

INDEPENDENCE OF THE JUDICIARY: THE NIGERIAN EXPERIENCE

Oladele O. O. *

Abstract

This article examines some of the basic principles on the independence of the judiciary by situating the Nigerian judiciary and its operating environment within them. It establishes that much progress has been made to realize the key objectives of the independence, but with the judiciary itself leading the way. However, much of the threats to the independence of the judiciary rear their heads from the remaining two branches of government, the executive and the legislature. This article identifies some of them and makes a case for proactive measures to combat the threats.

Keywords: Independence, Judiciary, Nigeria, and Constitution

1.0 INTRODUCTION

We have grown up to know the judiciary as one of the three branches of government in our constitutional democracy. On this branch depends the health and efficacy of our legal system as well as societal orderliness, the protection of the rights of citizens, the rule of law, as opposed to the rule of man or thumb otherwise known as arbitrariness, and the conduciveness of our national environment to economic growth and development.

This article traverses the basic principles on the independence of the judiciary and situates the Nigerian judiciary in those germane principles. It does this to answer pressing inquiries on its status, evaluating the factors that impact the norm of independence, in the light of the aberration of direct and indirect assault on the independence of this unavoidable component of governance.

Within the scope of its engagement, this article answers the inquiries: What is independence in this context? Why does the judiciary need to be independent? Is the Nigerian judiciary independent? What remains undone to ensure that it has an efficacious measure of independence?

2.0 INDEPENDENCE OF THE JUDICIARY

Institutional independence of the judiciary is intertwined with the constitutional principle of separation of powers. Simply put, it means that the judicial branch of government must be independent of the other branches, namely the Executive and the Legislature so as to be able to dispense justice according to the law. The Canadian case of *Valente v The Queen*¹ explains it as follows:

*Professor of Law, Department of Private and Commercial Law, Bowen University, Iwo, Nigeria

¹ [1985] 2 S.C.R. 673

[J]udicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government...

Judicial independence is a status or relationship resting on the objective conditions or guarantees as well as a state of mind or attitude in the actual exercise of judicial functions...²

In his book titled *The Nigerian Judiciary-A Silent Sufferer*, Gbenga Falade explains the independence of the judiciary in the following words:

Simply stated, judicial independence is the ability of a judge to decide a matter free from pressures and inducements. Additionally, the institution of the judiciary as a whole must also be independent by being separate from government and other concentrations of power. The principal role of an independent judiciary is to uphold the rule of law and to ensure the supremacy of the law. If the judiciary is to exercise a truly impartial and independent adjudicative function, it must have special powers to allow it 'keep its distance' from other government institutions, political organizations, and other non-governmental influences, and to be free of repercussions from such outside influences.³

In pursuit of judicial independence, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the *Basic Principles on the Independence of the Judiciary* (hereinafter referred to as the '*Basic Principles*')⁴ which the UN General Assembly of the same year endorsed unanimously.⁵

Principle 1 of the *Basic Principles* recommends the independence of the judiciary as follows:

The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the

² Ibid., at 687, 689.

³ Falade Gbenga, *The Nigerian Judiciary – A Silent Sufferer*, Ibadan, HISown Publishers, 2013, p.36.

⁴ United Nations, Seventh UN Congress on the Prevention of Crime and Treatment of Offenders, Milan, Italy, 26 August – 6 September, 1985. Available at: www.asc41.com/UN_congress/7th%20Congress%20on%20the%20Prevention%20of%20Crime/7th_congress.htm.

⁵ General Assembly, resolutions 40/32 of 29 November and 40/146 of 13 December 1985. Available at: www.ohchr.org/EN/ProfessionalInterest/Pages?independenceJudiciary.aspx.

duty of all governmental and other institutions to respect and observe the independence of the judiciary.⁶

In appraising our own experience, we will revisit this principle and do that in the light of past and contemporary disregard of it by the more visible branches of government. Immediately here, it is significant that the International Association of Judges (“IAJ”) established the Universal Charter of the Judge in 1999. The Charter provides, *inter alia*, that “[t]he independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence”.⁷

Importantly, the declaration of IAJ was informed by the well thought-out aspirations of the members borne out of years of cognate experience. To that extent, it should speak directly to the hearts of those who seek judicial offices, particularly in the path they thread to appointment to the hallowed office. More importantly, however, is the fact that the message is more for the members and organs of the other branches of government that are entrusted with powers, the abuse of which fatally impact the independence and functions of the judiciary. In taking this position, I ask myself, just as I ask your distinguished lordships and honour: What happened to the oath to uphold the Constitution?

In the light of the ongoing, the *Basic Principles 2* on the independence of the judiciary is germane. This is the principle of ‘non-interference’. The Principle provides as follows:

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

Likewise, Principle 4 provides:

There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

⁶ Office of the High Commissioner for Human rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No 9/Add.1, United Nations: New York and Geneva, at 120. Available at: www.ohchr.org/Documents/Publications/training9chapter4en.pdf.

⁷ International Association of Judges, Statute of the International Association of Judges. Available at: www.iaj-uim.org/iuw/wp-content/uploads/2013/07/forst-statute_I.pdf. See particularly, International Association of Judges, *The Universal Charter of the Judge*, 17 November 1999, Article 1. Available at: www.hjpc.ba/dc/pdf/THE%20UNIVERSAL%20CHARTER%20OF%20THE%20JUDGE.pdf.

Another important way and means of guaranteeing the independence of the judiciary is an enshrined method of selecting judicial officers with secured tenure according to the rule of law.⁸ This observation rests assuredly on *Basic Principle 10* in the following words:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

The conditions of service and tenure of judges and other judicial officers also form the bedrock of their independence. To that effect, *Basic Principle 11* requires that “[t]he term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.” Principle 12 declares that “Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.” Principle 13 aspires that the “[p]romotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.”

The UN laid down the *Basic Principles* so that the Governments of the Member States shall have a framework within which they shall secure and promote the independence of the judiciary through national legislation and practice. Consequently, they are to keep judges, lawyers, members of the executive and the legislature and the public informed of the principles and legislation made pursuant to them. The principles are to apply to judges as well as judicial officers on the lower bench.

3.0 THE NEED FOR INDEPENDENCE OF THE JUDICIARY

Healthy international co-operation requires the establishment of conditions under which justice could be dispensed so as to promote and encourage respect for human rights and fundamental freedoms, free of discrimination. These conditions include the principle of equality before the law, the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law without undue delay.

⁸ International Bar Association, “Challenges to the Independence of the Judiciary: A Case Study of the Removal of Three Judges in Iowa”, *Report of the International Bar Association’s human rights Institute (IBAHRI) with the research assistance of IBAHRI interns Gabriela Maldonado and Juan M Zarama, December 2013*, p.27. Available at: www.ibanet.org

Pursuant to the above, the court must be impartial and decide the matters before it according to the law and on the basis of the facts presented. It must be free of “restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason” as stated by *Basic Principle 2*. The court must serve the end of justice. It is for this reason that *Basic Principle 6* adds that “...the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.”

Judicial independence is valued because it serves important societal goals – it is a means to secure those goals. One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.⁹

To the same effect, ‘a word on marble’ of my Lord, Chief Justice Dahiru Musdapher, *GCON, FNIALS*, a former Chief Justice of Nigeria underscores the indispensability of judicial independence and impartiality in the administration of justice as follows:

The judiciary’s mandate is not an end in itself. It is a means to a higher end. The thrust of the judiciary’s mandate is the cause of justice. Therefore, in interpreting the law, all Judges must always reckon with the imperative to engender justice. As my Lord, Hon. Justice Kayode Eso, JSC, aptly puts it “without justice, law labours in vain.”¹⁰ In the perceptive words of Iyer, “Law without justice, is legitimation of tyranny; justice without law, is fraught with anarchy; justice riding law, with a mission and a vision, arrives at destination.”¹¹

In executing its mandate, the judiciary is not beholden to the apron strings of any political party, pressure group, religion, racial or ethnic group, sex, geo-political entity, etc. Consistent with the symbol of justice, which is depicted as a blindfolded person holding two even scales, the judiciary’s mandate is to dispense justice to all manner of people, without fear or favour, affection or ill-will.¹²

⁹ Ibid.

¹⁰ Kayode Eso, JSC, *Valedictory Speech, reproduced in (1990) SCNJ, 9-15, at 12.*

¹¹ V.R.K. Iyer, *Law Versus Justice: Problems and Solutions*, Deep and Deep Publications, 1981, at p.119.

¹² Dahiru Musdapher, “The Nigerian Judiciary: Towards Reform of the Bastion of Constitutional Democracy”, *NIALS’ Fellows’ Lecture Series*, Lagos, Nigerian Institute of Advanced Legal Studies, 2011, p.4.

Speaking on the impact of the independence of the judiciary on democracy, Yusuf O. Ali, a learned Senior Advocate of Nigeria argues persuasively that the rights and freedom for which democracy is known cannot be guaranteed if the judiciary is not independent. He adds that “[d]emocracy in the absence of independence of judiciary will have everything to fear for there could be no democracy firmly standing and well established if the power of judging by the courts is dependent on [the] executive and/or legislative whims and caprice.”¹³

4.0 IS THE NIGERIAN JUDICIARY TRULY INDEPENDENT?

In its traditional mould, the basic elements of judicial independence are often state to be of three components. The first is that a Judge shall have security of tenure and may be removed from office only according to the Constitution. The second is that the process for selecting Judges shall be free from political and other whimsical considerations. The third is that a Judge shall be adequately remunerated and the remuneration, which includes a safe pension scheme, must be protected against all attempts to remotely control the Judge.¹⁴

It is commendable that the Constitution of the Federal Republic of Nigeria 1999 guarantees the appointment of Judges according to due process.¹⁵ It also secures the tenure of Judges¹⁶ and makes provisions to safeguard their remuneration.¹⁷ However, the independence of the judiciary has many components that, in their disregard, threaten the substratum.

In this segment, I project my argument on the verdict of my Lord, Hon. Chief Justice Dahiru Musdapher, as he then was, while placing the roles of the judiciary in context and pitching it against the challenges that confront it. His Lordship stated as follows:

For a better understanding of the role-and limitations – of the judiciary as the bastion of constitutional democracy, it is important to take stock of the challenges that it grapples with. These include the lack of independence of the judiciary, especially at the state level, in terms of funding, political manipulation of the processes of appointment and removal of Judges by some state chief executives and their respective Houses of Assemble; delays in the administration of justice occasioned, in part, by institutional limitations and incapacities; and corruption.

¹³ Yusuf O. Ali, “The independence of the Judiciary as Panacea for Stability of Democracy in Nigeria”, paper presented at the Luncheon in Honour of Hon. Justice Olagoke, the 9th day of November, 2008, p.18. Available at: www.yusufali.net

¹⁴ Ibid. at p. 6.

¹⁵ See sections 231, 238, 250, 261, 266, 271, 276 and 281

¹⁶ See sections 291 and 292.

¹⁷ See section 84.

It is regrettable that some state chief executives treat the judiciary as an appendage of the executive arm. While it is true that, in some cases, this is self-inflicted (because of the way some Judges portray themselves), it does not invariably follow that a distinct arm of government should, because of the actions of a few, be treated with disdain. Sadly, the judiciary in several states still goes cap in hand to the executive begging for funds.”¹⁸

On the authority of section 162(9) of the Constitution of the Federal republic of Nigeria, His Lordship posited that the money standing to the credit of judiciary in the Federation Account is paid to the National Judicial Council (NJC) for onward disbursement to the heads of superior courts down to the state level. He however added that regrettably, many states leave to suffer the provision of infrastructure as well as the well-being of Magistrates and other lower court judicial officers that are their responsibilities.¹⁹

In addition to the above, His Lordship added authoritatively that “[t]he plight of state judiciaries is compounded by the fact that, in spite of the best efforts of the NJC, the processes of appointment and removal of Judges/security of tenure is the subject of political theatrics.”²⁰

Further, infrastructural provision for the judiciary has not responded favorably and sufficiently enough to the ICT needs and support as well as capacity development for the Judges and other judicial officers.

It is important to state that the corruption, ‘enemy within’, where tolerated, circumscribe the individual independence of Judges and other judicial officers in a self-inflicted way. In Yoruba parlance, it is said: “O ti je dodo, nitorina ko le so odododo”, that could be translated into English as: “He has eaten of sweet morsels, so he cannot tell the truth.” The damaging gravity of corruption of a Judge is summed up incisively by His Lordship, Hon. Justice Samson Uwaifo, JSC, as follows:

A corrupt Judge is more harmful to the society than a man who runs amok with a dagger in a crowded street. The latter can be retrained physically. But a corrupt Judge deliberately destroys the moral foundation of the society and causes incalculable distress to individuals through abusing his office while still being referred to as ‘honourable’.²¹

With all due respect, I join my voice with that of His Lordship, Hon. Dahiru Musdapher, CJN, as he then was that “... there is no middle ground and no space for the Bench for

¹⁸ Ibid. at pp. 12-13.

¹⁹ Ibid. at p.13.

²⁰ Ibid.

²¹ Uwaifo, JSC, Valedictory Speech, reproduced in (2005) 1 SCNJ, at 20.

those adjudged to be unworthy arbiters of truth. The choice is simple and our resolve is absolute – ‘*plata o plomo (Gold or lead)*’

The place appointed the advice of the NJC in the appointment, discipline and removal of Judges also impacts the independence the judiciary, and may do so negatively. The discretion exercisable by the President or the Governor “acting on the recommendation of the [NJC] that the judicial officer be ... removed for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or for contravention of the Code of Conduct”²² should be according to law. So also is the decision to reinstate a Judge following the advice of the NJC. It should not be at the whims and caprice of the Executive.

Another factor that adversely impacts the independence of the Nigerian judiciary is its reliance on the Executive branch of government of the enforcement of judgments. This is counter-productive to the extent that it nullifies the efficacy that should accompany the validity of court judgments painstakingly reached. I submit that the judiciary should have its own independent vibrant enforcement unit. In support of my position, I cite the position of my Lord, Hon. Justice Nnaemeka-Agu, JSC, as he then was, as follows:

The Courts should be well provided with well-equipped enforcement personnel of their own similar to the court marshals in the United States of America. Section 26 of the Police Act... which provides that court summons shall be served by the police should be respected and functions transferred to court marshals in the true spirit of separation of powers.²³

Perhaps, it is high time we elevated the alert by calling for an independent security agency for the judiciary in the light of the violence that desecrated the temple of justice in Ekiti State recently when Judges, lawyers and court officials were attacked and assaulted in the course of court proceeding with no enforcement agency in sight to offer any protection. This is compelling in the sense that the dastardly act repeated itself within a couple of days. There ought to be legislation setting up adequately equipped and motivated judicial enforcement and security agencies at the federal and state levels.

5.0 PROACTIVE STEPS TOWARDS THE INDEPENDENCE OF THE JUDICIARY

There has to be a constitutional guarantee of the independence of the judiciary beyond mere aspirations and equivocation. It is insufficient to consign it to the non-justiciable Fundamental Objectives and Directive Principles of State Policy part of the Constitution. Section 17(2)(c) that falls under that part provides: “The independence, impartiality and integrity of Courts of Law, and easy accessibility thereto shall be secured and maintained.” We have to give this the bite of justiciability:

²² Section 292(1)(b) of the Constitution of the Federal Republic of Nigeria

²³ Paper delivered at the All Nigerian Judges Conference, Abuja on the 29 June, 1992.

The issues that threaten judicial independence, some of which have been raised in the segment immediately preceding this will have to be resolved in favour of the independence in an urgent and proactive way. The inconceivable alternative is a slide into the Hobbesian State of Nature and the reign of anarchy.

6.0 CONCLUSION

In a succinct form, this article has examined some of the basic principles on the independence of the judiciary as our evaluation paradigm by situating the Nigerian judiciary and its operating environment within them. Much progress has been made to realize the key objectives of the independence, but with the judiciary itself leading the way. However, much of the threats to the independence rear their heads from the remaining two branches of government, the Executive and the Legislature. This article has identified some of the threats and made a case for proactive measures towards attaining the end of justice through the independence of those who serve at the altar of justice. The quest is an ongoing one as other areas of concern will call for action.

The direction of flow for the Nigerian judiciary should be in tandem with the counsel of the International Bar Association as follows:

The independence and impartiality of judges and courts is at the heart of a judicial system that guarantees human rights and the rule of law, particularly the right to fair trial, in full conformity with international law.²⁴

²⁴ IBA, *supra*, at p.27.