

INDEPENDENCE OF THE JUDICIARY: THE WAY FORWARD

PRESENTED BY

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My Lords, adjudication is the main business the Judiciary does. The court and the Judex are the hallmarks of the judiciary. The synonyms of adjudication are conclusion, decision, determination, finding, pronouncement, ruling, settlement, verdict. The judiciary whose business is adjudication is also a constitutional imperative. It is one of the Three Arms of government.

The judicial powers of the Federation and the State are specifically vested in the courts of law by Section 6 of the 1999 Constitution as follows:

6 (1) The judicial powers of the Federation shall be vested in the courts..

(2) The judicial powers of a State shall be vested in the courts...

It is further provided in Section 17 thereof, to wit:-

(1) The State social order is founded on ideals of Freedom, Equality and Justice.

(2) In furtherance of the social order—

(e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.

Still in Section 36(1), the Constitution provides, by way of procedure and a fundamental human right-

- (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and Constituted in such manner as to secure its independence and impartiality.

The Constitution is the grund norm and the fountain of all powers exercised by the Legislature, the Executive and the Judiciary. In Section 1 thereof, the Constitution declares its own supremacy, thus:

- 1 (1) This Constitution is Supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.
- (2) The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or of any part thereof, except in accordance with the provisions of this Constitution
- (3) If any other Law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other Law shall to the extent of the inconsistency be void.

The communal reading of Sections 6, 17(1) & (2) and 36(1) of the Constitution, together with Section 1 of the same Constitution, makes a clear statement that "independence of the Judiciary" is a constitutional imperative that cannot be derogated. The provisions make independence of the judiciary a basic constitutional right of every citizen; just as they make independence of the judiciary a "sine qua non" of the rule of law. It

is time the Judiciary should be proactive about its independence. Reading Sections 1, 6, 17(1) & (2) and 36(1) of the Constitution together with Section 318 thereof (that defines "government"); it appears that any legislative or executive action that negates or purports to inhibit independence of the Judiciary is an affront to the Constitution and thus attracting the wrath or sanction of Section 1(2) & (3) of the Constitution; rendering such legislative or executive actions null and void.

The Judiciary is not an appendage of the Executive. Gone were the days when the Judiciary was regarded as "Judicial Department". Two recent decisions pointing out how the Judiciary, like the Executive, shall present its budget or estimates to the Legislature for enactment deserve to be mentioned for necessary action.

In *OLISA AGBAKOBA, SAN v. A. G. FEDERATION, NJC & Anor* it was held that budgetary estimates of the Federal Judiciary need not be sent to the Executive for Inclusion in the Appropriation Bill. The court ruled that judicial estimates shall be submitted by the NJC directly to the National Assembly for consideration and appropriation.

On March 7, 2023 the Delta State High Court (Hon G. B. Okolosi, J), taking a cue from the *AGBAKOBA* Case and the relentless efforts of *JUSUN*, held in *JOHN AIKPOKPO-MARTINS & Anor v. GOVERNOR OF DELTA STATE & Ors* that, by virtue of Sections 120, 121(2) & (3), & 124 of the Constitution, the Chief Judge and the President of the Customary Court of Appeal are entitled to lay before the State House of Assembly the budget/estimates of the State Judiciary for consideration and appropriation; and that after passage by the House of Assembly , they

automatically become a charge on the Consolidated Revenue Fund of the State. And that thereafter, the State Governor, his agents and/or subordinates lack the vires and power to, howsoever, tamper with it by imposing any conditions for their release or disbursement to the Judiciary.

While these decisions receive kudos or plaudits for being milestones in the road map for financial independence of the Judiciary; Mr Abiodun Olatunji, SAN, commenting on "The Financial Autonomy of the Judiciary Must be Guaranteed", opined in his paper: "Securing Judicial Independence- The Way Forward", that

"the quest for financial/judicial autonomy suffered a setback by the Supreme Court in Suit No:SC/CV/655/2020- A.G ABIA STATE & 35 Ors v. A.G FEDERATION.. by a split decision decided 6-1 to nullify Executive Order 10, vide which the Federal Government of Nigeria had sought in 2019, to give effect to Section 81(3) and Section 121(3) of the Constitution, with regard to the financial autonomy of the 36 respective State Judiciary and Legislature, which had been observed more in the breach by State Governments and Governors.."

The Supreme Court, in the said case, struck down President Buhari's Executive Order 10 for usurping legislative functions, and being ultra vires the executive functions of the office of the President of the Federal Republic of Nigeria under the extant constitution; and therefore null and void by dint of Section 1(2) & (3) of the same Constitution. The Supreme Court in the said case was enforcing the rule of law under the written

Constitution. It was indeed, metaphorically, the case of the chief priest preferring to go hungry than succumbing to eating unclean profane foods.

With financial autonomy, has the Judiciary actually crossed the Rubicon? Stories from various jurisdictions tend to suggest that financial independence or autonomy may turn out to be an effort made to remove an earthworm and replacing it with viper. It is being suggested that the heads of courts and the Management Staff, led by the Chief Registrars, are so recklessly corrupt for any meaningful dividend of financial independence to judiciously and fairly go round effectively. I am told that: all that the Judges hear, most times, is the usual refrain: "My noble Lord, there is no money"!!

Financial independence is one of the vexed issues of independence of the Judiciary. This maybe the objective facet of the issue... being more of the struggle to be autonomous and independent of the other Arms of government, particularly of the Executive. This facet fits into the views of John Locke, a British philosopher through his book: *SECOND TREATISE OF CIVIL GOVERNMENT* (1690); wherein he focused on the need for governmental powers to be kept separate, and the need for one arm not to exercise overbearing and overriding influence on the other. Lord Acton, another British philosopher, had in another forum, stated that since power corrupts and absolute power corrupts absolutely; separation of power was very necessary. On his part the French Philosopher, Barron Montesquieu, advocating Separation of Powers, had stated that concentrating governmental powers in one arm was not in interest of the citizens as it would render the citizens subject to arbitrary and capricious will of their rulers; a condition manifestly contrary to the rule of law, and

a threat to civil liberty. The rule of law and guarantee of civil liberties form the objective bases for separation of powers exercised by the arms of government. The same arguments potentiate the fears that vesting enormous powers in the Heads of Courts and the Chief Registrars to manage financial autonomy of the judiciary may be counter-productive.

In the way forward, those powers and excesses must be checked by establishing Funds Allocation Committee (FAC), comprising senior Judges and all the Directors, with the Chief Registrar as the Secretary. FAC worked seamlessly well in Benue State High Court, when I was there. I do not see how it cannot, with some modifications to improve on it, work in any other court or jurisdiction.

WHAT ABOUT THE SUBJECTIVES OF THE JUDGES?

Adjudication being the main function of the Judiciary can only guarantee the much cherished independence of the Judiciary when the Judges, at all times, imbibe impartiality and integrity in adjudicatory process. This is rather more of some personal discipline than a quality. It is of course a personal discipline that is sauced by great learning and intellectual prowess. Authorities, responsible or recruitment, should put more emphasis on probing the character and learning of whoever is being considered for appointment. This must precede and supersede any other consideration, if independence of the Judiciary must prosper.

A corrupt judge, according to Hon Justice S. O. Uwaifo, JSC, in his valedictory speech on January 24, 2005, "is more harmful to the society, than a man who runs amok with a dagger in a crowded street. The latter

can be restrained physically. But, a corrupt judge deliberately destroys the moral foundation of society, and causes incalculable distress to individuals through abusing his office while still being referred to as "honourable". This, of course, is a complete abnegation of the express letters of Sections 17(2)&(3), and 36(1) of Constitution, earlier referred to. It is as well a renouncement of both his Oath of Allegiance and the Judicial Oath in the Seventh Schedule to the Constitution: the sine qua non to his assuming, and exercising, Judicial Office. Paragraph 9 of Part I of the Fifth Schedule to the Constitution, prescribing that a public officer shall not do or cause to be done, in abuse of his office, any arbitrary act prejudicial to the rights of any other person knowing that such act is unlawful or contrary to government policy, makes abuse of office also an offence triable at the Code of Conduct Tribunal. The Code of Conduct for Judicial Officers also makes issuing of interim injunctions, ex parte, an abuse of judicial office.

Independence of judiciary includes ability of courts and judges to perform their duties free of influence or control by other actors, be it private or governmental; and its purport to instill in the judges the desired courage to decide fearlessly and without favour. In common law Jurisdictions, it dates back to the Magna Carta, 1215. Judges had since been enjoined to say with good conscience and without hesitation whatsoever:

Nulli vademus, nulli negabimus, aut differemus rectum, aut justiciam

meaning: to no one will we sell justice, to no one will we refuse or delay right or justice.

This is the subjective element of the concept of the independence of the Judiciary. This subjective element relates to the personality and quality of the Judex; his character, integrity, learning, and independence of mind. Ogugodeng Joseph Dimgba, in the paper:- "21st Century Judiciary: Whither Justice And Judicial Independence" (May 30, 2023), states and I agree that : "A Judge who lacks learning, industry, and integrity is less likely to be independent no matter the constitutional guarantee". Similarly, a Judge who owes his appointment more to the Governor or other politician, not necessarily on the basis of merits, is more likely to be less independent and more likely to be answerable to the interests of his benefactor than to the public. It is within this class that Judges who sell justice, who refuse or delay right or justice are abound, and are more likely to emerge in these times of adverse political litigations.

Lawyers prosecuting election petitions are vociferously grumbling about, what they suggest is, the misinterpretation of Section 137 of the Electoral Act, 2022; which in their view has done away the judicial principle against "dumping of documents" at the court of trial. The principle insists that a witness must, in oral evidence, at least speak to the document. Section 137 of the extant Electoral Act is clear and without ambiguity. It provides:

137. IT SHALL NOT BE NECESSARY for a party who alleges NON-COMPLIANCE with the provisions of this Act for the conduct of elections TO CALL ORAL EVIDENCE IF ORIGINALS OR CERTIFIED TRUE COPIES manifestly disclose the non-compliance alleged.

In most cases the documents in issue are pleaded against their maker, suggesting admission against interest. This provision is quite new and novel. The intent and purport are clearly to expedite proceedings in election disputes, election petitions being clearly *sui generis*. It becomes worrisome when the *Judex* construes an unambiguous provision in manner that defeats its purpose and intent. It is clearly not the duty of the court, in its interpretational jurisdiction, to construe any provision of statute not to mean what it means in actuality; nor to construe it to mean what it does not mean.

In *OKUMAGBA v. EGBE*, the Federal Supreme Court, per Bairamin, FJ, confirmed the principle thus:

Feeling that the appellant deserved to be punished, the Chief Magistrate replaced the words "another candidate " by the words "any candidate" and enabled himself to punish appellant. In effect, he amended the regulation. But amendment is the function of the legislature and the courts cannot fill the gap which comes to light by altering the words of the regulation to make it read in the way he thinks it should be enacted. As Lord Bacon said in his essay on *Judicature*, the office of a judge is " *jus dicere non jus dare*", to state the law not to give law., and the court below should not gone in for *Judicial legislation*.

The plain functions of the Judiciary are expressed in Latin, thus : "*judicis est jus dicere non jus dare*".

That is, it is the duty of the judge to declare and administer existing laws, and not to indulge in imposing what, in his opinion, the law should be the. Only a lawless judge engages himself in capricious lawlessness. We

cannot deny the existence, in our judicial cycle, of this class of judges. The way out is for the NJC to be constantly alive to its disciplinary jurisdiction and powers. It should mete out appropriate and deserving punishment to erring judicial officers in order to instill discipline. It is a truism that the society goes down easily when it overlooks evil, when it permits evil, then celebrates evil; and the evil doer then promotes himself to outlawry, and impunity becomes the order of the day. The Judex should himself live above board. He shall do no evil, nor shall he give countenance to evil. As a Philosopher King the society has a lot to learn from him, as his every judgment or decision teaches a lesson.

Thank you for being a patient listening audience. I had just few days to put up this paper for this Session. Therefore, please accept the paper in spite of any inadequacies therein.

Accordingly, I crave your indulgence to bear with me.

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