

THE RULE OF LAW AND THE JUDICIARY IN MODERN DEMOCRACIES

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Abstract

The rule of law presupposes the equal subjection of all persons and authorities, irrespective of the status or class, to the dictates of the ordinary laws of the land. The judiciary plays a vital role in achieving the aims of the rule of law in modern democracies like Nigeria, to this end an independent judiciary is imperative. This research aimed at discussing the rule of law and the judiciary in modern democracies, with the objectives of finding out the challenges faced by the Nigerian judiciary in upholding the rule of law in Nigeria. The research employed doctrinal research methodology and sourced data from primary sources like the Constitution of the Federal Republic of Nigeria 1999; constitutions of United States of America and that of Ghana which were cited in comparative analysis. Also, secondary sources of data were obtained from journal articles and internet materials. The research found that the process of appointment and removal of judges in Nigeria, financing of the judiciary do not reflect with the accepted international standards and also do not accord with the principles of independence of the judiciary. The research recommended that the judiciary should be completely independent from the other arms of government in line with the doctrine of separation of powers. It went further to recommend that the process and procedure for removal and discipline of judges should be left to the judiciary disciplinary committee. Among other things, the research further recommended that the judiciary should be granted financial and budget autonomy.

Keywords: Justice, Rule of Law, Separation of Powers, Judiciary, Executive.

1.0 Introduction

Law is a system of rules created and enforced through social and or governmental institutions to regulate behaviour.¹ Laws regulate individuals or a community and ensure that there is adherence to the will of the state as duly enshrined in any nation's constitutional law. Laws ensure the safety of a people and protect rights of persons against abuses by people, organisations and by the government itself.

The Constitution of the Federal Republic of Nigeria is the supreme law of the country and it vests in the judicial arm of government the power to interpret laws made by the legislature. Section 6 (1) and (2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) vested judicial powers of the federal and state governments in federal and state courts respectively. Consequently, the judiciary is a system of courts that interpret and implement laws in a state. Nevertheless, the foremost function of the judiciary is to provide justice to the people whenever approached. The Nigerian judiciary as the guardian of the constitution is entrusted with the task of providing justice

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¹ See Robertson Geoffrey in 'Crimes against Humanity' (2006) 3rd ed. Penguin Books, London ISBN 978-0-14-102463-9.

to the state by exercising its powers to conduct judicial review and a transparent and proper interpretation and implementation of the laws without fear or favour.² It is upon this premise and foundation that the concept of rule of law is predicated and founded.

The rule of law is a constitutional concept that stipulates that the actions of governance must be done in accordance with the law.³ It encapsulates such ideals as government according to the law, equality before the law and the independence, and autonomy of the judiciary among others. It emphasizes the supremacy of regular law over arbitrary power and or executive fiat and seeks to achieve societal orderliness and sustainable political and civil power in all sectors of any given polity.⁴ This presupposes a situation where everything is done in accordance with law, thereby excluding any form of arbitrariness.⁵ Waldron submits that the idea of the rule of law is that the law should stand above every powerful person and agency in the land as the authority of government should be exercised within a constraining framework of public norms. Moreover, the rule of law requires that the ordinary citizen should have access to the law, in two senses. In the first sense, the law in a society is to be promulgated prospectively as public knowledge so that people can assess its impact in advance. The second part of the rule of law is the need for legal procedures to be available to ordinary people to protect them against abuses from public and private powers. The concept assures an independent judicial structure, the accountability of government officials and the integrity of legal procedures.⁶

A certain way to enthrone the rule of law in a society is through constitutional protection of an independent judiciary, executive and legislative arms of a government widely accepted as the doctrine of separation of powers.⁷ Under the doctrine, the three branches of government are distinct and separate. The powers given to each are very delicately balanced against the powers of the other two. Judicial independence in view of the separation of powers ensures that courts and Judges perform their duties free of influence or control by other governmental or private actors. A constitutional democracy thus pre-supposes a balanced system of divided or shared powers, and it is only within such a system that institutions of a state can ever hope to enjoy any measure of independence from arbitrary acts of the government. In this sense, the judiciary is independent with court autonomy and can reach decisions free from influence and direction from other arms of government. Judicial independence implies that judges are free from political pressures and influences when they reach decisions. Judges are not to be pressured by a political party, a private interest, or popular opinion in adjudication of cases or interpretation of rules. The independence of the judiciary ensures that even the common man in a society has a fair chance to make their case in court and that judges will be impartial. Such independence is essential to maintain the rule of law.

2.0 The Concept of Justice and the Common Man

A practice of a true and viable separation of powers amongst the arms of government and adherence to the rule of law essentially establishes justice in a society. But what is the nature of justice? Legal and political philosophers have attempted to provide the answer. Perelman for instance, submitted that justice means that the same treatment should be given to persons who have equal merit. He notes that to be just is to treat equally beings that form part of the same essential category.⁸ According to

²See Hon Justice O.O Goodluck 'The Judiciary as a Pivot for Good Governance' (2020) Nigerian Judicial Institute 2021/12.

³Daniel Cole, Rule of Law, 'Definition, History and Examples' <<https://study.com/learn/lesson/what-is-rule-of-law-concept-examples.html>>. Accessed 20 May 2024.

⁴B Nwabueze, *The Judiciary as the Third Estate of the Realm* (Gold Press Limited, 2007) 3.

⁵ibid.

⁶J Waldron, *The Rule of Law and the Measure of Property*, (Cambridge: Cambridge University Press, 2010) 6 – 7.

⁷See sections 4, 5 and 6 of the Constitution of the Federal Republic of Nigeria 1999(as amended) establishing the powers of the Legislature, Executive and Judiciary respectively.

⁸ See Perelman on Justice by David D. Raphael 'Revue Internationale de Philosophie' (1979) Essais en homage a Chaim Perelman, vol.33, No. 127/128, 260-276.

Miller the conception of justice is a state of affairs in which each individual has exactly those benefits and burdens that are due to him by virtue of his personal characteristics and circumstances.⁹ Justice has been defined as the concept of moral rightness based on ethics, rationality, law, natural law, fairness, religion, and equity. It is the result of the fair and proper administration of the law.¹⁰ The quality of being just; in conformity to truth and reality in expressing opinions and in conduct; honesty; fidelity; impartiality or just treatment; fair representation of facts respecting merit or demerit.¹¹ In these contexts, justice is done in any case before the courts if the courts faithfully interpret and apply the law to the parties before them without bias for or against any of them.

The question then is, what does the common man who seeks justice from the courts expect from the court? Basically the common man expects a quick, fair, and unbiased decision. He expects to obtain the decision at reasonable cost and without undue strain. He expects equal treatment with his opponent. He expects to be treated humanely and with maximum uprightness by everybody involved in the judicial process, irrespective of status or position. He expects a decision that does not violate his sense of morality and the basic norms of the community. The common man will be satisfied that he has obtained justice from the court if practically all the above expectations are met.

The common man also expects to enjoy access to the courts in terms of cost of obtaining justice. This challenge is two-pronged in effect. First is the huge financial implication of the usually complex and tiresome litigation processes which the obviously minuscule resources of a common man can hardly afford. Second is the likelihood of systemic judicial administrative bottleneck that verge on professional incompetence which usually elongates litigation *ad infinitum*. The legal mantra of "Justice delayed is justice denied" should be effectual in guiding judicial officials, especially sitting Judges to timely justice delivery as delay witnessed directly or indirectly dampens the common man's trust in the justice system. The foregoing reasons have caused a vast majority of people to resort to alternative means of dispute resolution.

3.0 Some challenges to the system of separation of power in Nigeria

The Constitution of Nigeria provides for the financial independence of the judiciary by providing that state and federal governments are to pay into the consolidated revenue account; monies standing in the credit of the judiciary to the National Judicial Council for onward disbursement to heads of court and other officers.¹² Unfortunately, the provision of the Constitution have for years operated as a mere slogan as some states are yet to implement the said provisions even after the President signed Executive Order 10 in 2020 to compel states to implement the financial autonomy provision.¹³ The problem of the absence of judicial autonomy is further aggravated by the Judiciary's dependence on the executive for its appointment and removal from office. Section 292 and Paragraph 29 (b) of the third schedule of the Constitution which provides for the removal of judicial officers provides that heads of court at the federal level are to be removed by the President upon a recommendation by the National Judicial Council (NJC) and upon an address supported by two-third majority of the senate praying that such head of court be removed for his inability to discharge the functions of his office (whether arising from infirmity of mind or of body) or for misconduct or contravention of the code of conduct. At the state level, the same procedure applies only that it is the Governor acting on an address supported by two-third majority of the State House of Assembly. The part of the provision which states that reference must be made to the legislative arm before a removal occurs has also not

⁹ David Miller, *Social Justice* (Oxford: Clarendon Press, 1976) 20-23.

¹⁰ USLEGAL, (Justice Law and Legal Definition) <<https://definitions.uslegal.com/justice/>>. Accessed 10 May 2024.

¹¹ *ibid*.

¹² Sections 81 (3), 121(3) and S 162 (9) Constitution of the Federal Republic of Nigeria 1999(as amended).

¹³ Also at the federal level, the judiciary has also complained of uncleared allowances that have been overdue for more than six years. Ameh Ejekwonyilo, "Judiciary Workers' Strike: CJN meets with JUSUN leaders again" *Premium Times*(April 23, 2021) <<https://www.premiumtimesng.com/news/top-news/456992-judiciary-workers-strike-cjn-meets-with-jusun-leaders-again.html>> Accessed 2 May 2024.

been implemented. This may stem cases of unjust and unconstitutional removal of judges in Nigeria; all of which will contradict international declarations on the independence of the Judiciary, particularly the first ground for the substantive removal of judges which is that “the grounds of removal must be discernible”¹⁴ Of course where the removal grounds are not clearly specified then judges cannot be said to have security of tenure in any meaningful sense,¹⁵ as they would serve at the whim of whichever person or body that is authorized to remove them.¹⁶ But in some countries like France and Germany, judges cannot be removed without the decision of courts; neither can they be transferred or promoted without their consent.¹⁷ At the African Court of Human and People’s Right, judges are not also removed except on the recommendation of two-third majority of the other members stating that such judge no longer meets the requisite conditions to be a judge. The recommendation of the judges is then communicated by the president to the chairperson of the assembly.¹⁸ In contrast, it is evident that the Nigeria’s mode of removal of judges is not at par with global trends on the procedure for removal of judges which ensures security of tenure of judicial officers.

4.0 Comparative model of separation of powers in other democracies

Given the importance of the doctrine of separation of powers, America recently introduced the Separation of Powers Restoration Act¹⁹ with an aim that it strengthens the walls of power between branches of government. The bill restores the constitutional role of the legislature and judiciary which may have been eroded in 1984 in view of the decision in *Chevron v Natural Resources Defence Council*²⁰ where the American Supreme Court held that courts must defer to agency interpretations of ambiguous statutes. The ruling led to executive branch agencies circumventing Congress to issue rules with the force of law. However, the 2023 Separation of Powers Restoration Act now repeals that precedent and stops executive branch overreach and interference in interpretive roles. However, the application of the doctrine of separation of powers in the American legal system operates through the function of the three branches of the governmental structure with checks and balances in place among them. Each branch of the government must respect the others, and all operate within the limits set by the Constitution. In this order, individual rights are protected where the President can veto legislation passed by Congress, stimulating reconsideration and debate. Congress can override a presidential veto with a two thirds majority in both houses, protecting the legislative process. The federal courts through judicial review, can declare legislation unconstitutional, acting as the ultimate guardian of individual rights. Congress has the power to

¹⁴UN Basic Principles on the Independence of the Judiciary - General Assembly Resolutions [1985] 40/32 And 40/146.

¹⁵The case of the removal of the Chief Justice of Nigeria by the President in January 2019 is a classic case that the United Nations special rapporteur on the independence of judges and lawyers describes as having broken international human rights standards on independence of the judiciary and the separation of powers. See the U.N *Africa Briefing* (11 February 2019) <<https://africabriefing.org/2019/02/buharis-suspension-of-nigerias-chief-justice-breaches-human-rights-un/>> Accessed 20 May 2024.

¹⁶J Van ZylSmit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law).

¹⁷Ibrahim Sule, *Judicial Independence in Nigeria: Between Global Trends, Domestic Realities and Islamic Law* (2018) available at <https://www.researchgate.net/publication/328914198_Judicial_Independence_in_Nigeria_Between_Global_Trends_Domestic_Realities_and_Islamic_Law> Accessed 20 May 2024.

¹⁸Article 9 (2) & (3) & (4) of the Protocol on the Statute of the African Court of Justice and Human Rights.

¹⁹The bill was introduced in the American house on 24th January 2023. H.R. 464-118th Congress (2023-2024).

²⁰467 U.S 837 (1984). The case was a landmark in which the United States Supreme Court set forth the legal test for determining whether to grant deference to a government agency’s interpretation of a statute which it administers.

impeach and remove federal officials, including the president and judges, ensuring accountability.²¹ As a result of separation of power and checks and balances flowing from a commitment to respect the distribution of power as enshrined in the American constitution, the judicial branch (Supreme Court) has powers to resolve any conflicts which might emerge between state and federal laws and to decide conflicts between citizens of different states. More so, the courts decide cases concerning the activities of any agency of the executive and they do so without recourse to the executive irrespective of the presumptive executive's dominance in the power structure. The Supreme Court has the final word on cases heard by federal courts, and all federal courts must abide by the Supreme Court's interpretation of laws. All these are fostered by the security and independence judges enjoy through lifetime appointments. This is a sharp contrast to the Nigerian system that retires judges either at the expiration of a prescribed length of service period or by reason of age.

What Nigeria has done by the present government is to merely elongate the tenure of judges of the High Court.²² Regardless of the present effort, it may be necessary to review the prospects of appointing lifetime judges for purposes of reducing political pressure on the judicial system.

Most importantly, the American system of separating powers impacts on the strength of political parties in a way that neutralizes the possible influence of a party in power over the judiciary. As a result of institutional division of governmental power, each of the major political parties themselves has been divided into a presidential wing and a congressional wing. Compared with the Nigerian federal system, separation of powers weakens the political parties in the American federal government.²³ The confluence of congressmen and the president as occasionally being members of same party merely renders unity of purpose between them and weakens any sense of collusion far more than a parliamentary system. Thus the federal structure which separates power destroys absolute control of the party leaders over their party as members of the same party are also elected into the various arms of government such as the congress/legislature. In keeping faith with the aims of the branch of government other members are elected into, the powers of the president over his own party is very limited. As such, even if the president's party has majority of congress, this advantage is no guarantee by itself that a president will gain approval for his legislative proposals. The same applies to the judiciary where the president requires co-operation of congress to affect the judicial system generally. Consequently, the president may not be able to centralize his authority and influence over the other branches of government. In addition, political effectiveness largely depends on congressional co-operation and the 20th century has seen presidents of the United States face a congress in which their party members are in the minority. This narrows down the influence of the president over the judiciary as the co-operation of congress is needed to as much as remove a judge.²⁴ Although the Constitution of the United States allows for impeachment and removal of justices in much the same manner as a president, the house is required to vote for impeachment, and then a senate trial is held, with two-thirds vote needed to convict.²⁵

²¹See Patrick M. Gary "Principle of the Separation of Powers, Involving Checks and Balances on those Powers" *Constituting America* (2023) <<https://constitutingamerica.org/90day-fp-principle-of-separation-of-powers-involving-checks-and-balances-on-those-powers-guest-essayist-patrick-m-garry/>> Accessed 17 May 2024.

²²See the Guardian News "Discordant tunes over elongation of judges tenure in office" 24th July 2023 <<https://guardian.ng/news/discordant-tunes-over-elongation-of-judges-tenure-in-office-/amp/>> Accessed 17 May 2024. The law which was the first to be signed by President Tinubu after being sworn into office in 2023, elongates the tenure of judges of the High Court from 65 to 70 years.

²³ See the views of Vile, MJC Vile "Constitutionalism and the Separation of Powers" (2nd ed.) (Indianapolis, Liberty Fund 1998).

²⁴As a result, the president must work with Senators who disagree with his agenda and this narrows the chances of influencing the judiciary as he may wish to. For example, over the past five decade, every Republican president has had to work with a congress in which at least one of the two chambers has been in the control of Democrats.

²⁵The independence of the judiciary in America has for long insulated the judiciary from unnecessary executive interferences so that only one justice has ever been impeached, and it was more than 200 years ago. See the Washington Post by Gillian Brockell 'Can a Supreme Court justice be impeached?' 7 April 2023

But nearer home is Ghana, an African country like Nigeria which judiciary has a history of independence that originates from the 1992 constitution that proclaims that the only body able to outline how the judiciary shall function is the Constitution itself,²⁶ barring any external influence from other branches of government such as the President and Parliament. In Kenya, it is shown in the case of *Law Society of Kenya v Attorney General & National Assembly Constitutional Petition*²⁷ that the courts draw a line across executive interferences when it dealt with the appointment procedure of the Chief Justice of Kenya. In that case, parliament enacted an Amendment Act which contained section 30 (3) of the Act, which sought to amend section 30 of the Judicial Service Act. The petitioner, Law Society of Kenya, averred that this provision in the Amendment Act, which required the Judicial Service Commission (JSC) to forward three names of nominees to the President instead of one name, gave the President additional powers of appointment of a Chief justice, which were not contained in Article 166(1) (a) of the Constitution. The petitioner submitted that according to Article 171 of the Constitution the JSC was established with the sole purpose of removing from the President the power to nominate and appoint judges and thus safeguard the independence of the judiciary. The court declared that the amendment to section 30 (3) of the Judicial Service Act, which compelled the JSC to submit three names to the President for appointment of the Chief Justice and the Deputy Chief Justice respectively was contrary to Article 166 (1) of the Constitution and therefore unconstitutional, null and void. It was the firm position of the court that the Constitution dictates that the sole and unfettered discretion of nomination of a person for the position of the Chief Justice lies with the JSC and not the President.

Another classic case that speaks to the issue of the independence of the Kenyan judiciary is the case of *Law Society of Kenya v Attorney General & 2 others*²⁸ where the JSC conducted interviews for High Court Judges and forwarded 25 names to the President for formal appointment, swearing-in as judges and gazetting. However, the President only proceeded to appoint 11 judges and noted that the 14 remaining names were still being processed and he could approve or disapprove some of the names. The petitioner argued that under Articles 166 and 172 of the Constitution the president has no role in ‘processing’, ‘approving’ and/or ‘disapproving’ the appointment of judges and that this was the JSC’s role. It was held that the President violated the Constitution by purporting to ‘process’, ‘approve’ or ‘disapprove’ the nominees for appointment as judges of the High Court by the JSC.²⁹

Although the independence of the judiciary can easily be eroded by direct influence of the executive over other branches of the government, it is factual that consistent efforts towards shielding the judiciary as shown in the democracies above will go a long way in enthroning the rule of law. Democratic tendencies and its actual observance should thrive much better in civilised nations and

<<https://www.washingtonpost.com/history/2023/04/07/supreme-court-justice-impeached/#:~:text=The%20Constitution%20allows%20for%20the,more%20than%20200%20years%20ago>> accessed 17 May 2024.

²⁶ Article 125 of the Ghanaian constitution provides for the judicial power of Ghana as “Justice emanates from the people and shall be administered in the name of the Republic by the judiciary which shall be independent and subject only to this constitution.”

²⁷ No. 3 of 2016; (2016) eKLR (Petition No. 3 of 2016).

²⁸ Constitution Petition No. 313 of 2014; (2016) eKLR (Petition No 313 of 2014).

²⁹ In Kenya, the decision of the Judicial Service Commission is binding on the President. All the President is required to do is forward the names of the nominees presented to the National Assembly and swear in the candidates without more after clearance from the assembly. The role of the President of Kenya therefore in the appointment process of the Chief Justice, the Deputy Chief Justice and other Judges is purely facilitative. The conclusion in the case was reached by the court with considerations of the fact that after all the composition of the JSC ensures that the President only indirectly participates in the process of appointing judges by nominating three persons as members of the commission. The President therefore has no express powers to appoint judges as same may result to interference with the independence of the judiciary in view of the separation of powers.

the near absence of positive efforts that should be geared towards improvement among developing nations degenerate values which may affect the Judiciary in no little measure.

5.0 Conclusion and Recommendations

Enthronement and strict operation of rule of law is a crucial societal desideratum for orderliness and peaceful cohabitation. The rule of law is instrumental to a proper and satisfactory justice delivery for a healthy societal edification. Thus, insisting on and making rule of law operative, virile and impactful will mean to recognize that it is a tool for judicial expansion and fulfilment, of which jurists are primarily responsible and which should be employed not only to safeguard and advance civil and political rights of the individual in a free society but also to establish social, economic, cultural and educational conditions. Rule of law application will also enhance judicial independence and balance of political power where the structure of a constitution is based on power sharing among the legislature, the executive, and the judiciary. To ensure absolute control by the law rather than man or office, the judiciary must be totally independent of the other arms of government. It is recommended that the removal of justices of the courts should be by a Judicial Council. Disciplinary and accountability systems for judges should include complaint mechanisms where members of the public can report knowledge or suspicion of corruption, investigative measures, as well as a hearing or 'trial' mechanism for disciplining and dismissing judges. International standards require that the disciplining bodies should be independent of the government, and that disciplinary or removal proceedings against judges 'must be determined in accordance with well-established procedures that guarantee the rights of judges to a fair and transparent hearing and to an independent review.'³⁰ In the case of appointment of judges, recommendations run along three lines: increase the number of actors involved in the selection process; establish clear criteria; appoint judges for a lifetime unless indisposed by reason of health and increase the transparency of the process of impeachment criteria and procedures. In addition, it is important for states to ensure administrative autonomy and budget independence for its judiciary which will prevent the executive from 'starving' the judiciary – or rewarding judges when important decisions are pending. Such problems are avoided where the judiciary receives a guaranteed share of the national budget as may be constitutionally guarded.

³⁰Prescriptions of the International Court of Justice ((ICJ), 6 August 2012).