ORGANIC STRUCTURES OF GOVERNMENT AND THE ROLE OF JUDICIARY UNDER THE 1999 CONSTITUTION OF NIGERIA: AN ANATOMICAL DISSECTION

BY

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Abstract

This paper is anchored on an anatornical dissection of the role of an independent judiciary under the 1999 Constitution of Nigeria. The first thing this paper seeks to ascertain is whether the judiciary is actually independent in Nigeria. What are the expectations of the judiciary vis-a-vis other organs of government. In what way has the concept or theory of separation of powers impacted in the performances of the judiciary. The paper also looked at the various parameters that support judicial independence and the extent of its attainment including mode of appointment of judicial officers, remuneration and welfare package, termination of appointments of judicial officers etc. Criticisms abound on whether the judiciary in Nigeria are doing well in the discharge of those onerous functions and what is needed to complement its efforts based on identified challenges and constraints in executing its constitutional mandate. The need to restore the judiciary as a guardian of the Constitution through the exercise of its powers with independence, impartiality and in a fair and open manner is critical. How far have the courts

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carried out their unlimited powers of control over the activities of the legislative and executive.

KEYWORDS: *Separation of Power, Judicial Independence, Socio-Economic Vices, Challenges and Constraints.*

INTRODUCTION:

The Federal Government of Nigeria is composed of three arms namely: The legislature, the executive and the judiciary. Their powers are vested on them by the 1999 Constitution of Nigeria. The three arms are at the center in the management of the affairs of government and the society at large. The legislative powers, as contained in section 4 of the Constitution, are to make laws for the peace, order and good governance. On the other hand section 5 provides for the powers of the executive which extends to the execution and maintenance of the Constitution and all laws made by the National Assembly. The judicial powers as enshrined in Section 6 of the Constitution gives powers to the courts to interpret laws and apply them in the adjudication of cases between persons and or government. The judiciary primarily settles conflicts, protects the rights of the individuals as well as protect the Constitution, hence the general comment that the judiciary is the guardian of the Constitution. The concept of separation of power among the organs of government is designed to ensure that there is no fusion of power in one arm or that there is no conflict in the execution of their functions. As independent and separate the organs may appear, this paper had ventured a meeting point of their relationship. For instance, while it is the responsibility of the judiciary to control the activities of the legislature and the executive, it is the executive that enforces the

judgments and orders of the court. It is also the executive that provides the infrastructure that houses the judiciary and even participates in making appointments of judicial officers. We think that the major area that the judiciary applies its sledge hammer rather than compromise is on the control of arbitrary, ultra viral and abuse of powers by the executive and legislature that leads to recklessness and lawlessness. It is only an independent judiciary that can effectively control the excesses of the other two arms of government. It takes many basic elements for the judiciary to be properly tagged independent. In the situation we find ourselves in Nigeria, can it be rightly asserted that the Nigerian judiciary is independent in the true sense of it? Using case law, an attempt has been made in this paper to identify the level of performances that can be rightfully ascribed to the judiciary in discharging its control powers over the other arms of government. However, a lot still have been done in this direction to ensure that the judges are courageous enough to discharge the functions without fear or favour. This is more so, not to succumb to the whims and caprices and the overbearing powers and influence of the executives who constantly interfere and post a threat to the judiciary.

The Organs of Government

One basic feature of the 1999 Constitution of the Federal Republic of Nigeria (as shown in the first, second, third and fourth alterations) is the clear adoption of the distribution of constitutional powers and functions of government among the three arms namely:- the legislative powers, executive powers and the judicial powers. Section 4 of the Constitution provides that the legislative powers are vested in the National Assembly at the

Federal Government level and the House of Assembly at the State level. Sub-section 4 (10) states that the legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly for the Federation which shall consist of the Senate and a House of Representatives. Similarly, sub-section 4 (6) states that the legislative process of the state of the federation shall be vested in the House of Assembly of the State.

On the other hand, the executive powers of the federation as enshrined under section 5 (1) shall be vested in the President and may, subject to the provisions of any law made by the National Assembly, be exercised by him either directly or through vice president and ministers of the government of the federation or officers in the public services of the federation. Sub-section (2) thereof provides that the executive powers of the state shall be vested in the Governor of the state and may subject as aforesaid and to the provision of any law made by House of Assembly, be exercised by him either directly or through the Deputy Governor and commissioners of the government of the state or officers in the public services of the state.

Sections 6(1) of the same Constitution of the Federal Republic of Nigeria copiously provide that the judicial powers of the federation shall be vested in the court to which the section relates, being courts established for the federation.

The Constitution has in furtherance to the powers so vested in the three arms of government prescribed the scope and limitations towards the exercise of these powers. Having identified these features that had remained paramount since the era of the 1979 Constitution to the time of the various alterations of the 1999

Constitution (the latest in 2022), this paper has ventured to address the problems in line with the structure set out above.

The Concept of Separation of Power

Simply put, the powers of the Federal Republic of Nigeria are divided into three, namely: The Legislative Powers, the Executive Powers and the Judicial Powers. It was the great French Jurist, Philosopher and Political Scientist, Montesquieu[1224] who, in his immortal words and wisdom advocated that there should be three organs of government which should be separate and independent. He said:

> *'Political Liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority 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 Legislative and Executive 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 would be an end of everything whether of the nobles or of the people if the same person were to exercise all the three powers.'*

[1224] Retrieved from: https://www.supremecourt.uk

This wise and eloquent theory was propounded in 1748 and adopted by the Convention of 1787 mainly to preclude the exercise of arbitrary power with a view to avoiding tyranny and totalitarianism. Thus in *Myers V. United States*[1225], Justice Brandeis of the United States Supreme Court gave the rationale for the separation of powers in the following illuminating words:

> *"The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction (between the three arms of government) but, by means of the distribution of the governmental powers among three departments, to save the people from autocracy".*

It is pertinent to note that under the Westminster model of Government which was replicated in the Constitutions of 1922-1963 of Nigeria, the Judiciary was treated as mere appendage of the Executive and called judicial departments. We also like to note that it was the 1979 Constitution that for the first time introduced the separation of powers of the three bodies under a Presidential system of government. Under Part II of the 1999 Constitution (as amended), Section 4 vested the Legislative Powers on the National and State Assemblies, while under Section 5 the Executive Powers of the Federation and the States are vested on the President and Governors respectively. The Judicial powers of the Federation are vested on the courts

[1225] See 272 U.S 52, 293.

established by the Constitution under section 6. However, it should be noted that other courts established by the State Houses of Assembly are also empowered to exercise judicial functions.

This is because questions always asked create doubt on whether there is true separation of power. Such veiled questions are supported by the fact that in the exercise of their powers there is genuine need to overlap for purposes of effective coordination and checks. It is not easy to see a water-tight compartment of government. To support this view Professor Nwabueze in his book said:[1226] *"These seek to make the separation of powers more effective by balancing the powers of one agency against those of another through a system of positive mutual checks exercised by the governmental organs upon one another".*

For instance the appointment of the Chief Justice of Nigeria, the Justices of the Supreme Court, Justices of the Court of Appeal, Chief Judge and other Judges of the Federal High Court are appointed by the President on the recommendation of the National Judicial Council and confirmed by the Senate.[1227] From these provisions of the Constitution it is clear that the Executive, the Legislative and those who constitute members of the National Judicial Council participate in the appointment of Federal Judges. Similar procedure is adopted in the appointment of State Chief Judges and other High Court Judges made by the Governor on the recommendation of the National Judicial Council subject to confirmation by the House of Assembly of the State.[1228] While the

[1226] (Constitutionalism in the Emergent States at page 20)
[1227] (See sections 231 (1) (2), 238 (1) (2) and 250 (1) (2) of the 1999 Constitution of the Federal Republic of Nigeria
[1228] (See Sections 273. (1) (2) of the 1999 Constitution).

Legislative arm makes laws, the President and Governors, as the case may be, assent by signing the bill into law. The Judiciary interprets the laws made by the Legislative arm and may even declare a law unconstitutional, null and void. The conclusion we draw from the Constitutional provisions is that the three arms of government cannot be kept in water-tight compartments. What should be pursued rather is that each organ must operate within the limit of the powers allocated to it within the Constitution so as to be independent in relation to the performance of its basic functions. Since the effect and intendment of separation of power is to enthrone positive checks and balances among the three arms, and on the other hand, to bestow the needed independence of the Judiciary, we will consider the other related issues under independence of the judiciary.

The Imperatives of True Judicial Independence

The Judiciary is the guardian of the Constitution and of course the entire gamut of the Rule of Law. Its independence is a necessity. The radical pillar of judicial independence as can be seen in the preceding parts of this paper is separation of power which encourages checks and balances among the three organs of government. Powers are conferred on the judge by the Constitution so that he may exercise it with independence and impartiality. It also supports the concept of the rule of law that all executive, administrative, legislative and judicial actions should be backed by the authority of law which shall not be administered arbitrarily. Furthermore, justice should be accessible to all and should be conducted in a fair and open manner by an independent and impartial judiciary.

It is also imperative that all extrinsic and unnecessary pressures are removed to ensure the desired level of independence. We will go on to highlight these imperatives of judicial independence for better understanding of the matter.

Appointment of Judicial Officers

We are bold to say that Judges should not be appointed on grounds of sentiments but qualification, capability and integrity. In this regard we advocate that there should be synergy between the Bar and the Bench in nominating or recommending persons who should be appointed as judges. This collaboration is essential when we call to mind the numerous sharp practitioners emerging in the legal profession. Let the right persons be appointed please. When the foundation is weak the building is bound to collapse.

Considering and putting on the front burner the rising concern in appointing people who are not fit or proper into the bench, Anthony Aniagolu, had this to say:

> *"Nowadays the appointment of bad judges, in different parts of the country, is now taking centre stage among the constraints of the Judiciary. No more special scrutiny is exercised in the appointment of some judges. In earlier days people frown at the appointment of candidate regarded as not sufficiently knowledgeable in law, or weak, generally in their commitment to the Law. Nowadays candidates who are known to be openly corrupt, manage to secure appointments as judges. Some appointments are now made on the basis of*

> *sex gratification, with the result that something immorality has now entered the judiciary*[1229]*."*

Aniagola has our support as it is common knowledge that corruption has gradually penetrated into the main fabric of the judiciary. It has to be gotten right from the beginning of engagement to ensure that the right persons are appointed into the bench. It was in response to the failing situation as expressed by the Justice of the apex court (supra), that in 2022 the Nigeria Bar Association, calling for expression of interest for purposes of appointing 16 (Sixteen) justices for the Court of Appeal, emphasized on strict adherence to Rule 4 (4) (1) (a), (b) and (d) of the National Judicial Council guidelines for appointment of Judicial Offices for superior courts of record. The rule requires that a letter of good standing from the chairman of the applicants Branch confirming that he or she possesses the qualities set out in the Rule must be obtained by the applicant.

As good as these pre-requisites are spelt out on paper, our worry is the constant negative tendencies of Nigerians trying to cut corners. It is noteworthy that similar conditions precedent have been provided in other rules as well as Laws, but clogs are always found in the wheels of enforcement to the effect that wrong persons are given the opportunities to serve as judges even to the detriment of the right candidate. Many factors are brought into play like nepotism, bribery and corruption and religious bigotry etc. This is very important because a judge who was employed

[1229] (See Hon. Justice Anthony Anigolus, JSC (Rtd)"Constraints in the Administration of Justice" published in the Report of All Nigeria Judges conference held between 1st – 5th November, 1999, at the international conference centre, Abuja.

through such unwholly beliefs and sentiments will not be of good standing to make positive pronouncements in his or her court when confronted with similar situation for adjudication. We therefore join to advice that the process of appointment of judges of both superior and inferior courts should be handled within the realm of high ethical standards. To do this successfully we suggest that intensive investigation into the character of the applicants must be carried out no matter what it may cost the National Judicial Council. In addition, the members of the National Judicial Council charged with the responsibility of appointment and removal of judges must be men of proven integrity and high moral standards. Doing this, would be a step in the right direction that would positively put the judiciary in a proper perspective. The above position as established regarding the appointment of judges, it also imperative to warn the appointee – judges that failure to go through the process of engagement as laid down does not constitute a license or passport for misbehavior. How a judge was appointed must never be an excuse for lack of integrity otherwise the consequence would be dismissal as appropriate. Thinking aloud along this line Akinola Aguda said thus; "It does not matter how a judicial officer was appointed, it remains for him to insulate himself from the influence external to him in the discharge of judicial functions. For he should remember that the dreadful day of God's judgment shall surely come to every individual (whether or not he believes in such divine judgment) and he will be adjudged as to whether or not he had permitted himself to be influenced in his judicial work by political and administrative superiors or that he failed" [1230].

[1230] Hon Justice Akinbola Aguda Speaking at and induction Course for newly

His Lordship said it all leaving nothing to be added as the whole essence that a judge should free himself from influences of personal gain or partisanship, political, religious, or ethnic bias.

Who a Judge he should be

- **Good conscience.**

The Judge should be one that is not capable for any other reason like ignorance, corruption, favouritism, prejudice, fear, favour and other factors that aid compromise in delivering a just decision. His conscience should be guided by good reasoning and be his.

- **Bold**

A Judge must be completely independent with nothing to influence or control him but God and his conscience. Lord Atkin in *Liversidge V. Anderson*[1231] said: **"**Amid the clash of arms the laws are not silent, they speak the same language in war as in peace. Judges are no respecter of persons and they stand between the subject and any attempted encroachment on his liberty alert to see that every conceived action is justified by law". Churchill also said: "The only subordination which a judge knows in his judicial capacity is that which he owes to the existing body of legal doctrines enunciated in years past by his brethren on the bench... and to laws passed by Parliament which have received the Royal assent!"

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appointed Judges and Kadis at Abuja between 19th 23rd July, 1995

[1231] (1942) A.C. 206 at 244

Diligence in discharge of Judicial responsibilities

Quick dispensation of justice is evidence of independence of the conscience of a judge. Justice delayed is justice denied. Once a case is pending for long, it gives the public the opportunity to suspect foul play or lack of transparency. In *Cop V. Amf Agbaje*[1232] the Western, State Court of Appeal said:

> *"In this connection, we note with great satisfaction and approval, the expeditious and swift manner in which the matter was dealt with by the learned Judge, Aguda, within six days he had heard and determined the matter. This is as it should be, for the Law says so. An application for Habeas Corpus should always be dealt with expeditiously by the courts. Any unnecessary delay in hearing and determining applications of this nature, defeats the very ends of Justice."*

Adequately remunerated Judiciary and good welfare package

An independent judiciary certainly must be one that enjoys good welfare package. Reasonable salary and allowances. Good cars and houses. It is often forgotten by the lawyers that it is the duty of the legal profession to ensure the independence and adequately remunerated judiciary. We want to use this opportunity to remind the Bar Association that it has been their traditional responsibility to fight for the comfort of the judiciary. It is not for the judges to pursue their welfare. The conditions under which Nigerian Judges work are still very poor and as a matter of urgency should be enhanced. Without overemphasizing this point, how can a councilor respect a magistrate or even a High Court Judge if the

[1232] (1969) 1 NMLR 176 at 185

councilor earns higher than the judicial officer. Or worse still the councilor is riding a healthy car while the judge has a car that will always break down. Independence also relates to recognition and respect of the Judge. Churchill, in expressing satisfaction with the popular feeling about British Judges, said: *"There is nothing like them in our land. They have to interpret the law according to their learning and conscience. They are distinguishable from the great officers of state and other servants of the Executive, High or Low and from leaders of commerce and industry. The British Judiciary with its tradition and record is one of the greatest assets of our race and people".*

On the need to constantly improve on the welfare package of judges Hon. Justice Mohammed Bello CJN (as he then was):

> "The ever changing pattern of life and upward movement of prices with the attendant high economic pressures on society cannot but be adversely felt by us. They must be addressed by government. I make bold to say that the ivory tower in which judges live imposes heavy constraints on the capacity to withstand economic pressures and upward movement of prices. As such constant and frequent reviews of their conditions of service to counter the adverse economic pressures and the provisions of materials for the

> discharge of their duties must be a pre-occupation of government."[1233]

Self-Accounting

The yearning has been that the judiciary be self-accounting. Self-accounting will only make any meaning if there is proper budgeting which must allocate good funds to take care of all heads of expenditure (Capital and Recurrent) for the smooth running of the judiciary. The situation calls for the Attorneys-General at the Federal and State levels to properly advise the executive. Unfortunately, the Attorneys-General fail to do what they should do for fear of being sacked.

Enforcement of Court decisions

While it is often advocated that the powers of the courts must be invoked with extreme caution the Executive should not in any way impede the enforcement of judicial decisions. It is an exercise in futility for a judge to go through the whole process of hearing only to discover that the decision is not enforced. One does not need to waste time here because our legal books are replete with numerous instances of failure to enforce judgments as a result of Executive or Legislative interference. The decision of the court includes judgment, decree, order, conviction, sentence or recommendation.[1234] .

Unfortunately, the judiciary does not have any form of independent force of its own to conduct enforcement of its decisions. It therefore all the time relies on the coercive powers of

[1233] Hon. Justice Mohammed Bello, CJN (1993) in his opening address at the 1993 all Nigerian Judges conference held in residential hotel, port Harcourt between 15th – 20th November, 1993).

[1234] See section 318 on the 1999 Constitution on interpretation

the State to enforce its decisions. Such powers are with the Executive who may refuse to release them to the courts if they are affected by the decisions. Truly the judiciary have neither force nor will; neither sword nor the purse but only the judgment. It is the duty of the Attorney-General at the Federal or State levels to advise the Executive to always obey court orders. In the Ojukwu's case (supra) Uwais, said:

> *"it is a matter of grave concern that the Military Government of Lagos State should be seen to disregard a lawful order issued by a Court of Law. If governments treat court orders with levity and contempt, the confidence of the citizen in the courts will be seriously eroded and the effect of that will be the beginning of anarchy in replacement of the rule of law. If anyone should be wary of orders of court, it is the authorities; for they, more than anyone else, need the application of the rule of law in order to govern properly and effectively."*

We do appreciate the fact that the situation is not the same under a democratic setting. Violation is not too common now. But in some cases judges do nott care whether their decisions have been enforced or not. On the other hand the Executives do summon judges to their offices directing them on how to give their ruling or not to authorise execution processes. This is very common even now with election cases. Again, this depends on the conscience of the Judge. A Judge should have two salts: the salt of wisdom, lest he becomes insipid, and the salt of conscience lest he becomes devilish. We shall say more about enforcement as a major challenge to the judiciary.

Judicial Ethics

- Free in thought and to deliver independent judgment.
- Should not pervert justice, not partial, not accept bribe not subvert the course of righteousness; sound in reasoning, valid and rightful; not abuse his power but to uphold right and fairness.
- A man of constant learning and research to know the latest position of the law.
- Of high moral standards and honesty.
- Courageous and firm at all times.
- Show high level of maturity, prudence, confidence and rational in responding to issues.
- Not the talking judge who takes over the arena.
- Be conscious of the fact that he is not the trader in the market who can dress or talk carelessly with little or nothing to protect. The judge has a lot to protect in order to be who he is and to distinguish himself from other members of the society.
- Not easily emotional and disparaging in his response to issues in court.

Termination of Appointment of Judicial Officers

We have talked about appointment of judicial officers as a fundamental or basic foundation from which the good and bad judge emerges. Thus, if a person of questionable character is enrolled as a judge to decide between parties and issues in dispute and even as in criminal cases condemn persons to death, then the society is at risk. In that case the substratum of the independence of the judiciary is knock off the bottom.

Similarly, if judges are indiscriminately dismissed or their appointments terminated contrary to measured rules and regulations, then independence is a mirage. The Constitution provided a maximum retirement age of 70 years for the Justices of the Supreme Court and Court of Appeal while Judges of the High Court, Grand Kadis may retire at a maximum age of 65[1235]. Having been duly appointed, no judicial officer shall be removed before his age of retirement except as otherwise stipulated in the Constitution. Accordingly, Section 292 (1) of the Constitution provides, "A judicial officer shall not be removed from his office or appointment before his age of retirement except in the following circumstances:

In the case of :

(i) Chief Justice of Nigeria, President of the Court of Appeal, Chief Judge of the Federal High Court of the Federal Capital Territory, Abuja, Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja and President Customary Court of Appeal of the Federal Capital Territory, Abuja by the President acting on an address supported by two third majority of the Senate;

(ii) Chief Judge of the State, Grand Kadi of the Sharia Court of Appeal or President of Customary Court of Appeal of a State by the Governor acting on an address supported by two-thirds majority of the House of Assembly of the State, praying that he be so removed for his inability to discharge the functions of his office or appointment

[1235] (see sections 291(1)&(2) of the 1999 Constitution)

> (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct;

In any case, other than those to which paragraph (a) of this subsection applies, by the President or as the case may be, the Governor acting on the recommendation of the National Judicial Council that the Judicial Officer be so 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 contravention of the Code of Conduct.

At least, the Constitution has clearly stated the circumstances that may lead to the removal of a Judicial Officer and the process of removal. It is anticipated that these copious constitutional provisions would, to high extent, guarantee security of tenure and protection against arbitrary removal of Judicial Officers and so remove the fear of insecurity by most judges. Security of tenure is an essential ingredient of the independence of the Judiciary and must be given serious consideration and attention at all times to ensure sustenance. We do not have problem with removal in the event of infirmity of mind or body. Problems arise in cases of misconduct or contravention of the Code of Conduct.

Under the Third Schedule made pursuant to Section 153 the National Judicial Council have the powers to recommend to either the President or the Governor of a State as the case may be concerning the removal of Judicial Officers under them as stipulated earlier in this paper. We must state here that for the process of removal of a Judicial Officer not to be faulty as to affect the independence of the judiciary depends on the integrity, conscience and wisdom of the members of the National Judicial

Council. In most cases removal of Judicial Officers are based on acts of misconduct like bribery and corruption or making obnoxious orders that bring disrepute to the judiciary. Whatever the reasons are, all we can say here because of lack of time and space is that the National Judicial Council should be extremely careful not to be carried away by emotion and desire to make news or just to give the impression that the judiciary is doing cleansing for good image laundering. Let the real bad ones be shown the way out and for very grave misconduct. Where a Judge as a human errs in a circumstance that pose no threat to the image of the judiciary nor cause any injury to any person such judicial officers should be properly advised not removed.

Furthermore, since the hearing of petitions against judicial officers by the National Judicial Council is a quasi-judicial proceeding, we also advise that the principle of prove beyond reasonable doubt should guide the decisions of the Council at all times.

Judicial Control on the Legislative and Executive

(a) Checks on Legislature:

A bold judge is capable of providing a check on the Legislative and Executive. He requires great sense of responsibility and impartiality to check the excesses of the Legislature. For instance in *AG of Bendel State V. A.G. of the Federation*[1236] the Supreme Court of Nigeria had no difficulty in declaring as null and void a Revenue Allocation Bill which was rushed through the House of Representatives and the Senate without full compliance with

[1236] (1981) 10.S.C.I.

relevant provisions of the Constitution notwithstanding that it had been assented to by the President. In this celebrated case, the Chief Justice of Nigeria (CJN), Fatayi-Williams made a landmark pronouncement on the uninhibited role of the courts in controlling the excesses of the legislature in appropriate cases. The CJN, relying on section 4(8) of the Constitution had this to say:

> *"It is the Constitution that gives power to the Legislature to make laws and the Constitution sets down in some detail the procedure for exercising that power. Therefore any challenge to the procedure adopted by the legislature in exercising that power must be adjudicable by the judiciary which is the only institution of governance that has the right, the power, and the wherewithal to perform that function even if section 4(8) of the constitution were not there."*[1237]

On his part, Bello in the same case aptly and succinctly put it this way:

> *"I would endorse the general principle of Constitutional law that one of the consequences of the separation of powers, which we adopted in our Constitution, is that the court would respect the independence of the legislature in the exercise of its legislative power and would refrain from pronouncing or determining the validity of the internal proceedings of the legislature or the mode of exercising its legislative powers.*

[1237] Ibid

> *However, if the Constitution makes provisions as to how the legislature should conduct its internal affairs or to the mode of exercising its legislative powers, then the court is duty bound to exercise its jurisdiction to ensure that the legislature comply with the constitutional requirements."*[1238]

Section 4(8) of the 1999 Constitution provides as follows:

> "Save as otherwise provided by this Constitution, the exercise of the legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of court of law and of judicial tribunals established by law and accordingly, the National Assembly shall not enact any law that oust or purports to oust the jurisdiction of a court of law or a judicial tribunal established by law."

We find solace in the bold approach of the apex court Justices in this matter with the legislative force of section 4(8) of the 1999 Constitution (as altered). Hitherto, it has been a near fear syndrome by members of the Bench that the legislature is supreme and so untouchable even in the face of the accepted and assimilated doctrine of separation of powers in the Constitution. The Supreme Court's posture in this case under consideration has considerably nailed the so called fear of legislative supremacy to bring the matter to its conclusion.

[1238] Ibid

Having said all this in applaud of the steps taken by the judiciary, the caveat we would place on it as always from different scholars is that the courts should avoid being antagonistic neither with the legislature nor the executive. Working in a harmonious atmosphere, the three arms of government remains the best approach in a developing society without compromising the operation of the rule of law. The case of *Lakannni V. Attorney-General for Western Nigerian*[1239] is an example of a situation where the executive being unsatisfied with the decision of the Supreme Court immediately passed a legislation to neutralize the decision and to ensure that it is enforced. This may not be a good example since it was under the military rule in Nigeria. The situation cannot be the same under the civil (democratic) rule. It is therefore, the undoubted duty and responsibility of the judiciary (judge) to interpret and uphold the Constitution against any Legislative error. In the same vein, Justice Akinola Aguda further had this to say:

> "it seems clear to me in those circumstances that a judiciary which refuses to provide a check on the legislature's exercise of legislative powers when viewed along relevant provisions of the written constitution will be abandoning its social, political and moral responsibility, and thus compromising its impartiality and its independence to the detriment of the health of the nation. But the exercise of the power requires the greatest sense of responsibility and impartiality by the Judiciary"[1240].

[1239] (1994) 4 ESCLR 713)
[1240] Justice Akinola Aguda (Supra)

On the other hand, the Courts should not interfere with the internal procedures of the Legislature as it will amount to imposing its powers on another house. We must confess that the judiciary has not done too well in the area of legislative control either due to lack of interest or that litigants hardly challenge laws passed in error or a total misunderstanding or lack of knowledge about the principles of separation of power vis-a-vis the conduct of checks and balances.

(b) Checks on the Executive:

It is the responsibility of the judiciary to check the constant abuse of power and executive recklessness. It is true that the Executive appoints judges under the Constitution but that is not enough to cause judges to compromise their constitutional responsibilities. It is absolutely not acceptable for a judge to dance to the yearnings or desires of the executive on the ground that he was appointed by the Chief Executive. On this point reference is made to the brave words of Hon Justice Akinola Aguda, (supra) he said:

> *"It does not matter how judicial officer was appointed, it remains for him to insulate himself from' the influences external to him in the discharge of his judicial functions. For he should remember that the dreadful day of God's judgment shall surely come to every individual and he will be adjudged as to whether or not he had permitted himself to be influenced in his judicial work by political and administrative superiors or that he failed to free himself from influences of personal*

> *gain or partisanship —political, religious or ethnic bias!"*

Honestly, the above proposition by Justice Aguda remains strong in our jurisprudence today as it is often chanted that the exercise of the powers of the judiciary as a check on the Executive is not antagonistic nor a subjugation of the Executive by the Judiciary but a positive demonstration of judicial independence and impartiality. Accordingly, a bold judge should be able to condemn wrongful actions of government (executive). One or two examples where the court has successfully condemned the activities of the Executive done in excess of its powers will be of help here. In the celebrated case of *Shugaba Darman V. The Fed Ministry of Internal Affairs & Ors*[1241] the courts condemned in totality the act of the Minister of Internal Affairs in the 2nd Republic who unconstitutionally deported a political opponent to a neighboring country without due regard to his fundamental human rights. The court ordered the plaintiff to return to Nigeria and was in addition awarded damages. Another case was *Ojukwu V. Governor of Lagos State*[1242] where the court condemned the action of the Lagos State Government which forcefully took over Ojukwu's properties despite pending application for injunction not to do so. It was a clear example of Executive lawlessness in which Ojukwu was restored to the status quo ante by the court. There is a plethora of cases along this line showing the boldness of the judges over executive recklessness.

[1241] (1981) 2 NCLR 549
[1242] (1985) 2NWLR 805

Honestly, it has become a matter of serious concern and consideration in many jurisdictions including Nigeria that the judiciary should rise to its challenge and responsibility to ensure that the Executive keeps within the area allocated to it in the Constitution regarding the general scheme of governance. We will recall here that the common law rule limiting the application of mandamus to persons other than the crown or servants does not apply in Nigeria. An example is the case of *Bashir Alade Sh1tta-Ben V. Fed Public Service Commission*[1243] The use of mandamus in many cases on ground of locus standi or no standing to sue. As the country continue to grow physically and spiritually the general attitude of litigants and judges themselves are changing concerning the issues of locus standi. The posture being taken now is to allow people access to court and be heard without rationing justice. Thus in *Adesanya V. President of Nigeria,*[1244] Fatayi Williams CJN said:

> *"I take cognisance of the fact that Nigeria is a developing country with multi-ethnic society and a written Federal Constitution where rumour-mongering is the pastime of market places and the construction sites to deny any member of such society who is aware or believes, or is led to believe.... that any law passed by any of our legislative Houses whether Federal or State, is unconstitutional, access to a court of law to air his grievance on the flimsy excuse of lack of sufficient*

[1243] (1981) 1 S.C. 40 at 57-58.
[1244] (1981) 5 S.C.112

> *interest is to provide a recipe for organized disenchantment with the judicial process."*
>
> *"In the Nigerian context, it is better to allow a party to go to court and to be heard than to refuse him access to our courts. Non-access, to my mind, will stimulate the free for all in the media as to which law is constitutional and which law is not. In any case, our courts have inherent powers to deal with vexatious litigants of frivolous claims. To re-echo the words of Learned Hand, if we are to keep our democracy, there must be one commandment-thou shall not ration justice."*

From the foregoing, courts should be prepared to listen to litigants except in cases of clear busy body or meddlesome interlopers. Therefore, appropriate cases of mandamus shall lie against an officer who fails to perform his public duty. In the same manner and spirit, the court should in appropriate cases issue orders of certiorari, prohibition and Habeas Corpus applying the various principles laid for them including the exercise of powers of judicial review. All these are applied with a view to sustaining the rule of law and maintaining law and order in the society.

The Judiciary and Its Responses to the Socio-economic Vices and Developmental Problems of Nigerian Society

"The work done by judges of England is not now as glorious as it was, their opportunities are not what they used to be, there are no great constitutional questions for English judges to decide such as still have to be considered by the supreme court of a federation or

such as may arise under the Canadian bill of rights. They have no such exciting task in front of them as awaits the court of India and Nigeria that of fusing English law with the indigenous law|"[1245].

Perhaps we should have taken this before now. but it is stationed here for a purpose, principally to make the reader more comfortable with the issues canvassed earlier in this paper. We will look at the traditional roles and the ones emerging as a result of societal changes. Obviously, a consideration of the role of the judiciary should encapsulate the principles of a democratically federated system of government like Nigeria.

(a) The judiciary like we said earlier in this paper is the guardian of the Constitution. It ensures that the provisions of the Constitution are jealously observed and properly interpreted to achieve its purpose. In guarding the Constitution the judiciary is by extension guarding the rights of the citizens. The principles usually taken into account in perfecting this role include adherence to rule of law, fair hearing, equality before the law etc in attunement with the prevailing circumstances in the realm of societal changes. In 1907 Charles Evans Hughes declared that the judiciary is the safeguard of our liberty and of our property under the Constitution.

(b) The courts deal with people and their individual problems on a case by case and day to day basis. Consequently, it is

[1245] "(per Lord Devlin in his samples of Law making, p. 6)

the judiciary who would readily know whether there is inequitability in the workings of the system or not. The court therefore, intervenes to safeguard the society against injustice. In the course of resolving a lawsuit, the courts indeed do all they could to condemn tyranny or executive recklessness? The courts therefore are enemies of tyrants.

(c) The Judiciary is the last hope of the common man and so the citizens last line of defence in his unequal combat with power especially when it is abused. It is the attitude of the court or judge who worth his salt that battles to ensure that its cherished independence is not reduced to mere theoretical proclamation that is akin to defacto independence.

(d) The judiciary strengthened by the theory of separation of power constitutes a veritable organ in checkmating the Legislature and the Executive from arbitrarily doing the wrong thing to the detriment of other citizens contrary to law. The court therefore, protects the people from power without being subservient to those with which power is domiciled.

When these functions are religiously followed the conclusion is that the judiciary would maintain its reasonable level of independence, pride of place, strength and of course professionalism. Because of the incidence of globalization and quest for developmental upliftment in a contemporary society like Nigeria the responsibilities of the judiciary is becoming wider and wider every day. Challenges coming up before the courts frequently are the dream of the government to eradicate or reduce

the activities of Boko Haram; Kidnappers; armed robbery (of old and new models); child abuse and human trafficking; dealers in fake drugs and drug traffickers; vandalisation of oil pipelines and electricity; oil theft; constant air mishap; failed contracts; various degrees of corrupt practices; breaches of fundamental human rights; deliberate spread of Covid disease by carriers and infected persons; application of the Freedom of Information Act; election petitions etc. It is true that if the legislature and the executive down their tools the society may not altogether collapse but if the judiciary alone stops working a state of anarchy will prevail that would lead to total collapse of the system. Most of these base behaviours that have been adequately criminalized require quick dispensation of justice. Courts should give priorities to them as another way of discouraging the perpetrators who always think that when they are taken to court the matter will linger while they have their freedom through the right of bail in bailable offences. I encourage judges to take up the challenge posed by these monsters and dispose all such cases without delay.

Social Objectives Under Chapter II of the 1999 Constitution

Until we succeed, we have over and over again talked about the justiciability of chapter II of the 1999 constitution of the Federal Republic of Nigeria. This solemn and basic provisions in the groundnorm articulated the fundamental objectives and directive principles of state policy. The content being encapsulated in sections 13 fundamental obligations of the government; 14 the government and the people; 15 political objectives; 16 economic objectives; 17 social objectives; 18 educational objectives; 19 foreign policy objectives, 20 Environmental objectives; 21

Directives on Nigerian cultures; 22 obligations of the mass media; 23 National ethics; and 24 Duties of the Citizen .

The Fundamental Objectives and Directive Principles of state policy as catalogued above from sections 13 to 24 constitute basic objectives and principles that form the fulcrum of human existence in a modern society. It is very unfortunate that these aforesaid basic needs for better living are fancifully there for nothing. The offensive section of the Constitution which impedes the power of courts to adjudicate on matters concerning the fundamental objectives and Directive principles of state policy is section 6 (6) (c) which states as follows:

"The judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of state policy set out in chapter II of this Constitution"

The effect of the obnoxious prevision of Section 6(6) (c) of the Constitution is that the Fundamental Objectives and Directive principles of State policy when not observed by any authority be it Federal, State or Local government such is not justiciable. In other words, if a candidate at an election campaign promises (even if written as agreement) that he would build a bridge for a particular community if elected, he fails or reneges to fulfill his promise no action can be taken by the community against such candidate. Our position has been at various fora that if the provisions are there merely for fancy, then expunge it from the

fundamental law of the land. This is simply like providing something for a child with the right hand and taking it away from him with the left hand. We humbly submit that justiciability of the provisions of chapter II would not only make politicians to be serious, it would also herald development and minimize corruption and resources would be judiciously utilized.

Sections 6 (6) (b1) and 7 (2) (a) and (b) have provided unlimited access to the courts by any person. Consequently, section 6 (6) (c) which limits access to court concerning matters under the fundamental objectives and directive principles cannot stand. We are not alone on this position. Even in India the position is to enforce similar provisions being integral part of the Constitution as was decided in *Pandev V. State of Bingal*.[1246] Confronted with the issue of ouster of court's jurisdiction, Hon. Justice Ejembi Eko, holding dissenting judgement in *Orakuh Resources Ltd & Ior V. Nigerian Communications Commission & 4 Ors*[1247] Said: "uninhibited or unhindered access to court of law that is: the direct and easy accessibility thereto guaranteed by section (17) (2) (e) of the Constitution is a major aspect of the rule of law. Any provision of a municipal law or statute purporting to restrict easy accessibility to the law courts for citizen to ventilate their grievance must be subjected to strict interrogation or interpretation". In the same way Karibi - White, JSC stated in *Capt, Amadi V. Nnpc*[1248]. *"the right to easy access to the law court for the citizen to vent grievances i.e in pursuit of the determination of his civil right or obligations against the other*

[1246] (1988) LRC (Const.) 241
[1247] (2022) 6 NWLR (pt. 1827) 539 at 599.610
[1248] (2000) 10 NWLR (pt. 874) 72 at 76

including individuals, government, or authorities, means the approach (or access) to the court of law without constraint. Such constraints include unnecessary and cumbersome statutory roadblocks".

We respectfully submit that the pronouncements made in the above cases by the apex court regarding access to court as well as the position taken by the Indian courts (supra), the provision of section 6 (6) (c) is no longer a good law. It needs to be abrogated very urgently or the courts should adopt a library approach to it.

Challenges and Constraints of the Judiciary in Executing its Constitutional Role

We are here confronted with tense situations that tend to erode the perceived independence of the judiciary thereby making the judiciary less powerful, less stable and far below its counterparts: the Legislative and the Executive. Indeed we think this is the most critical aspect of the discussion on judicial independence.

Failure to Enforce Court Decisions/Orders

Section 287(1) of the 1999 Constitution Provides:

(1) The decisions of the Supreme Court shall be enforced in any part of the Federation by all authorities and persons, and by courts with subordinate jurisdiction to that of the Supreme Court. Sub-sections (2) and (3) made similar provisions for enforcements of decisions of the Court of Appeal and the High Court's respectively. The provisions in the 1999 Constitution are also replication of the provisions of the 1979-1989 Constitutions on the subject. It is potent to note that "authorities", "persons" and "courts with subordinate jurisdiction" have the power to enforce decisions of superior courts. But like we said earlier, the courts

do not have the force to so enforce. Everything is in the hand of the executive while the court merely provides the judgment and cooperation by monitoring the activities of the enforcement officers from the Executive (mostly the police). Unfortunately, what occurs most of the time is that the courts are subjected to the coercive influence of the other arms of government to stop enforcement. The main problem is that the Chief Legal Officers - The Attorney-General of the Federation or State have found themselves as strictly part of government and so derail and renege in their responsibility of advising the executive as appropriate.

At the Annual General Bar Conference held at Lagos in August 1989, Oputa, JSC said:

> *Every Government in this country, civilian and military, has had an Attorney-General as the Chief Law Officer of the State. On this all-important and indispensable officer rests the arduous, onerous and frightening responsibility of steering the government along the path of justice, observance of the Rule of Law and the Human Rights provisions of the Constitution. In military regime where the legislative and executive functions of government are fused, the Attorney-General assumes even greater responsibility. Now, every Attorney-General is first and foremost and I dare say, permanently a lawyer. He is only temporarily a Minister or Commissioner for justice. As a lawyer he should share the anxiety of members of the legal profession in the observance of the rule of law. As a Minister he has to advise the government*

> *of the day. If his honest and considered advice is rejected and he feels very strongly about it, he can resign.*

We sympathize with Hon. Justice Chukwudifu Oputa of the blessed memory for his passion and pride of being a lawyer. Sympathy here because he is even suggesting that an Attorney-General should resign if his advice is rejected. The question is who has ever resigned in Nigeria or has the Executive not rejected advices from the Attorneys-General. In Nigeria the worse scenario is where the Attorney-General assumes the role of the government-in-power. Preference is given to the role as Minister or Commissioner of Justice than the role of an Attorney-General. I think that is why rightly in our view some people are asking for the separation of both offices for separate persons to occupy. In *Federal Civil Service Commission V. Laoye*[1249] it was an Attorney-General who asked the Supreme Court to reverse all its former decisions in which the court declared the removal of a civil servant illegal. Dealing with the matter squarely, Oputa, J.S.C again said:

> *"Before dealing with these submissions, I like to dispose of what the Attorney, General described as "the trend of the court to favour individual litigants against public institutions". Yes, justice has never been one-way traffic. It has never been justice for government functionaries only. Justice has two scales and the case of either party is put one or other of the scales and weighed. Justice is also depicted as blind. It neither sees nor recognises*

1249 (1989)2 NWLR Pt. 106 at 652

> *who is government functionary and who is not. It is not a respecter of persons or institutions no matter how highly placed they are. it is the duty of courts to safeguard the rights and liberties of the individual and to protect him from any form of abuse or misuse of power or what my learned brother ESO, J.S.C in Governor of Lagos State V. Ojukwu (Supra) described as executive lawlessness.'*

There are scores of refusal by executive and legislative to obey court orders. For instance- in October 1982, Anyaegbunam, C.J. (Fed High Court) made an order against the Senate but when the President of the Senate received the order, the Senators called the judge names and rejected the order.[1250] The former C.J. of Kano, Dahiru Musdaphar suffered the same act of intimidation and disobedience to court orders in the hands of Governor Abubakar Rimi in 1982. Ajose-Adeogun, J of Lagos State also suffered the same show-down by Governor Lateef Jakande in 1982. It seems that the executive is only interested in orders of Court involving confiscation of properties, which are never accounted for.

(b) Executive Interference

Another monster is the fact that the Executive feels and extends its almighty power to interfere with the functions of the judiciary. While the judiciary fights to resist the pressures of hysteria, fanaticism and prudence, the executive is clothed with the force of expediency and clamour. How can a Chief Executive

1250 See New Nigerian Newspaper October 22, 1982)

shamelessly pick his phone and call a Judge with a directive on the way a case he has interest (personal or government) should go. If the judge fails to obey, he becomes a target not to be elevated or accorded any benefit others enjoy. Where lies the independence? Where lies the separation of power?

(c) Poor working condition and low retirement age

Although there is improvement in the welfare package of judicial officers now, it is not enough. One of the cardinal principles of objective independence of the judiciary is that all monies meant for the judiciary should be voted by the legislative and domiciled directly into the relevant department of the judiciary but certainly not through the Executive. Provided that the amount so allocated should be enough to cater for the welfare and provision of adequate infrastructure for the judiciary. A judge should have good cars, dressing allowances, personal residential accommodation where he will move into at retirement; police orderly even at retirement and infact to continue enjoying his employment benefits after retirement. Also age of retirement should not be less than 75 years for all judges, unless the judge is physically incapacitated. This recommendation is supported by the fact that in Nigeria when judges retire at the age of 65 years or 70 years from Supreme Court or Court of Appeal, they are still strong and as a result they take up more tedious public assignments.

(d) Corruption:

For the individual or subjective conscience of the judge to be intact the judge should not be corrupt. The spirit of the judge should always be ready to fight against the cold hands of corruption otherwise he suffers the disgrace that may extend to

his children. Needless talking much about corruption which is usually fueled by greed and nepotism but suffice it to say that corruption poses a great danger to the independence of the judiciary. Our knowledge and passion for corrupt-free state makes us feel that one day this country will totally become a poor or failed State if corruption is not properly controlled.

(e) Lack of Continuous Learning

Judges should be given the opportunity to attend and participate in Seminars, Symposia , Conferences, refresher courses and other programmes that would enhance their knowledge of the Law and procedure, especially in the face of changing trend in the general scheme of things. Knowledge itself is power and how to acquire it must not be compromised. Enough funds should be allocated for training and retraining of judicial officers locally and internationally.

(f) Judicial Lawlessness

At times judges contribute to the problem by conducting themselves in such a way and manner that puts their integrity, erudition, uprightness, conscience and maturity to test. Such little but serious issues like poor dressing; poor and careless speeches; drunkenness; over-zealousness and desire to make news as newspaper headlines; making quick orders as pre-trial remedies without giving affected parties opportunity to be heard.

In his opening address at the 1988 Conference of Judges in Abuja, Nigeria Bello, observed: *"Indeed, there is an urgent need among some of us, the judges, to appreciate that exparte injunctions which were devised as vehicle for the carriage of*

instant justice in proper cases should not be converted into a bulldozer for the demolition of substantial justice".

In recent time, contradictory court orders are made on the same subject matter by different judges of the same jurisdiction. For instance, in Lagos, Federal High Court making orders on a matter another Federal High Court in Abuja had adjudicated and made its own orders. How do you enforce such conflicting orders from the same court? We all call to mind the orders and counter orders on exparte applications made in respect of the imbroglio at the Annual General Bar Conference at Port Harcourt in 1992. We recommend unequivocally that judges should conduct themselves very well to put their head above board and not to give the other arms of government the opportunity to make the Judiciary a laughing-stock.

CONCLUSION

The judiciary is the guardian of the constitution. Powers are conferred on the Judge so that he may exercise it with independence and impartiality and make justice accessible to all in fair and open manner. This independent minded judge is backed by the pillar of separation of power propounded over 300 years ago.

Judgment of courts should be enforced by the authorities and persons charged with the responsibility to do so. Everything should be done to enhance the independence of the judiciary. Programmes should be adopted to strengthen and make the judiciary more proactive. The welfare of judges must not be played with for any reason. The Executive and the Legislative should not involve in any act or omission that would negatively

interfere with the functions of the judiciary at all times. Instead, a healthy working relationship should exist among the three arms of government without necessarily overlapping. The courts should be liberal in handling matters that concern social objectives as provided for under section 17 of the 1999 Constitution to perfect the foundation of a new social order.