 170(10) of the 1979 Constitution⁷⁹ to decline jurisdiction to entertain every matter relating to the impeachment of State Chief Executives. However, Aihe⁸⁰ had submitted, and, rightly too, that where the proceedings or determination of a tribunal is procedurally wrong, an ouster clause notwithstanding, a court of law should be able to review such proceedings or determination in order to ascertain its legality. Surely, for the ouster clause of section 170(10) to come into effect, the whole proceedings or determination must be lawful.⁸¹

In *Inakoju & Ors v Adeleke & Ors*,⁸² the Supreme Court readily agreed with the Court of Appeal that the entire section 188 sub-sections 1 – 11 of the 1999 Nigerian Constitution must be read together; and that a proper reading of the whole section will reveal that the ouster clause in sub-section 10 can only be properly resorted to and invoked after due compliance with sub-sections 1 - 9 that preceded it.⁸³ Sub-section 11 makes it abundantly clear that it is the House of Assembly that decides whether or not a conduct is gross misconduct to warrant the removal of a Governor. Failure to comply with any of the

⁷⁷ See *Nixon v United States* 506 US 224 (1963) where Justice Souter agreed with the majority that the case presented a non-justiciable political question. See also *Hastings v United States* 837 F Supp. 3 (DDC 1993).

⁷⁸ (2007) 4 NWLR (Pt. 1025) 423. See the cases of *Balarabe Musa v Musa Hamsa & 6 Ors* (1982) 3 NCLR 439, *Balarabe Musa v Speaker, Kaduna House of Assembly & Anor* (1982) 3 NCLR 450, *Abaribe v The Speaker Abia State House of Assembly* (2002) 14 NWLR (Pt. 788) 466.

⁷⁹ Now 1999 Nig. Const., s. 188(10). (providing that: “No proceedings or determination of the Panel or of the National Assembly or any matter relating thereto shall be entertained or questioned in any court”).

⁸⁰ Aihe, D.O. *Selected Essays on Nigerian Constitutional Law*, Idodo Umeh Nigeria, Benin (1982) p. 69.

⁸¹ *Ibid.*

⁸² (2007) 4 NWLR (Pt. 1025) 423.

⁸³ This is consistent with Professor Aihe’s view. See Aihe, *Op. Cit.* at 69.

provisions of subsection 1 – 9 will mean that the ouster clause of subsection (10) cannot be invoked in favour of the House of Assembly.⁸⁴

1.6 Conclusion

It has to be conceded that the two-stage-process for removal of a public office holder from office under the American Constitution gives Congress a firm control of the impeachment process, which they could initiate and conclude within a short period of time against the public office holder. However, the exercise of the impeachment power calls for restraint on the part of the legislature. The power has to be used to foster national interests and not the selfish or parochial interests of the legislators.⁸⁵ Despite the flexible nature of the American impeachment process, Congress only resorts to it in extreme cases in the overall interest of the Nation; and in the entire history of America, only two Presidents have been impeached by the House of Representatives; while none has been convicted and removed from office.

Considering the selfish and unpatriotic attitude of Nigerian politicians, it is obvious that a more flexible impeachment process that would give the National Assembly power to commence impeachment proceedings in the House of Representatives and conclude the same in the Senate, as it is the case under the American Constitution, would be abused. We therefore stoutly reject the calls by some members of the Nigerian National Assembly for adoption of the American impeachment procedure in the Nigerian Constitution and insist that

⁸⁴ *Per. Tobi JSC* at 653. See also *Dapianlong v Dariye* (2007) 8 NWLR (Pt. 1036) 332 where Onnoghen JSC held that: “It is true that section 118(10) of the 1999 Constitution ousts the jurisdiction of the courts in respect of the impeachment of a Governor or Deputy Governor, but that must be subject to the rule that the Legislature or House of Assembly complied with all the constitutional requirements in section 188 needed for the impeachment as the courts have jurisdiction to determine whether the said constitutional requirements have been strictly complied with”.

⁸⁵ In Imo State of Nigeria, the legislators are considering the impeachment of the Governor for failing to pay their allowances; while the Deputy Governor of Enugu State was impeached for keeping a poultry farm within the government house.

the current procedure, though imperfect, should be retained, with the following modifications:

(i) Clear Definition of Gross Misconduct/Impeachable Offences

The definition of gross misconduct for the purposes of impeachment under the Nigerian Constitution⁸⁶ is vague and requires to be couched in more precise terms. Specifically, the impeachable offences or gross misconducts should be clearly stated, as the discretion given to the Legislature to determine such offences/conducts is unjustifiable and susceptible to abuse.⁸⁷ To further ensure that politically motivated and baseless grounds are not employed for impeachment of Chief Executives of Federal and State government, the determination of impeachable offences or gross misconduct should not be left to the whims and caprices of the legislators. Following the American constitutional position,⁸⁸ such offences should be clearly specified in the Constitution even if in broad terms and they

should not be restricted to acts done in the performance of official duties,⁸⁹ but should include anything which could bring the office of the President or Governor into disrepute.

The Ghanaian constitutional arrangement⁹⁰ by which the physical and mental incapacity of the Chief executive is a ground on which the Legislature could base an

⁸⁶ Constitution of the Federal Republic of Nigeria, 1999, s. 143(11) (defining gross misconduct as 'a grave violation or breach of the provisions of this Constitution or a misconduct of such a nature as amounts in the opinion of the National Assembly to gross misconduct').

⁸⁷ See Fisher, L. *Constitutional Conflicts between Congress and the President*, University Press of Kansas, Kansas, 5th Edition (2007) p. 173 (quoting James Madison that ill-defined and loose terms would be equivalent to having the President serve at the pleasure of Congress).

⁸⁸ See U.S. Const., art 11, s. 4 which provides that the President, Vice President and all Civil Officers of the United States, shall be removed from office on impeachment for, and, conviction, for treason, bribery, or other high crimes and misdemeanors.

⁸⁹ See 1992 Ghana Const., art 69 where the grounds for impeachment of the President, include willful violation of the oath of allegiance and presidential oath or willful violation of any other provision of the Constitution or conduct which brings, or is likely to bring, the high office of the President into disrepute, ridicule or contempt or conduct which is prejudicial or inimical to the economy or the security of the State or inability to perform the functions of his office by reason of infirmity of body or mind.

impeachment notice is quite commendable, as it takes the initiate from the Federal Executive Council, whose members, as presidential appointees, would be reluctant to pass any adverse resolution against the President.⁹¹

(ii) Improvement of the Quality and Independence of the Investigation Panel

The quality and independence of the Panel of investigation should be improved. In this regard it is recommended that provision be made for the inclusion of professionals such as accountants and lawyers in the membership of the Panel of investigation. This measure would ensure that the conducts of these professionals are also monitored and checked by their respective professional bodies. Where there is any evidence of abuse or compromise by the Chief Justice or Chief Judge in the appointment of members of the Panel of investigation, the matter should be reported promptly to the National Judicial Council for disciplinary action. However, this may also constitute a ground for the aggrieved party to challenge the impeachment proceedings.

Nevertheless, legislative and constitutional improvements of impeachment procedure would record only minimal achievements, until the right political culture is developed and sustained among the Nigerian political class. The Nigerian legislature must learn to exhibit political maturity and patriotism in the exercise of legislative powers, including the impeachment power. It cannot afford to continue to use the impeachment power as an instrument of political vendetta. In the United States of America Senator William Pitt Fessenden, a Republican from Maine, after voting against the conviction of President Andrew Johnson, a democrat, for violating the Tenure of Office Act, boldly and patriotically declared as follows:

⁹⁰ 1992 Ghana Const. at art. 69(1)(c), 69(2)(b).

⁹¹ The Federal Executive Council of Nigeria refused to declare ailing President Yar'Adua incapable of performing the functions of his office despite the President's absence from duty for more than three months on health grounds. See Abimboye, D. "The Revolt of an Amazon" in *Newswatch* 15th February, 2010.

To depose the constitutional Chief Magistrate of a great Nation, elected by the people, on grounds so slight, would, in my judgment, be an abuse of the power conferred upon the Senate, which could not be justified to the country or the world. To construe such an act as a high distant misdemeanor, within the meaning of the Constitution, would, when passions of the hour have had time to cool, be looked upon with wonder, if not with derision.⁹²

Undoubtedly this was a commendable display of political maturity and patriotism which Nigerian legislators should learn to emulate. Indeed, Nigeria still has much to learn from America and other advanced democracies in the use of constitutional powers for the achievement of democratic sustainability.

⁹² 3 Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on impeachment by the House of Representatives for High Crimes and Misdemeanors 22 (1868); W.H. Rehnquist, *Grand Inquests: The Historic Impeachments of Samuel Chase and President Andrew Johnson* (1992) cited in Block, *Op. Cit.* p. 9.