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Rethinking the Applicability of Judicial Precedents and the Sustainability of the Independence of the Judiciary in Nigeria

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Abstract: *This paper examines the judicial powers of the courts and the jurisdiction of the courts as provided by the Constitution of the Federal Republic of Nigeria, 1999. The paper also examines other relevant statutes to give an insight into the independence or otherwise of the Nigerian judiciary. It also highlights the doctrine of separation of powers and the rule of law as constitutional principles geared towards safeguarding the sanctity and independence of the judiciary. It further discusses the factors affecting the independence of the judiciary including judicial precedent as it affects the independence of the judiciary. It concludes that the observance of the rule of law and independence of the judiciary in ensuring the sanctity of the temple of justice is the bedrock of a democratic society.*

Keywords: powers, jurisdiction, independence, judiciary, sanctity, temple of justice.

INTRODUCTION

The court is generally referred to as the temple of justice. While the judicial officer who presides over the court is referred to as *"Lord,"* in our jurisdiction, the lawyers are the ministers in the temple along with court officials, myrmidons of the law, *etcetera*, who provide the human capital for the administration of justice in the judicial process. The concept of the sanctity of the temple of justice is the need to maintain the integrity and the aura of the judiciary or the court for the effective dispensation of justice without fear or favour. The judiciary must be respected at all times no matter whose ox is gored.[1] While any person can disagree with the

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judgments of courts, it should not be a pedestal to bring the judiciary into odium and ridicule. Judicial officers should not be called names because some persons or a group of persons disagree with their judgments or orders. Where there is ground for complaint against a judicial officer, such compliant should be directed to the appropriate authority or agency responsible for the discipline of judicial officers in Nigeria.[2] The court is a quiet and serene place where justice is administered when there are disputes or conflict between persons or between persons and government or authority. Its essence and importance is to ensure a peaceful and orderly society. The court is a hollowed and highly revered temple where the judicial officer is the 'Priest' while the lawyers are the 'Ministers.'[3] Therefore, unnecessary attacks, criticisms, and actions aimed at undermining the integrity of the judiciary should not only be discouraged but abhorred. This is to maintain the sanctity of the temple of justice or the judiciary in a sustainable manner in the interest of the society.

The judiciary, being the organ of government responsible for the determination of the rights of the citizens and government is considered sacred in the discharge of its constitutional duties. It must therefore insulate itself from the other arms of government to dispense justice in accordance with the laws of the land. This is so because the constitutional mandate of the judiciary is different from that of the legislature and the executive. The sanctity of the temple of justice includes respect for the judicial powers of the court and the independence of the judiciary. The discourse of the independence of the judiciary must necessarily lead to the discussion of certain constitutional principles of separation of powers and the rule of law in this chapter. There cannot be independence of the judiciary without these constitutional principles because these constitutional principles act as safeguards to the independence of the judiciary.

Every court owes its existence either to the Constitution or to a statute creating it. It is the Constitution or the statute creating the court that becomes the source of its jurisdiction.[4] A court must dispense justice without fear or favour.[5] As such the judge must be courageous and be independent. A judicial officer that is not independent cannot maintain the sanctity of his court. The judiciary is the arm of government saddled with the responsibility of interpreting the laws. In other words, the primary function of the judiciary is to determine disputes between arms of government, tiers of government and individuals or individuals and individuals on disputed

[1] I. Uwaleke, B. Nwannekanma, G. Dunia and Y. Abobami – Ojo, 'Sanctity of the Supreme Court Must Be Preserved, Respected' <https://www.guardian.ng> news> sanctit…> accessed 5 June, 2023.

[2] *Ibid.*

[3] J. Onyekwere, 'Desecration of Temple of Justice, Ominous Sign of the Danger Ahead' <https://www.guardian.ng> accessed 5 June, 2023.

[4] ME Nwocha, 'An Appraisal of Judicial Powers under the Nigeria Constitution' [2017](6)(10) *International Journal of Humanities and Social Sciences Invention*; 15.

[5] *Ibid.*

questions of facts and law in accordance with the laws enacted by the legislature and precedents of the courts.[6]

Judicial Powers and Jurisdiction of Courts in Nigeria

Section 6 of the Constitution[7] vests the judicial powers of the Federation in the courts. The courts here include the Federal and State courts as established by the Constitution or may be established from time to time.[8] The same section 6 of the Constitution lists the Federal superior courts and those of the States. The Constitution also confers on the National Assembly or a State House of Assembly, the powers to establish courts and vests such courts with judicial powers or jurisdiction.[9] This is to ensure the sanctity of the courts.

In the exercise of its powers to vest such courts with judicial powers or jurisdiction, the National Assembly or a State House of Assembly does not extend the powers of the court beyond its legislative competence.[10] Consequently, the National Assembly cannot exercise its legislative powers to create court in respect of residual matters. Residual matters are matters which are not included in the exclusive legislative list and the concurrent legislative list. Such matters are within the exclusive preserve of the States to the exclusion of the National Assembly.

Section 6(3) of the Constitution provides that the courts specified in sub-section (5)(a) – (i) of section 6 shall be the only superior courts of record in Nigeria. Section 6(5) lists the courts created by the Constitution. The fact that the Constitution vests judicial powers in the courts established or may be established does not mean that all the courts exercise the same powers or jurisdiction. In other words, the fact that a court is vested with judicial powers does not necessarily mean that it has jurisdiction in all matters. Jurisdiction is conferred on the courts by the statute creating it.[11] Consequently, the Supreme Court in *Garba v. Mohammed,*[12] stated that the law is trite that courts are established by statutes. Therefore, it is the statute which creates a particular court that will also confer on it, its jurisdiction.

Similarly, by virtue of section 6(6)(a) of the Constitution, the courts have inherent powers. Inherent power can therefore be said to be powers which enable the courts to make suitable orders in order to do justice to parties before it.[13] The exercise of inherent powers of a court is not for the self - aggrandizement of the court or judge but for the ultimate attainment of

[6] AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th edn., Pearson Education Ltd., 2007) 83.
[7] CFRN, 1999, as amended.
[8] PA Oluyede, *Nigerian Administrative Law* (University. Press Plc, 1988) 43; Section 6(1) and (2) CFRN, 1999, as amended.
[9] PAO Oluyede, *Constitutional Law in Nigeria* (Evans Brothers (Nigeria Publishers) Ltd., 1992) 283.
[10] *Ibid.*
[11] *Ibid.* Section 6(1) and (2) CFRN, 1999, as amended.
[12] (2016) LPELR – 40612 (SC) 1 at 62.
[13] Oluyede, n. 9 above at 284.

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substantial justice particularly in circumstances or situations where the law is inadequate or there is no provision at all. The underlying principle is to ensure the maintenance of the sanctity of the courts. The powers of the court to impose sanction is provided in section 6(6)(a) of the Constitution. This will include the power to punish a party for contempt in appropriate case and award of cost in deserving situations. All these are to ensure efficient administration of justice and respect for the courts.

Operation of Judicial Precedent in the Exercise of Judicial Powers in Nigeria

The doctrine of judicial precedent is derived from the principle of *stare decisis*. It means stand by the decisions already made.[14] The principle formed the cornerstone or foundation for deciding later cases with similar facts based on earlier decision of superior court. It is therefore, a doctrine which compels lower courts to strictly follow the decisions given by higher courts in the same jurisdiction[15] notwithstanding whether the previous decision is right or wrong.

This doctrine of *stare decisis* is recognized and entrenched in section 287 of the Constitution which provides to the effect that all courts and authorities shall enforce without question decisions of the Supreme Court. Similarly, section 287(2)[16] mandates all courts below the Court of Appeal to enforce the decisions of the Court of Appeal while section 287(3)[17] enjoined all courts lower than or subordinate to the High Courts and the National Industrial Court to enforce the decisions of such courts.

It is therefore argued that from the above the principle of *stare decisis,* it is meant to ensure consistency, uniformity, certainty and predictability in courts' judgments. It is also to ensure sanctity in the hierarchy of courts. However, there are instances wherein the doctrine suffers some jeopardy in the Nigerian legal system as a result of some conflicting judgments of the Supreme Court.[18] This has become a source of problem and poses confusion to lower courts which are bound to follow the decisions of the Supreme Court. There are situations the Supreme Court reversed itself without direct reference to earlier decisions on the same issue or subject matter. These inconsistencies constitute hindrance to the principle of *stare decisis*. With respect to situations where there are conflicting decisions of the Supreme Court, it is now trite law that lower courts are bound by the latter decision and must follow it.[19] However, the Supreme Court also gave a direction to mitigate the problem of inconsistency in the principle of distinguishing. In such circumstance, the law and the facts has to be considered with the present case to see if

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14 Law Teacher 'Understanding the Doctrine of Judicial Precedent' <https://www.lawteacher.net> underst...> accessed 1 April, 2024.
15 Nwocha, n. 4 above.
16 CFRN, 1999, as amended.
17 *Ibid.*
18 Nwocha, n. 4 above. at 19.
19 *Kanu v. Asuzu* (2015) LPELR – 24376 (CA) 1 at 51 - 52; *Osakue v. Federal College of Education (Technical), Asaba and others* (2010) 5 SCM 185 at 203 paragraphs B – F per Ogbuagu, JSC.

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they are substantially the same or the law has changed or been amended to warrant the judgment of the Supreme Court in the latter case.[20]

In the application of *stare decisis*, it is the *ratio decidendi* that is to be followed by the lower courts. The *ratio decidendi* is the reason the court gave to arrive at the decision. It must not be the *obiter dictum* which the court made by the way side in the course of the judgment. In the analysis of *stare decisis*, there is a distinction between "a principle' and 'a rule.' A rule determines the outcome of the dispute in which it is applied; whereas a principle is a guide and does not decide the outcome of the matter.[21] It is argued that the Supreme Court being the highest court of the land beyond which no appeal can lie should act with circumspect in its decision having regards to its earlier decisions in any matter before it. This is to reduce inconsistency in its judgments and ensure uniformity, consistency, certainty and predictability in judicial decisions. Where the Supreme Court departs from its earlier decision or decisions, the reason for so doing should be lucidly stated in the judgment either as a result of a change or an amendment in the law.

Independence of the Judiciary

The independence of the judiciary implies that judges in the exercise of their judicial functions, are not subject to control either by the executive or the legislature, but to declare what the law is on any subject – matter before them. The purpose is to ensure that judges dispense justice impartially between the government and the citizens.[22] Independence of the judiciary guarantees

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[20] This is the position of the Supreme Court in *Ugwanyi v. NICON Insurance Plc* (2013) 53 NSCOR 673 where the court held that cases remain authorities only on what they decided. Thus an earlier decision of this court will only bind the court and subordinate courts in a subsequent case if the facts and the law which inform the earlier decision are the same or similar to those in the subsequent case. Where, therefore, the facts and/or the legislation which are to inform the decision in the subsequent case differ from those which informed the court's earlier decision, the earlier decision cannot serve as a precedent to the subsequent one.

[21] *Western Steel Works Ltd & Another v. Iron Steel Workers Union & Another* (1986) LPELR – 3479 (SC) 1 at 28 – 30 where Oputa, JSC emphasized the distinction between a principle and a rule thus: "The important thing to note is that what emerges from the consideration of these cases is merely a Principle and not a Rule. As Ronald Dworkin noted – "A rule is a normative proposition making certain legal results depends upon the establishment of certain factual situations stipulated in the antecedent part of the rule." Rules generally determine the outcome of the dispute in which they are applied. It is not so with "principles." Principles are broader statements of conduct and they do not necessarily decide the outcome of the dispute. They merely incline the decision one way or the other depending on the facts and surrounding circumstances of the case in hand. A principle (from the latin word principium) merely forms the starting point. Thus, a legal principle is a comprehensive rule or doctrine which finishes a basis or the consideration of the case in which the principle is meant to apply. Principles simply incline a decision one way or the other but they do not conclusive and they survive intact when they do not prevail. The point I am making is that in applying any principle, the peculiar facts of the case in hand as well as the surrounding circumstances will dictate whether the principle will apply or not."

[22] BO Nwabueze, *Constitutional Democracy in Africa* (Vol. 1, Spectrum Books Ltd., 2003) 308 - 311.

justice to the citizens and upholds the rule of law, human rights and democratic values.[23] Independence of the judiciary does not imply unpredictability or recklessness on the part of the judiciary.[24] It does not mean judicial rudeness or arrogance, or in the name of judicial activism. It is argued that the purpose of an independent judiciary is to protect human rights and uphold the rule of law in a transparent and accountable manner.[25] Independence of the judiciary is meant to act as a safeguard against the arbitrariness of executive actions and checkmate such executive actions through administrative review of executive actions by the courts. Independence of the judiciary guarantees the sanctity of the courts.

The concept of the independence of the judiciary is rooted in the British system of justice which is regarded as the origin of the independence of the judiciary.[26] The concept of independence of the judiciary which prevailed in England later spread to other jurisdictions which adopted the common law tradition. These include the United States of America, India, Nigeria, *et cetera*. Hence according to Nwabueze:

The principle of judicial independence and impartiality is among Nigeria's valuable heritage from Britain.[27]

Factors Affecting the Independence of Judiciary in Nigeria

Generally, by constitutional jurisprudence, the judiciary is the arm of government saddled with the responsibility of interpreting the laws. The Constitution provides some measure of constitutional independence to the judiciary when it vests the judicial arm with the judicial powers of the Federation and the State.[28] This is coupled with the separation of powers embedded in sections 4, 5 and 6 of the Constitution which ensure that judges are free from external control or influence in the discharged of their judicial functions by the executive and legislative arm of government. In other words, independence of the judiciary also connotes the independence of individual judges to give his own judgment in any matter before him without any influence from other judges. The decision should be based on the facts and applicable laws before him.[29] In the appellate courts in Nigeria where the judges sit in panels of three, five or seven as the case may be, each of the judges should give their judgment hence there is majority

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[23] VC Maduekwe, UG Ojukwu, and IF Agbata, 'Judiciary and the Theory of Separation of Powers in Achieving Sustainable Democracy in Nigeria (The Fourth Republic)' (2016) 4 (8) *British Journal of Education* <https://wwweajournals.org> accessed 3 February, 2020.

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.*

[27] Nwabueze, n.22 above.

[28] M Umukoro, 'Judicial Independence: Self-Financing Options' in DC Maidoh, and others (eds), *Judicial Administration and Other Legal Issues in Nigeria: Essays in the Honour of Honourable Justice R.P.I. Bozimo, Chief Judge of Delta State* (Malthouse Press Ltd; 2000) 1.

[29] FO Oho, 'Administration of Justice: Role and Constraints of the Public and Private Bar,' in Maidoh, and others, *Ibid.* at 21 – 22.

judgment and dissenting judgment. Where there is a split judgment, the majority judgment becomes the judgment of the court. It is, therefore necessary to consider the factors that will strengthen the independence of the judiciary at the stage.

Appointment

The whole essence of the independence of the judiciary can be compromised at the appointment process. Independence of the judiciary implies the independence of judges to think freely and be independent in his judicial duties in accordance with his judicial oath in line with the dictate of his conscience and the provisions of the law. He must act without any influence from the executive, legislature, his brother judges and even individual members of the public. Where a judge is not free from these, he is not fit to be a judge because he cannot be said to be independent.[30] A man who has an ugly past or an inordinate ambition to acquire wealth or material gains should not aspire to be a judge.[31]

A judge must possess sufficient knowledge of the law. If not, he becomes a calamity to the society and clog to the administration of justice. It is expressed in the maxim '*ignorantia judicis est calamitas innocentis*' which means that the ignorance of the judge is the calamity of the innocent. It is therefore argued that the qualification for appointment for judges to the various courts as provided by the Constitution without more is not sufficient.[32] This will ensure sufficient knowledge and competence on the part of the judge – applicant.

It is further argued that the constitutional provisions on appointment of judges as provided in the Constitution promotes and encourages appointment of person without merit and appreciable knowledge of the law coupled with the issue of quota system or federal character contained in section 14(3) and (4) of the Constitution. This gives room to political consideration in the appointment processes of judges which also involve intense lobbying by applicants coupled with the fact that there is no transparency in the process of appointment of judicial officers. The process of appointment of judicial officers in Nigeria is shrouded in secrecy and clandestineness.

The office of a judge is sensitive and honourable; therefore, it requires competence and integrity. The vacancy for the office of a judge should be made public and should not be allowed to be privileged information to only the serving judges who will want to have their kith and kin appointed. Since it is an office or a position dealing with honour, integrity and competence, the role of the Bar in the appointment process should not be underestimated. The Bar should be consulted by the appointing authority for its input on the suitability of the candidates in and out of court and the opinion of the Bar should be respected. It is also suggested that the names of

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30 Oluyede, n. 9 above at 286.
31 *Ibid.*
32 Sections 231(3), 238(3), 250(3), 254B(3), 256(3), 261(3), 266(3); 271(3), 276(3) and 281(3), CFRN, 1999, as amended.

the candidates should be published in national dailies before the appointment process is concluded. This is to enable members of the public to object to the appointment of any candidate on grounds of lack of integrity, honesty, character and competence. Where a man lobbied his way to become a judge whether through the members of the executive, the legislature or the judiciary, he cannot be independent when his benefactor request for favour or indicate interest in a matter before him as a judge.[33]

Dismissal

Section 292(1) of the Constitution provides for the removal of a judicial officer from office before his age of retirement. The section provides two scenarios. The first is in relation to heads of various courts that can be removed by the President or the Governor as the case may upon an address supported by two third majority of the members of the Senate or the House of Assembly of the State praying for his removal. This is usually due to the inability to discharge the functions of the office by the office holder due to reason of infirmity of body or mind or for misconduct or for contravention of the code of conduct. The second scenario is with respect to other judges who are not heads of courts. These judges can only be removed from office by the President or the Governor of a State acting on the recommendation of the National Judicial Council that the judicial officer be removed for his inability to discharge the functions of his office or appointment arising from infirmity of mind or body or for misconduct or contravention of the code of conduct.

The Constitution did not define misconduct as it relates to judicial officers but it however defined "gross misconduct" or 'misconduct' in relation to the impeachment of the President, Vice-President, Governors and Deputy – Governors.[34] This is a grave oversight on the part of the drafters of the Constitution because the definition may be left within the province of the executive and the legislature who desire to remove a particular head of court or a judge for whatever reason. It is argued that there is a better security of tenure to other judges than the heads of courts under the Constitution. This is so because in the case of other judges, the National Judicial Council will investigate and thereafter recommend. The National Judicial Council is a body of eminent jurists headed by the Chief Justice of Nigeria.[35] However, in the case of the heads of courts, their destiny in office lies with legislature and the executive who are politicians with party affiliation and interest. The provisions of section 292(1)(a) of the Constitution does not safeguard the security of tenure of the heads of courts in Nigeria. It is suggested that there should be an amendment to that constitutional provision to the effect that once there is an allegation against a head of court, the procedure for impeachment of the President or Governor should be followed but the investigative panel shall not be appointed by the Chief Justice of Nigeria or the Chief Judge of a State where he is involved. This will reduce

[33] Oluyede, n. 9 above at 286.
[34] Sections 143(11) and 188(11), CFRN, 1999, as amended.
[35] Paragraph I, Part 1, Third Schedule, CFRN, 1999, as amended on the NJC composition and powers.

the rate at which State Governors removed Chief Judges from office in Nigeria. In the United States, Article 11 section 4 of the United States Constitution, 1787 subject judicial officers to the same impeachment procedure as the President.[36] This is a better safeguard to the office of a judge in recognition of the crucial role they perform in the society.[37] In Germany, Article 97 of the German Basic Law states that judges who have permanent appointment, that is for life, cannot be dismissed against their will, or permanently or temporarily suspended from office, or given a different function, or retired before the expiration of their term of office except by virtue of a judicial decision and only on the grounds and in the form provided for by law. In Germany, the security of tenure of office of judges is guaranteed on the ground that it is the courts that would have the last say on the matter.[38] It is time for there to be an amendment to the Constitution to ensure that the removal of a judicial officer is subject to impeachment or judgment of court thereon to meet up with modern standard and international best practices.

Funding and Remuneration

There can be no independence of the judiciary if the judiciary does not have financial autonomy or independence. The remuneration of judges can only be paid from a secured source not controlled by the executive and the legislature. Therefore, the importance of funding and remuneration of the judiciary is a crucial aspect of the independence of the judiciary and integrity of judges.[39] As observed by Shimoh:[40]

> Judicial office no doubt has its attraction, but that alone may not, without adequate remuneration, ensure the high standard of the Bench. While it is doubtful if very large salaries are necessary to secure integrity, judges should be free from financial anxieties.

Section 80 of the Constitution provides for the establishment of the Consolidated Revenue Fund of the Federation and by sections 81(3) and 162(9) of the Constitution, the funds standing to the credit of the judiciary is charged to the consolidated revenue fund to be paid to the National Judicial Council for disbursements to the heads of the courts established under section 6 of the Constitution. The fund includes the salaries, allowances and other benefits due to the judicial officers of the superior courts in Nigeria. Section 84 of the Constitution empowers the National Assembly to prescribe the salaries and allowances payable to public officers including judges

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36 The section provides to the effect that the President, Vice – President, all civil officers of the United States including judges "shall be removed from office on impeachment for and conviction of treason, bribery, or high crimes and misdemeanor".

37 KM Mowoe, *Constitutional Law in Nigeria* (Malthouse Press Limited, 2008) 192 – 194.

38 *Ibid.*

39 *Ibid.* at 195.

40 S Shimoh, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (North Holland Publishing Company, 1976) 30 – 31.

of the superior courts and the amount must not exceed which the Revenue Mobilization Allocation and Fiscal Commission have determined. The remuneration and salaries including the condition of service and other allowances of judicial officers are not to be altered to their disadvantage after the appointment in Nigeria. The provisions of sections 80, 81(3), 84 and 162((9) of the Constitution are important constitutional safeguards geared towards the independence of the judiciary in Nigeria.

The point must be made that despite the clear and unambiguous provisions of sections 81(3), 84 and 162(9) of the Constitution, the judiciary is still starved of funds by the executive arm of government which acts as an elder brother and *primos inter pares* among the three organs of government in Nigeria. Clearly in Nigeria, there is no financial independence for the judiciary and this affect the discharge of its duties. Ibrahim Tanko Muhammad, CJN, had no option but to shout aloud that despite the fact that the Constitution provides for separation of powers and independence of the three arms of government.[41] He stated that he has continued to go cap in hand to beg for funds to run the judiciary; a situation he said had impacted negatively on the administration of justice in Nigeria.[42] According to the Chief Justice of Nigeria when a financial assessment of the judiciary is undertaken, it is clear that the judiciary is not independent. This is because the annual budget of the judiciary is still a far cry from what it ought to be.[43]
Again by sections 81(3) and 162(9) of the Constitution, the funds of the judiciary is charged to the Consolidated Revenue Fund and ought to be released upon demand to the judiciary subject however to availability of fund. However, in practice financial independence of the judiciary is a far cry in Nigeria. Ibrahim Tanko Muhammad, CJN, gave a graphic description of the situation as follows:

> If you say that I am independent, but in a way, whether I like it or not, I have to go cap in hand asking for funds to run my office, then I have completely lost my independence. It is like saying a cow is free to graze about in the meadow but at the same time, tying it firmly to a tree. Where is the freedom?[44]

The constitutional provisions regarding the funding of the judiciary do not *per se* ensure that a judge is well paid.[45] To Ijalaiye,[46] when compared with their British counterparts, the Nigerian judges must really be on the wrong side of the fortune. The learned author added that even locally when compared with the six figure salaries of bank chief executives and managing

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41 I Nnochiri, 'Judiciary Not Free, We Beg For Funds, CJN Laments' *Vanguard* (Lagos, September 24, 2019) 8.
42 *Ibid*.
43 *Ibid.*
44 *Ibid.*
45 Mowoe, n. 37 above.
46 DA Ijalaiye, 'The Legal Profession and the Third Republic' [1991] (2)(10), *Justice: A Journal of Contemporary Legal Problems*; 29.

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directors of big companies, the Nigerian judges still have a marathon race ahead to catch up with comfort.[47] The situation is even worse with the judicial officers of the inferior courts. Some of them take public transport to attend to cases in their courts. The courts are so dilapidated to be called courts.

The issue of salaries of judges in Nigeria is a topical and national discourse when compared to other climes. Bemoaning the situation, Ibrahim Tanko Muhammad, CJN., stated that the issue of the salaries of judicial officers is still occupying the front banner of national discourse. It is one of the many issues yet to be addressed by the government. He stated that the salaries of judicial officers in Nigeria are still very far from an ideal package to take home.[48] Recently, the salaries and allowances of judicial officers of the superior courts in Nigeria have been increased by 300 percent vide an Act of the National Assembly.

It is hereby argued that there is a manifest inconsistency between sections 81(3), 162(9) and 121(3) of the Constitution. By the provisions of sections 81(3) and 162(9) of the Constitution, the amount standing to the credit of the judiciary is to be paid to the National Judicial Council for disbursement to the heads of courts established for the Federation and the States under section 6 of the Constitution. These provisions covered the field and there is no need for section 121(3) of the Constitution which provides that any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the State shall be paid directly to the heads of the courts concerned. Having determined what is due to the States judiciary in budgetary provision, the appropriate thing to do is to deduct at source at the federal level and pay same over to the National Judicial Council for disbursement in accordance with sections 81(3) and 162(9) of the Constitution. Section 121(3) of the Constitution has subjected State judiciaries to financial ordeal at the mercy of the State executive. For example, in Delta State relying on section 121(3) of the Constitution, Delta State enacted the Delta State Judiciary Fund Management (Financial Autonomy) Law, 2021 which was signed into Law on 3rd day of August, 2021 in which the Governor gave himself the powers to release funds to the judiciary on monthly basis. [49] Section 17 of the Law mandates the Chief Registrar, on receipt of the budget ceiling or envelope from the Commissioner for Economic Planning of the State and after due consultation with relevant institutions and committees, prepare the annual estimates of income and expenditure of the judiciary for the financial year which shall be forwarded to the Governor for inclusion in the

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[47] *Ibid.*

[48] Nnochiri, n. 41 above.

[49] Section 7(1) of the Delta State Judiciary Fund Management (Financial Autonomy) Law of Delta State, 2021 which provides: "From the commencement of this Law and pursuant to the provisions of Section 121(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Section 4 of this Law, the Governor shall by warrant issued under his hand authorize the Accountant – General to release directly into the Judiciary Statutory Accounts all monthly capital and recurrent expenditure due to the Judiciary as allocated by SAAC." By section 22 of the Law, it repealed Delta State Judiciary Fund Management (Financial Autonomy) Law of Delta State, 2014.

appropriation law or supplementary appropriation law for that year. It is argued that by this provision, it is still the executive that determines and controls the budget ceiling of the judiciary as contained in the budget ceiling or envelope from the Commissioner for Economic Planning. Section 19 of the Law mandates the Auditor-General of the State to audit the accounts of the funds received from the Consolidated Revenue Fund of the State. It is further argued that this Law is unnecessary and does not in any way improve on the provisions of sections 81(3) and 121(3) of the Constitution but rather tend to subtly subject the Delta State Judiciary to executive control. It is further argued that section 121(3) of the Constitution should be expunged because the judiciary funds by the provisions of section 162(9) of the Constitution shall be paid to the heads of courts through the National Judicial Council directly from the Consolidated Revenue Fund of the Federation.

Exercise of Prerogative of Mercy

Sections 175 and 212 of the Constitution empower the President or the Governor to grant to a person convicted of a criminal offence pardon. Conviction can only be secured after the courts have spent time and energy on such cases. Sometimes, the right of appeal up to the Supreme Court would have been exhausted. This is an infraction of the independence of the judiciary because the exercise of the power of prerogative of mercy popularly referred to as pardon has the effect of overruling and nullifying the decisions of the courts with respect to such convicts.[50] It is therefore recommended that sections 175 and 212 of the Constitution should be abrogated because it has no sustainable development goal to the State. Rather, it is an encroachment on the independence of the judiciary and an encouragement to corruption in developing nations such as Nigeria.

Public Criticism of Court Proceedings and Judgments

There seem to have been an emerging trend in present day society where both lawyers and litigants subject court proceedings, orders, rulings and judgments to criticism daily in the open either on television or in other media instead of appealing such rulings, orders or judgments. This practice undermines the independence of the judiciary in Nigeria. It also offends Rule 33 of the Rules of Professional Conduct for Legal Practitioners, 2023 where such act is done by a legal practitioner.

Judicial Precedent as a Factor Affecting the Independence of the Judiciary in Nigeria

Judicial precedent has its advantages. However, judicial precedents affect the independence of the judges in the hierarchy of courts in the delivery of their judgments. This is so because by the doctrine of judicial precedents, lower courts are bound by the judgments of the higher court in the hierarchy of courts. The lower courts are bound to follow such decisions even if reached *per incuriam*. The individual judge cannot ignore the earlier or previous judgments. Judicial precedents therefore influence future judgments or decisions except where the principle of

[50] Oluyede, n. 9 above at 294.

distinguishing is applicable.[51] In other words, following earlier decisions of the superior courts make the lower court subservient and this erodes the independence of the judge to give his judgment based on the facts and law before him. The principle of judicial precedents has the potential of compelling the judicial system to perpetuate wrong decisions and makes judges to turn what ought to be an advantage of certainty of law to be certainty of injustice.[52] The doctrine and practice of judicial precedent clearly prevents lower courts from departing from the decisions of higher courts with the resultant effect of hands being tied. This has resulted to unnecessary rigidity in this area of the law.[53] Notwithstanding, an intelligent, honest and courageous judicial officer will know when and how to apply the principle of judicial precedent *vis – a – vis* the principle of distinguishing of facts of cases before him so as not to apply or follow the principle slavishly.

The exercise of judicial powers cannot be attained by the courts if there is no independence of the judiciary in Nigeria. There is therefore the need to examine some constitutional concepts such as separation of powers and rule of law that ensure that the independence of the judiciary is safeguarded and guaranteed. These constitutional principles constitute the foundation for judicial independence. They are bulwark upon which modern constitutional democracy is dependent and the rights of the citizens guaranteed. Without these constitutional principles, the rule of force will prevail over the rule of law. Anarchy will reign supreme and the independence of the judiciary will be compromised.

Separation of Powers under 1999 Constitution

The doctrine of separation of powers originated from the observation of John Locke on the prevalent conditions in 17th Century England.[54] Locke thought it was better to vest legislative and executive powers on different organs of government so that the legislature can act quickly and at intervals and the executive can be constantly be at work. He felt that it was not right to give to lawmakers the power of executing the laws because in the process they may exempt themselves from obedience and make the law to suit their personal interests.[55] In the words of John Locke:[56]

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they exempt themselves from obedience to the laws they made, and suit

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51 RWM Dias, *Jurisprudence* (5th edn., LexisNexis, 2013) 136.

52 F Adaramola, *Jurisprudence* (4th edn., LexisNexis Buttterworths, 2008) 232 – 233.

53 *Ibid. at 234.*

54 BO Iluyomade and BU Eka, *Cases and Materials on Administrative Law in Nigeria* (2nd edn. Obafemi Awolowo University Press Limited, 1997) 7.

55 *Ibid.* J Locke, *Second Treatise on Civil Government,* Chapters 12 – 13 cited by Iluyomade and Eka, *Ibid.*

56 *Ibid.*

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> the law, both in its making and execution, to their own private advantage.

The French jurist, Baron de Montesquieu took the study on the doctrine of separation of powers further to what it is today. He based his study on the works of John Locke and on an imperfect understanding of the 18th Century English Constitution.[57] In his work, Montesquieu was more concerned with the presentation of the political freedom of the citizens. According to him:

> 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 the executive… there would 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.[58]

It is argued that a situation where all governmental powers are concentrated in the same person or body would lead to tyranny because power corrupts and absolute power corrupt absolutely.[59] Hence, section 4 of the Constitution vests legislative power in the National Assembly or the legislature; section 5[60] vests the executive powers in the President or the Governor as the case may be while section 6 vests the judicial powers in the judiciary. This is to ensure check against tyranny and no arm of government is to be allowed to be so powerful and subject other arms of government and the people to servitude.[61] The theory of separation of powers therefore means that human freedom and liberty will be ensured when the powers of the three organs of government are separated and distinct from each other.[62]

While the idea and concept of separation of powers is laudable, the operation of a very rigid and complete separation of powers in modern government is near impossible and it is doubtful if any system of government has attained such an end,[63] hence the concept of checks and balances in constitutional jurisprudence.

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57 E Malemi, *The Nigerian Constitutional Law* (3rd edn., Princeton Publishing Company, 2012) 83 where the learned author quoted John Locke's Second Treatise on Civil Government, Chapters 12 – 13.
58 BL Montesquieu, *Esprit des Lois, Book XI*, 3 – 6 quoted by Iloyomade and Eka, n. 54 above. See also Malemi, *Ibid*.
59 *Ibid.*
60 CFRN, 1999, as amended.
61 Malemi, n. 57 above at 89.
62 Maduekwe Ojukwu, and Agbata, n. 23 above.
63 Iluyomade and Eka, n. 57 above.

It has been observed earlier that a rigid application of separation of powers is near impossibility in practice and theory as there are instance where the judiciary exercises legislative role in making rules for regulating the practice and procedure of the courts pursuant to relevant constitutional provisions. The executive make laws in guise of orders, directives, regulations, proclamations, *etcetera,*[64] hence the need for checks and balances among the three organs of government.

Rule of Law

For ages past, it was recognized that the possession by the State of coercive powers that may likely be used to suppress and oppress citizens is a major problem in legal and political theory.[65] According to Aristotle, government by laws was superior to government by men and that the rule of law is preferable to that of an individual.[66] In the middle ages, it was believed that there was universal law which ruled the world. Bradley and Ewing referring to the work of Gierke stated that medieval doctrine, while it was truly medieval, never surrendered the thought that law is by its origin of equal rank with the State and does not depend on the State for its existence.[67]

In 13th century, Bracton while adopting the theory of the rule of law held in the middle ages that the universe was governed by law, whether human or divine, held unto the belief that *'the king himself ought not to be subject to man, but subject to God and to the law, because the law makes him King'.*[68] In Britain, the 17th century struggle of supremacy between the Crown and the Parliament led to the rejection of the divine right of kings and there was a compromise between the common law lawyers and the Parliament on the subject.[69] The abrogation of the Court of Star Chamber in 1641 guaranteed that common law should apply to public and private act except as common law was altered by Parliament.[70]

Later the Bill of Rights, 1689 affirmed that the monarchy was subject to law. By the Bill of Rights, it was not only that the monarchy was coerced to rule through Parliament but also the right of the individual citizens and the governed were freed from unlawful interference in so far

64 *Ibid.*
65 Bradley and Ewing, n. 6 above.
66 *Ibid.*
67 *Ibid.*
68 Iluyomade and Eka, n. 54 above at 5.
69 Bradley and Ewing, n. 6 above.
70 *Ibid.*

their private affairs was established.[71] This later became the basis of the decision in *Entick v. Carrington.*[72]

It is noted that economic and social developments since 1765 seemed to have qualified the decision of Lord Canden that in the absence of precedent, no common law powers of search and seizure will be recognized. However, the decision in *Entick v. Carrington*[73] still exercises influence on judicial attitudes to the claims of government in the United Kingdom.[74] The last stage of history on the rule of law came with the exposition of Albert Venn Dicey. Although his exposition is generally accepted as authoritative, nonetheless it has been subjected to criticism.[75]

Rule of Law and Its Implication in Modern Times

According to Nwabueze, the rule of law is a concept with a rather imprecise description.[76] Modern writers seem to suggest that the rule of law have at least five meanings.[77] These five meaning shall be considered hereunder.

Everything must be done according to law: This means that every act of government organs, agencies and departments must be done in accordance with the law. Where in any case governmental actions cannot be justified under any law, such act or action is illegal, unlawful and unconstitutional and any person affected by such act or action has a right to approach a court of law for appropriate remedy.[78] One commonest area of breach of this meaning is the acts of the Police relying on its powers under section 4 of the Police Act[79] to arrest and

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71 *Ibid.*

72 (1765) 19 St. Tr. 1030 at 1067 and 1073. In this case, two of the King's messengers were sued for having unlawfully broken into the plaintiff's house and seized his papers. The defendants relied on a warrant issued by one of the Secretaries of State ordering them to search for Entick and bring him with his books and papers before the Secretary of State for examination. The Secretary of State claimed that the power to issue such warrants was essential to government 'the only means of quieting clamours and sedition'. The court held that in the absence of a statute or a judicial precedent upholding the legality of such a warrant, the practice was illegal. Lord Camden, CJ, said: 'What would the Parliament say if the judges should take upon themselves an unlawful power into a convenient authority, by new restrictions? That would be, not judgment, but legislation … And with respect to the argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinction.

73 *Entick's case.*

74 Bradley and Ewing, n. 6 above at 96.

75 Iluyomade and Eka, n. 57 above. See also H. Philips, *The Constitutional Law of Great Britain and the Common Wealth* (2nd edn. Bitterworths, 1957) 109.

76 Nwabueze, n. 22 above at 142.

77 Iluyomade and Eka, n. 57 above. Oluyede, n.9 above at 50; Oluyede, n. 8 above at 90; Malemi, n. 57 above at 108 – 114.

78 Oluyede, *Ibid*; Bradley and Ewing, n. 6 above at 100.

79 Cap. P.19, LFN, 2004.

investigate or detect crimes in Nigeria usually arrest suspects in the course of their investigation of crime and detain as far as weeks and sometimes months in contravention of section 35(4) and (5) of the Constitution in which a suspect is expected to be brought to court within one day on two days as the case may be which is a reasonable time for arraignment. It is must be noted however that the provisions of section 35(4) of the Constitution does not apply to any person arrested or detained upon reasonable suspicion of having committed a capital offence.[80]

Government should be conducted within a framework of recognized rules and principles which restrict discretionary power. This entails that the rule of law demands that the courts should intervene to prevent any abuse of discretionary power especially when such powers are conferred in a general language and exercised by government officials in a manner that amount to abuse.[81] Here, the courts should be able to maintain a balance between the need for a fair and efficient administration of governmental affairs for the good of the society and the need to protect citizens' rights against arbitrary government or abuse of powers.[82]

Equality before the law: This implies that every person or organs of government or State officials and the ordinary citizens should be equal and subject to the ordinary law of the land. The State should not gain any advantage over the ordinary citizen. The law should apply equally to the rulers and the citizens.[83] However, the law provides restrictions such as immunity clause for the President, Vice-President, Governors and Deputy – Governors,[84] parliamentary immunity, judicial immunity and provisions of the Public Officers Protection Act[85] or Laws of the various States and limitation laws. These exemptions are legal inhibitions to the operation of equality before the law under the rule of law in modern society.

No citizen should be punished except for a legally defined crime: It is the intendment of the rule of law that no citizen should be punished except for a breach of a legally defined crime and punishment prescribed by a written law.[86] In this respect, section 36(12) of the Constitution provides that no person shall be held guilty of a criminal offence on account of any act or omission that did not, at the time it look place amount to or constitute an offence and penalty prescribed by a written law. This was the basis of the decision in *Aoko v. Fagbemi.*[87]

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80 Section 35(7), CFRN 1999, as amended.
81 Oluyede, n. 8 above.
82 *Shugaba Addulrahaman Darmam v. The Federal Minister of Internal Affairs and others* (1981) 7 NCLR 25; *Director of SSS v. Agbakoba* [1993] 3 SCNJ 1 at 16 – 17.
83 Oluyede, n. 8 above at 51; Oluyede, n.9 above at 91; Malami, n. 57 above; Iluyomade and Eka, n. 54 above.
84 *Ibid*, Section 308.
85 Section 2(a), Public Officers Protection Act, Cap. P. 41, LFN, 2004. In *Yabugbe v. C.O.P.* [1992] 4 NWLR (Pt. 234) 152 at 177 – 178, the Supreme Court held that the provisions of the Public Officers Protection Act is not to shield Public Officers from public prosecution but covers only civil liability.
86 Oluyede, n. 83 above.
87 (1961) All NLR 604; *Ibrahim v. Nigerian Army* (2015) LPELR – 24596 (CA).

Respect for the decisions of the courts: The rule of law entails respect and obedience to courts' decisions. There must be respect for the orders, judgments and processes of the courts by the government and the citizens,[88] even if such orders judgment is unjust, perverse or illegal or unfavourable to government until it is set aside on appeal or by a competent court.[89]

International Conventions and Rule of Law

Right from 1945, there has been continuing struggle within the international community to advance the rule of law in international relations and to secure respect for the protection and observance of human rights.[90] This effort led to the emergence of the Universal Declarations of Human Rights (UDHR). This was followed by the European Convention on Human Rights, the African Charter on Human and Peoples Right. Similarly, the United Nations has adopted other treaties such as International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of Racial Discrimination (CERD) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as measures in deepening and strengthening the rule of law internationally.[91]

CONCLUSION

This paper has revealed the need for governmental actions to be carried in accordance with law with an independent judiciary to safeguard the rights and liberties of the citizens. The judiciary must continue to be courageous to protect the Constitution and safeguard the liberties and freedom of the citizenry and promote the rule of law. The financial independence of the Nigerian judiciary is sacrosanct for courageous and independent judiciary. Therefore, every stakeholder of a democratic society must ensure the observance and compliance with section 81(3) and 162(9) of the 1999 Constitution dealing with financial independence of the Nigerian judiciary.

As part of deepening the independence of the judiciary, the process of appointment of a judge in Nigeria should be looked under the 1999 Constitution and necessary amendments should be done to accommodate same to ensure transparency, competency and integrity. The mere attainment of ten years post call is no longer sufficient. There should be evidence of practice of law and judgments obtained to ensure competence and integrity. The Nigerian Bar Association should be made a major partner in the appointment process by the appointing authority. This is to ensure that men of character and integrity are appointed as judicial officers to preside over the affairs of the citizens.

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[88] *Entick v.Carrington* (supra); *Governor of Lagos State v. Ojukwu and others* (1986) LPELR – 3186 (SC) 1 at 21 – 22.

[89] *Nwawka v. Adikamkwu* (2014) LPELR – 22927 (CA) 1 at 27 - 28; *Labour Party v. INEC* (2009) LPELR – 1732 (SC) 1 at 25.

[90] Bradley and Ewing, n. 6 above at 103.

[91] *Ibid* at 104.

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Finally, the independence of the judiciary and the rule of law is the pillar cannot be compromised. Therefore, the observance of the rule of law and independence of the judiciary in ensuring the sanctity of the temple of justice is the bedrock of a democratic society.