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## The Judiciary as an Organ of Government

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### **Abstract**

*This paper highlights the intricate organization and crucial role of the judicial arm of government in the effective running of society. The paper explains and re-echoes the imperative of an independent, impartial and fearless judiciary as a bulwark against abuse of power, tyranny, lawlessness and instability in the nation. Finally, the paper outline the enormous contribution of the Nigerian Judiciary to the survival of the country's democracy and suggests urgent review of relevant laws by government and capacity building for its officers in order to enhance its overall performance and speedy dispensation of justice and boosting of its credibility and public acceptance.*

## **Introduction**

The Judiciary represents the court system in the land, it symbolizes judges and justice. It is the third arm of any modern government. This was popularized by Montesquieu, the French political philosopher and jurist who postulated that there should be separation of judicial duties from legislative and executive functions to forestall tyranny.

A court system implies a judicial arrangement of graduated competences of hierarchal structural arrangement from lower to superior courts, courts of first instance to Supreme Court, where appeals are taken or heard, and special courts or tribunals, exists in modern democratic countries.

Lastly, for the administration of justice to be fair and equitable in any political setting, it should combine autonomy with accessibility and a certain degree of uniformity. To be fair means that it is objective and fearless. To be equitable implies that court rules are equally applied, as rewards and punishment to both the poor and the rich. Autonomy connotes independence and authority.

## **Functions of the judiciary**

The primary function of the judicial organ is that of adjudication, whereby a court determines guilt and administers punishment to anyone who has breached the law. In this way, a judge or group of judges settles disputes between parties, through the application of rules and procedures already laid down by the appropriate state agencies. It should be pointed out that all judicial systems perform the function of adjudication; the political environment in which the court operates dictates the mode of its application.

Interpretation of the law is another function performed by the judiciary. Legal interpretation, in fact, goes hand-in-hand with adjudication. This is because whenever a matter is brought before the court for adjudication, the essence of findings the 'true' meaning of the law is made apparent, and whenever this is done a judicial precedent is set, and it affects all future court decisions. Thus, the judicial arm becomes actually engaged in law-making through the process of the interpretation and consequent setting of judicial precedent.

Another function of the judiciary is the power of judicial review. This ensures that actions and activities of other arms of government and administration are in accordance with the law and the constitution. Judicial review is the power of the court in appropriate proceedings before it, to declare a legislative or executive act either contrary to, or in accordance with the constitution, with the effect of rendering the act invalid or vindicating its validity and thus putting it beyond challenge in future. The court can declare a law unconstitutional, as in the United States, on the grounds that it contravenes certain provisions of the concerned Federal or State constitution. This

process is known as *Judicial Review* and it is considered as a check against possible excesses by the legislature or the executive. Similarly in the Nigerian case of *Olewoyin V. Police*, the plaintiff claimed that the Northern Region High Court (Amendment) Law 1960, which provided for a judge of the Sharia Court of appeal to sit in the High Court on appeals from native courts, was declared contrary to the 1960 constitution of Northern Nigeria which created the high court and prescribed its constitution.

However, it is pertinent to note that such safeguard against possible abuses is possible only when courts are genuinely independent and responsive to social needs and objectives. Coupled with the willingness of the executive branch to obey or cooperate, the most elaborate constitutional provisions will prove fraudulent and empty, as the experience in many Latin American and African countries has shown. In Nigeria, during the 1999-2007 Obasanjo Administration, a lot of court decisions were not obeyed by the Federal executive. A special case in point was the decisions of the Supreme Court on the Federal Government to pay Lagos State's revenue allocation, which was withheld for political reasons by the President. It was however when some Yoruba Elders went to see President Obasanjo over the matter that he reluctantly released part of the withheld allocation to the Lagos State government much later.

During this period also, the courts in Nigeria lived above board, by maintaining their independence and responsiveness to social needs. In another case, at the 2007 Edo State Electoral Tribunal holding in Benin City, Justice Olabanji Orilonishe, while ruling on the preliminary objections raised by the Governor Osunbor's counsel, who urged the tribunal to strike out the petition by the then initially defeated Governorship Candidate, Adams Oshiomhole on grounds that there were many irregularities that made the petition unfit for hearing declared:

The days of justice by technicalities, which is as bad as injustice are over because the weight of judicial authorities have shifted from undue reliance on technicalities to doing substantial justice even-handed on parties in a case. Justice by technicalities has died in Nigeria for good and has been buried; the trend these days is to do substantial justice by the merit of each case.

The above case is an example of situations where the courts in Nigeria tried to maintain their independence from the Executive and responsiveness to societal needs.

In Sierra-Leone 2008 election, the government party (the ruling party) requested the Constitutional Court to stay action on the release of the final results of the Presidential election, on the grounds that a particular wards election was inclusive. The Constitutional Court ruled against the government party stating that if even the

election is rerun and the government party wins all the votes, the party would not win the election. So the court declared the final results in defiance of government request, thus upholding its independence and responsiveness to societal need, peace and good government. This paved the way for an opposition party candidate, Ernest Koroma, winning the election.

Similarly in Nigeria, the judiciary has made many landmark judgments that can be said to have contributed immensely to the survival of its democracy. Some examples are the restoration in Anambra State of Governor Peter Obi's mandate against that of the government party, the Peoples Democratic Party (PDP), whose Governorship candidate was Andy Uba, the reinstatement of former Governor Rashidi Lodoja of Oyo State after his unconstitutional impeachment by the House of Assembly; likewise is the Appeal Court annulment of the purported victory of former Governor Olusegun Agagu of Ondo State and the restoration of the opposition candidate of the Action Congress party. Dr. Olugsegun Mimiko; and also the reinstatement by the Appeal Court of the candidature and victory of Chibuike Rotimi Amaechi as Governor of Rivers State over Clement Omehia who was illegally used by their party (PDP) to usurp Amaechi's victory at the party's primaries. The directive was even after the election which Omehia had won but the court's decision was based on the fact that Amaechi was the candidate known to law since he won the primaries and the party was the legal platform that the electorate voted for and not Omehia.

As commendable as these decisions, there are many Nigerians who have serious reservations about the performance of the Nigerian judiciary. They think that some cases or matters were compromised. This is because obvious bad cases were won and good ones were lost by parties in litigation.

There are others who complained about the unduly long delay in the handing of the election cases. It is submitted that the political party's constitution and the Electoral Act should be reviewed and streamlined to avoid administrative abuses and delays in the conduct of elections and adjudication by the courts. There should also be serious capacity building of judicial personnel for overall effective performance and quick adjudication of cases. In ending this subsection, let us not forget to mention in passing, that Switzerland stands alone in using the Federal legislature as the final interpreter of the constitution, subject to referendum of the electorate.

The courts, most times, in the process of judicial review, performs legislative functions. When the judiciary interprets a particular law by assigning specific meanings, such new meanings become rules which guide actions and behaviour. In the same vein, when a particular legislation is declared unconstitutional, there is a new rule, inherent in the judicial decision, which guides behaviour and action. This judicial judgments and decisions constitute some form of rule-making. The judicial responsibilities of the courts place them as moderators of behaviour, a balance of

powers, restrainers of the excesses of other arms of government and government officials. It also places the judiciary as the settler of disputes and conflict between governments and between individuals and government. Implicitly, from the above, there is the perception that the judiciary is the protector and bulwark against the oppression and abuse of individuals and groups in the society.

The performance of these later functions depends on the impartiality, independence and powers of the judiciary. This is because in many countries, the court are politicized by the executive, making them to be ineffective in the system, and thereby flagrantly refusing to implement court ruling with impunity. The executive sometimes, influence the decision of courts, because in many countries of the world, the executive appoints judges which in some countries is subject to the ratification of the legislature which determines the appointments, tenure and conditions of service of judges. This defeats the courts duty and responsibility as an organ that should serve as a factor in social change. As an eminent writer Kousuolas' noted:

Through judicial review as well as ordinary interpretation of the laws the courts may serve as a safety valve against social pressures which the executive or the legislature is unwilling to meet, provided, of course that the courts reflect as accurate as possible the prevailing social trends and have sufficient autonomy to react accordingly. If (however) they are oblivious or hostile to new imperatives, the courts may actually become an obstacle to change.

Also, judges may be called upon, as it has happened in many countries, including Nigeria members of the political duties when fairness, integrity and impartiality are considered top priority. In Nigeria members of the highest courts have now and then been invited to chair sensitive posts requiring absolute political neutrality. For example, electoral commissions, truth and reconciliation commissions, appointed as receivers in bankruptcy, perform marriages and above all swear-in political office holders, Kousoulas moreover tells us that in several Southern American States, especially in the hinterlands, county judges administer mental institutions, orphanages, or relief programmes for the poor; courts also administer estates, issue licenses, naturalize citizens and so on.

### **Organization of the judiciary**

Judicial Arrangement in the federal system conforms with its federal nature that there are courts at the centre and the regions or states which carry out adjudication in their respective jurisdictions. They do it in such a way that the rural nature of the society is provided for. There are courts which settle disputes between the central government and the government of the federating units. In the former Yugoslavia, for instance, they are called the Constitutional courts which ensure "constitutionality and legality

in accordance with the constitutions”. There are inferior courts that settle cases at the level of the federating units and at the grassroots level.

In the United States of America, (USA) there are three levels of federal courts. These are the Supreme Court, the Appeal Courts and the Federal District Courts. They settle disputes at the Federal and State levels. The arrangement in Canada is different, in the sense that the Supreme Court is a creation of an Act of Parliament rather than that of the constitution. All the lower courts there are provincial courts, as the Dominion government does not set up courts. In Australia, the High Court serves as the highest Court of Appeal. State courts exercise federal jurisdiction. In India, there is a peculiar judicial arrangement, where courts which are headed by the Supreme Court perform special function of maintenance of the federal system. They ensure that the relations between the union and the states are properly maintained.

In Britain, the highest Court of Appeal is part of Parliament, into which Cabinet Ministers are also members. Under such fusion of power, one could be skeptical about how such arrangement could allow for independence of the judiciary. It may be taken for granted, however, that when the nine Law Lord sit to perform their judicial functions, they see themselves as different from the legislature and the executive. The judiciary in Britain is made up of different court structures. There are courts that try criminal cases normally brought before them by the state, courts of civil jurisdiction which try civil cases which the state is not a party to, which are between two parties. There are also courts of unlimited jurisdiction which try any case that are brought before them. This is unlike courts of limited jurisdiction which cannot hear cases involving any amount that is above is specified monetary value. There are courts of first instance or courts of primary jurisdiction and any case that come into it can be allowed to get to another court on appeal, in most cases, therefore appeal goes from the court of lower grades to the court of higher grades.

The judiciary in Britain enjoys much respect and confidence both within and outside the country. This is because their judges are largely associated with impartiality and independence, irrespective of the fusion of power in the country’s parliamentary system of government. The judges are insulated from politics; their remuneration is not subject to the influence of politicians, as they are paid directly from the consolidated revenue fund.

In the USA, there is a similarity between its judiciary and that of Britain, in the area of well established tradition of respect, independence and impartiality of the judges. Like in Britain, the judges are insulated from politics and their remuneration is equally charged directly to the consolidated revenue funds. The United States has a hierarchical arrangement of courts. There are the district courts, the appeal courts and the supreme courts. The major area of difference in the judicial arrangement between

these two countries is that, that of the United States is designed to meet its Federal structure while that of Britain is designed to meet its unitary structure. In the USA, the Supreme Court is the highest court of appeal of the land. It settles constitutional matters and disputes between states and also those involving the federal government. The appeal courts hear cases between government and between individuals.

In Nigeria, the Supreme Court serves as the highest court of Appeal. In addition to it, there are Federal Courts like Appeal Courts. At the state level there are High Courts and Magistrate Courts. In addition the Northern states have Sharia Courts. At the local government level there are Alkali Courts in the North and Customary Courts in the South. The various military regimes that have ruled Nigeria, managed to retain the federal nature of organization of the judiciary, with minor changes. Although the judiciary in Federal system is organized to cater for the diversities in the political system, the need for its independence and impartiality probably attracts higher priority in designing the judicial structure.

The tradition of high level of confidence in the judges in Europe and the United States of America and their appreciable level of impartiality and political neutrality is yet to find its feet in Nigeria. The same applies to most countries of the Third World like Haiti, Liberia, Mauritania, Mexico, Pakistan, etc. The situation is worsened by military dictatorship frequently prevalent in these countries.

China and other communist countries organize their judicial system in such a way that their revolutions can be sustained. In the former Union of Soviet Socialist Republics (USSR), the Tzarist Legal System was perceived by the Bolsheviks as designed to perpetuate oppression of the people. One variable which is noticeable in the judicial system of most of the communist countries is that they basically have the tradition of the British courts in their organization and expectation of impartiality of the judges. The former USSR had a supreme court with civil, criminal and military divisions. The Supreme Soviet appointed the Supreme Court judges but in reality the communist party played the most fundamental role in appointment of judges. This is a total departure from the British tradition where judges are expected to be politically neutral. Every republic in the former USSR had its own courts as people's courts at the lowest level.

### **Separation of powers**

The whole notion of the separation of government powers derives from the assumption that the functions of three main institutions of governance, the legislature, the executive and the judiciary can and should be shared out, and that this is what can guarantee political stability and individual liberty. Salvador Giner contends that Montesquieu's writings were not only an inspiration for critical and rational thought, as well as a ground for secular morality; it was in essence a plea for re-definition of freedom.

However, while separation of powers may enhance individual political freedom, because of in-built checks and balances of governmental powers as presumed, depending on the political system, it could be said that complete division of responsibilities may not be feasible, because of overlapping roles, even though there are certain discernible spheres of influence for each organ. As Nwabuzor and Mueller have observed:

the total process of governance requires the coordination of the three branches of governance... to that extent, separation of powers of these institutions is such that the 'separation' has blurred rather than firmly fixed boundaries. Nevertheless, there are clearly defined areas of activity that belong to the different branches, although if they work at cross-purposes beyond certain limits, governmental stability is clearly likely to be adversely affected, though recently, we have also noticed that the chief executive has increasingly assumed dominance in this tripartite system.

Nonetheless, some view the judiciary as a means for assuring the separation of powers. For instance, in Nigeria, Section 6 of the 1999 Constitution vests the judiciary power of the federation in the courts. The courts to which the section relates are the Supreme Court, the Court of Appeal, the Federal High Court, the High Court of a State, the Sharia Court of Appeal of a State and the Customary Court of Appeal of a State.

According to Emiola judicial powers of the courts are all pervading, there is no limit to the issues the courts can take inasmuch as they are justifiable it is expressly provided that these "powers shall extend, notwithstanding anything to the contrary in this constitution to all inherent powers and sanctions of a court of law".

Inherent powers and sanctions of a court of law as used in the Constitution may also mean the unlimited power of a superior court of record to assume jurisdiction on any issue in dispute and to award appropriate remedies, either at common law or in equity. In the case of *Mayor and Aldermen of the City of London v. Cox*, the House of Lords said: "Nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so". This statement is strengthened by Section 272 of the Nigeria Constitution, 1999, which gives general jurisdiction to state High Courts.

The phrase "notwithstanding anything to the contrary in this constitution' appears to be so pervasive as to enable a court assume jurisdiction in a complaint of irregularity in the procedure for the removal of the president or governor under section 143 (10) or 188(10) of the 1999 Nigeria Constitution. These powers are so extensive that the courts are enabled to annul any decision, order, act or policy of not only individuals,



in government or in private capacity, but also of government and all government agencies.

### **Conclusion**

There are three main formal institutions of government the legislature, the executive, and the judiciary. The legislature carries out the law-making function, while the executive and the judiciary perform duties of enforcement and adjudication, respectively. The judiciary, as an organ of government, has the singular power to act as a check on the powers of the two other arms of government the legislature and the executive. It is only the judiciary that can void the actions of these two other arms, when they act contrary to the law and the constitution.

The courts system which is the judiciary, all over the world is built on a judicial arrangement of graduated competences. The hierarchical structural arrangement from lower to superior courts, courts of first instances to Supreme Court where appeals are taken or heard and special courts/tribunals exist in several countries for the administration of justice and as checks and balances on the legislature and the executive.

In popularizing the court system which is the third arm of government, Montesquieu stated:

Political liberty is to be found only when there is no abuse of power. Experience shows that every man invested with power will abuse it by carrying on as far as it will go... To prevent this abuse, it is necessary from the nature of things that one power should be a check on another.... When the Legislature, Executive and Judiciary powers are united in the same person or body .... There can be no liberty ... Again there is no liberty if the judicial power is not separated from the legislative and executive ... there should be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers.

Under the 1963, Republican Constitution whereby Nigeria practiced the British parliamentary system of government, the judiciary was clearly separated as a branch of government, but the separation between the legislature and the executive was not quite clear. However, where an officer acting in his capacity in one branch of government went beyond his duties in that capacity, the courts readily held such action void for being ultra vires his powers in that capacity at the suit of an aggrieved party. The Nigerian Constitution 1999 provided for a presidential system of government. It provided for a clear division of the three powers or branches of government. The Constitution is the supreme law of the land and rule of law is the

basis of government action. Any law or action that contravenes the provisions of the Constitution is void to the extent of such inconsistency. Any branch or officer of government that goes beyond its or his powers will usually have such actions set aside by court at the suit of a proper party who is aggrieved.

Finally, this paper adumbrated the enormous contribution of the Nigerian judiciary to the sustenance of democracy in the country and recommends that there should be urgent review of relevant laws by government and capacity building for judicial officers for overall effective performance and quick dispensation of justice as well as boosting of its credibility and acceptance in the eyes of the generality of the people.

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