

Interrogating the Autonomy of the Judiciary and its Role in Building a Strong National Democracy

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Abstract: There is no doubt that the judiciary is one of the three arms of government vested with constitutional powers of law interpretation and administration of justice. It is therefore not out of place that the constitution to an extent provided measures to ensure its autonomy or independence so as to enhance separation of powers and checks and balances in governance. It is however worrisome that the autonomy of the judiciary has continued to hang in the balance and at the mercy of the executive arm upon which it has continued to depend on for funding and appointment of judges etc. This has adversely affected the role of the judiciary in building a strong national democracy. The paper interrogated the autonomy of the judiciary and its role in building a strong national democracy. The paper raised a number of pertinent conceptual and theoretical issues of practical implications relating to the theme. The importance and threats to judicial autonomy were unraveled. The paper affirmed that judiciary is the guardian and protector of fundamental human rights as well as the arbiter of disputes among all levels of government. This is why the judiciary ought to be not only autonomous but independent so as to be free to perform its functions without fear or favour. This is the primary goal of separation of powers; to enable the three arms of government to be independent of each other financially and otherwise. The paper made some recommendations for future purposes.

Keywords: *Interrogating, Autonomy, Judiciary, Strong National Democracy.*

Introduction

Democracies in modern times are fundamentally composed of three arms of government; the Executive, Legislature and the Judiciary. Each of these arms of government derives its powers from the Constitution. With recourse to Nigeria, the 1999 Constitution as amended guarantees the powers of each of the three arms of government. Nigeria has two sets of Judiciaries: Federal Judiciary and States Judiciary: under the Federal Judiciary we have the Supreme Court, Court of Appeal, Federal High Court, National Industrial Court, and such other judicial bodies like the National Judicial Council, National Judicial Institute, Federal Judicial Service Commission and Judicial Service Committee Abuja. The State Judiciary comprises of the State High Court, the Sharia Court of Appeal, Customary Court of Appeal and applicable Judicial Service Commission (Gambo, 2019).

As an arm of government the Judiciary is financed through annual budget at the Federal and States levels. No wonder Gambo (2019) affirmed that the Judiciary is central to good governance and sustainable democracy, and therefore, there are high expectations about its functions particularly under civil rule. Therefore, in order to ensure rule of law in governance and for the purpose of building strong and virile national democracy the autonomy or if you like the independence of the Judiciary should be sacrosanct. Pursuant to the above, the 1999 Constitution as amended made provisions for the financial autonomy of the Judiciary at Federal and State levels.

The above notwithstanding, the Judiciary is still confronted with several challenges including poor funding, undue executive interference and intimidation of judicial officers and judges, corruption, frequent strikes by Judiciary staff, poor facilities in court rooms, low morale of staff, poor staff welfare and motivation etc. These no doubt hampers the role of the judiciary in building strong national democracy. Gambo (2014) attributes these chains of challenges to poor funding; and by implication lack of autonomy of the judiciary in Nigeria. This paper therefore, intends to interrogate the autonomy of the judiciary in relation to its role in building strong national democracy in Nigeria.

Theoretical Framework

This paper adopted the Structural-functionalism as an offshoot of the systems approach and can be placed in the same methodological category. It can therefore be placed within the category of macro as opposed to micro approaches to political inquiry. Structural-functionalism, a sociological concept with fountainhead of Malinowsky, emerged from the effort of scholars like Talcott Parson, David Easton, Gabriel Almond, Bingham Powell, and James Coleman to develop a comprehensive framework within which political system, past and present as well as Western and non-Western could be analyzed as a basis for scientific study of comparative politics and administration (Budlender, 2005).

The proponents of the structural-functional approach sought to develop a common scientific framework for the analysis of all political systems.

This approach has four related analytical goals with the acronyms CRIP:

- i. **Comprehensiveness:** The inclusion of Western and non-Western cases
- ii. **Realism:** The analysis of the actual behaviour, rather than formal rules
- iii. **Intellectual order:** The creation of a unified theory of politics which will bring together the fields of comparative government, political theory and international relations
- iv. **Precision:** The application of scientific and quantitative techniques in the study of political behaviour and phenomenon.

The core assumption of the structural-functional approach is that a universal set of political functions could be defined and associated with different structures in different political systems. In other words, all political systems perform the same core set of functions, although these functions may be performed by different structures from one society to another. Political system here refers to a set of interactions, institutions and agencies concerned with formulating and implementing collective goals of a society by employment or threat of employment of more or less legitimate physical compulsion. It exists in both domestic and international environment shaping, these environments and being shaped by the environment.

The literature on structural-functional analysis has identified five types of political structures located within the modern political system: political parties, interest groups, legislature, executives/ bureaucracies, and the courts (judiciary). In existing Western systems, political parties are largely but by no means exclusively associated with interest

aggregation; interest groups with interest articulation, legislature with rule making or policy formulation, executives and bureaucracies with rule application or policy implementation and courts with rule adjudication.

The summary of the assumption of the structural functionalism is that for the effective operation of society different structures or institutions are created and each structure is assigned functions. Thus when the structures efficiently perform their assigned functions it will result to effectiveness and system efficiency but when any of the structures fail in its functions it automatically results in system dysfunction. The approach therefore, clearly explains the phenomenon of autonomy of the judiciary in relation to its role in building strong national democracy in Nigeria. In the light of the present scenario in Nigeria it is apt to assert that the judiciary if allowed to perform its constitutional roles without intimidation and undue interference, will in no small measure strengthen the rule of law, fundamental human rights and good governance through quick dispensation of justice without fear or favour.

Conceptual Insights on Judiciary and Judicial Autonomy or Independence

Judiciary is a derivative of the word judicial which means “doing an act with wisdom, logic, foresight, fairness and honesty” (Yakubu, 1990). Judiciary therefore means doing something or acting logically, fairly and honestly. Boviers Dictionary 3rd edition, defines “judiciary” as “the system of courts of justice in a country. It is therefore the department of government concerned with the administration of justice”. In the light of the above definitions some key points are germane to the functional elements or prerequisites that constitute a judiciary, namely: judges, courts of law and administration of justice. More importantly however, the judiciary represents a legal institution of the state and this predisposes it to not just ordinary or common dictionary meaning but more aptly to legal definition. Consequently, the Black’s Law Dictionary 8th edition defines the term judiciary thus, the branch of government responsible for interpreting the laws and administering justice; a system of courts as well as a body of judges.

In the submission of Oloko (1990) on the nature of the judiciary, he described the judiciary as the specialized differentiated structures, processes and personnel that are devoted to the task of performing on a continuous basis, one of the three inter-related and independent governmental functions in modern and modernizing societies. The specific governmental function performed by the judiciary in all societies is known as rule adjudication as distinct from the two governmental functions of rulemaking and rule application. In addition, constitution has high regards to the powers of the judiciary just like the other arms of government; executive and legislature. Thus to the judiciary exclusively is committed the judicial powers of the federation and the states, the guardianship of specially entrenched fundamental rights, interpretation of the constitution itself and the power, where necessary, to strike down as unconstitutional, enactments of the legislature and or actions of the executive (Oputa, 2007).

Judicial Autonomy or Independence of the Judiciary

The concept of ‘autonomy or independence of the judiciary’ can be consciously or unconsciously misconstrued by some government functionaries, politicians, and some members of the general public. In this paper autonomy and independence are used interchangeably. Consequently, it is only necessary to clarify the contextual connotation of the term. The concept of judicial autonomy or independence usually connotes wider judicial autonomy. The expression simply means that the courts that exist in any modern state must be allowed to exercise their judicial functions without interference from any quarters (Chukkol, 1995). Indeed, independence of the judiciary means more than the absence of interference from the other organs of government (Ogbu, 2004). It means:

...that deciding officers shall be independent in the full sense, from external direction by any political and administrative superiors in the dispensation of individual cases and inwardly free from the influences of personal gain and partisan or popular bias; thirdly, that day to day decisions shall be reasoned, rationally justified in terms that take full account both of the demands of general principles and the demands of the particular situation (Aguda, 1992; Karibi-Whyte, 1987). Thus the independence of the judiciary involves “both subjective independence as well as objective independence, it involves de jure independence as well as de facto independence; it involves structural independence as well as budgetary independence” (Oputa, 1990).

In practical terms, the independence of the judiciary according to Nnaemeka-Agu (1993) implies:

- a) that the judiciary shall have its own separate administration under the umbrella of, say, the judicial service commission or committee at the federal and state levels, which should take charge of the welfare and discipline of all judges and the judiciary staff and provide and maintain all necessary infrastructure and equipment for the due performance of their functions;
- b) that the judiciary shall control its own finances from funds to be budgeted for its capital and recurrent service by the government and become completely self-accounting;
- c) that subject to such general guidelines as the government may deem necessary to give, the judiciary be left free to perform its day-to-day functions without direction, dictation or control from any quarters.

Independence of the judiciary is the bedrock of the administration of justice. Judicial independence carries with it the absolute independence of every member of the Bench (Ijalaye, 1991; Oputa, 1992).). According to Oputa (1990), “a judge must enjoy complete independence if he is to render, satisfactory service to the cause of justice”. “The principle of the complete independence of the judiciary from the executive” declared the great Winston Churchill “is the foundation of many things in our Island life.” As John Marshall, the third Chief Justice of the United States cited in Duru (2003) suggested that; a judge must be completely independent with nothing to influence or control him but God and his conscience. As relevant as the above statement may seem, it raises pertinent serious questions, especially with recourse with current Nigerian political dispensation where autonomy of the judiciary is nothing but a charade.

Judicial independence means that the judicial branch or system is not influenced by other branches of government. Therefore, the main objective behind granting judicial autonomy or independence is to avoid improper influence on the court from the other arms of government- Executive or the Legislatures (U.S. legal.com). Consequently, the point must be noted here that funding is central to the autonomy of the judiciary anywhere in the world. And cognizant of the fact those resources (money in this case) are limited and prioritization of their allocation creates competition among different public departments; resource allocation becomes more difficult when it comes to the judiciary as has been the case in Nigeria. The funding of the judiciary is in the hands of other state powers, the Executive and the Legislature; this poses serious threat to the role of the judiciary in building strong national democracy.

From the foregoing, the principle of separation of power is crucial to avoid concentration of

power in one single branch, but the one that holds the “power of the purse” has some extra weapon which could be used against the other branches (Wikipedia.org, 2019). Accordingly, whereas the autonomy of the judiciary in terms of its finances, appointments

and dismissal will be advocated by this paper the view that the judiciary should be completely autonomous or independent from the Government and society is a mere utopia. It is not realistic nor in tune with contemporary global trend in justice administration. Separation of power can only operate effectively where there is checks and balances and the judiciary cannot be a master of its own.

Interrogating the Importance of Judicial Autonomy or Independence

Democratic system is incomplete in the absence of the law courts. The judiciary thus is a stabilizing force by virtue of its constitutional roles. An independent judiciary therefore, is a fundamental element of democracy. It is apt to add that, the strengthening of judicial autonomy or independence is a crucial element of the transformation of the judiciary and is fundamental to the creation of a democratic state. In the light of the very fundamental role that the judiciary performs in society, there is no doubt about the importance of ensuring its

autonomy to the best practical level in the performance of its functions. In recognition of this fact, (Churchill as cited in Duru, 2003) opined that the principle of complete independence of judiciary... is the foundation of many things in our life... it is perhaps one of the deepest gulfs between us and all forms of totalitarian rule. The only subordination which a judge knows in his judicial capacity is that which he owes to the existing body of legal doctrine enunciated in years past by his brethren... and upon laws passed by parliament which have received the royal accent.

Kelly (2001) suggested that; it is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. Thus provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences. Accordingly, it is vital that the judiciary enjoy autonomy or be independent so as to enable it perform its important and indispensable functions well. According to Justice Nnaemeka-Agu (1993): what cannot be doubted is that a judge must be completely independent, free and freed from all forms of external influence and control, before he can perform his functions well. This is true of judges all over the world. But, it is perhaps true in Nigeria where money is the lord and some people think that even justice is a commodity which can be bought and sold. The importance of judicial autonomy is further underscored by the following words from Akinkugbe (1972); If the Bar knows that its conduct will be judged by an independent, fearless and incorruptible Bench it will live up to expectation.

From the foregoing discussion it is apt to align with the submission of Ogbu (2000) that a strong independent and impartial judiciary is a force for stability in a democratic society by: a just resolution of conflicts and contradictions inherent in a democracy; ensuring that right is right as opposed to might is right, using the spirit of the law to engender non-violence social change. In view of the above, it must be conceded that considering the very nature of the judicial function, autonomy of the judiciary is not only desirable; it is imperative. Bitter experience has shown that an independent judiciary and equally independent Bar are essential and necessary pre-requisites for the maintenance of the rule of law as well as a proper, effective and efficient administration of justice. The International Commission of Jurists (as cited in Duru, 2003) recognizes that an independent judiciary is an indispensable requisite of a free society under the rule of law. Judicial independence is the element which makes possible the deciding of important controversial issues on the basis of merit and principle rather than expediency. Judicial independence is designed to enable the judge resist the pressure of political hysteria or

executive fanaticism. It allows the judge to rise above passion, popular clamour and the politics of the moment. Without judicial independence no judge or justice, however, well prepared by qualities of heart, mind and professional training can give his best in an atmosphere of political turmoil (Duru, 2003)

Importantly too, independence of the judiciary instills public confidence in the judiciary. According to Justice John Evans of the Canadian Federal Court of Appeal (as cited in Budlender, 2005), independence “is a necessary condition for obtaining and maintaining this confidence, without which the courts’ legitimacy ... will rapidly erode and with it human rights and the rule of law.” Independent courts are vital to ensuring access to justice for all members of society. Overall, judicial autonomy, itself an element of democratic transformation, facilitates the achievement of many of the other transformation goals in building a strong national democracy.

Judicial Autonomy: The Nigerian Reality

In spite of the existing constitutional and statutory safeguards, Ehiogie (2021) queries whether the Nigerian judiciary is truly autonomous or independent? This is very doubtful based on the reasons the author enumerated below.

(A) **Financial Dependence:** Apart from the Federal judiciary which to some discernible extent enjoys some control of its budgetary allocations for the payment of re-current expenditure like salaries, it is not certain whether they exercise such control over the release and expenditure of capital votes without some measure of Executive influence. Even at this, policies like Treasury Single Account (TSA) which compels the judiciary to pay its income into TSA denies the judiciary of its much needed revenue and keeps it dependent on Executive Largesse. This is worse off at the state level in Nigeria, where the judiciary virtually genuflects round Executive tables for funds to sustain its role in nation building.

(B) **Easy removal of Judges on the Prompting of the Executive:** The judiciary in Nigeria today is faced with enormous threats, which impinge upon its autonomy and independence. This includes the issue of easy and unilateral removal of judges by the president or governors as the case may be. Recently there have been instances where judges are arraigned before the Code of Conduct Tribunal without any reference to NJC for failure to correctly declare assets; this is a flagrant and crude abuse of Executive powers that jeopardizes judicial independence.

(C) **Decisional Independence:** Judges all over the world are entitled to decisional independence or autonomy. No doubt there is a fair presence of decisional independence amongst Nigerian judges in respect of civil cases founded on common law and general criminal litigation. The area of concern is on politically related matters like matters involving the EFCC and related offenses. In such matters the decisional autonomy of judges is often found to be infringed upon by executive interests. This is an impediment to judicial independence as judicial decisions ought not to be subjected to such illogical influence (Ehiogie, 2021).

Judicial Autonomy as a Recipe for Building Strong Democratic System

There is need to point out here that a number of judges are also influenced by corruption, greed and avarice in the discharge of their duties. It is this notion that has given rise to such concepts as “black market” ex parte orders, “cash and carry” judgments and a host of uncomplimentary narratives surrounding the nature of some of the judgments delivered in Nigeria. The danger is that negative perception of this nature; erode the three basic elements of the independence of the judiciary, viz:

- (i) The judicial system must be publicly perceived as impartial in rendering decisions. Judges should not have personal interest, whether due to bribery and corruption or as a result of political pressures in the outcome of disputes between private parties and the government.
- (ii) Judicial decisions must be accepted and respected by the contesting parties and the larger public; and
- (iii) Judges need to be free from undue interference from the parties in a case, other branches of government and higher Courts within the National Judiciary.

Sequel to the above, the independence of the judiciary is the cornerstone of a democratic society and safeguard for the freedom and rights of the citizens under the Rule of Law. It is extremely important for the Judges to be free to make impartial decisions based solely on law and facts without interference, pressure or influence. In a democratic state it is the duty of the judiciary to formulate the rule of law through interpretation and application of law to respond with a verdict, settling disputes, checking illegality and so on. To help democracy thrive, the basic principles of democracy such as the rights contained in Chapter 4 of the Nigerian Constitution and other democratic rights must be upheld along the principle of compliance with extant laws. Nigeria now relies on the judiciary and judicial means for addressing core legal, moral, political controversies and public policy questions on equality of rights, criminal justice, education, labour and environmental protection.

It is important to protect the judiciary in a democracy as the judiciary is the defender of people from the intrusions and overreach by the government and powerful individuals. In this way it preserves a free and democratic society. The entire Bar and the public have a duty to guarantee the independence of the judiciary as the legal framework in our country is not enough to guarantee this critical element of our democracy. Linda Klein, past president of the American Bar Association (ABA) (2017), clearly captured the need to respect judicial officers in her message to ABA on June 1st, 2017. The eminent lawyer had this to say; Public trust is eroded when leaders attack judge's character and competence. Disagreeing with a decision is one thing. But personal attacks on judges are attacks on our constitution. The academia through research should accept the challenge and continue to educate the public about the role of the Judiciary in building a strong national democracy.

Our attention needs to be drawn to what Timothy Snyder, a professor of History at Harvard University said in his book; "On Tyranny". The erudite professor held the strong view that it is imperative to defend institutions like the courts and press. He argued that although these institutions normally defend people, there are times when the institutions cannot protect themselves and need to be defended by the people in order to maintain their vital roles in building an egalitarian society.

Enhancing the Autonomy of the Judiciary for Sustainable Democracy

It has been agreed that autonomy of the judiciary is germane to building a strong national democracy. Consequently, besides the issues already adduced, some critical points are worth recapping here. In terms of ensuring institutional independence, constitutional guarantees of the separation of powers and of non-interference in the judiciary by other branches of government are crucial (UN General Assembly, 1985). Disciplinary procedures should also be "fairly and objectively administered. Similarly, to protect the judges from fear of reprisals for their decisions, judges should be immune from civil suits arising from acts or omissions in the course of exercising their judicial functions (UN General Assembly, 1985).

Another important safeguard, financial security, is crucial to maintaining individual independence preventing other branches of government from using threats of salary reduction to influence judges. Financial security includes adequate remuneration and protections against the arbitrary reduction or suspension of judges' salaries. Similarly, the adequate provision of resources allows the "judicial system to operate effectively without any undue constraints which may hamper" judicial independence (UN General Assembly, 1985). The judicial appointments process also impacts on individual independence. Judicial appointments "should be made on the basis of clearly defined criteria and by a publicly declared process." The appointments process must also "safeguard against judicial appointments for improper motives", and people selected should "be individuals of integrity and ability with appropriate training or qualifications in law" (UN General Assembly, 1985).

Furthermore, to protect independence, any system of promoting judges "should be based on objective factors, in particular ability, integrity and experience" (UN General Assembly, 1985). If judges believe that the content rather than the quality of their decisions will impact on their likelihood of being promoted, they might be reluctant to make decisions upon which the government will look unfavourably.

Conclusion:

This paper has established the need for and importance of judicial autonomy or independence not only in Nigeria but across the world based on United Nations principles and other national legal instruments. However, the peculiarity of the Nigerian case was highlighted as it posed serious threat to effectiveness of the judiciary in its role in building strong national democracy. In conclusion therefore, we adopt the instructive opinion expressed by Attorney Klein (supra) that; the legal community must remain diligent and vigilant in their support of institutions, especially the autonomy of the courts. Judicial independence ensures the rule of law safeguards our democracy.

Recommendations

The following recommendations are proffered;

1. The appointment, promotion and dismissal of judicial officers should be clearly removed from the control of the executive arm of government.
2. The constitutional provisions mandating that funds for judges of superior courts should be drawn from the consolidated Revenue Fund should be enforced across levels of government and same should be extended to judges of inferior courts.
3. There is need to separate the office of the Attorney-General from that of the Minister/Commissioner for Justice, to enhance transparency and efficiency in the judicial process.
4. The National Judicial Commission should be restructured and be properly equipped with enabling powers to effectively check the activities of judicial officer for the purpose of disciplinary action in times of abuse of power.

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