

FEDERALISM AND THE CHALLENGES OF JUDICIARY IN NIGERIA

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Abstract

This paper examines the judiciary and the principles of federalism as it is in the present day Nigeria. Furthermore, this paper also undertakes a critical perusal on the constitution of the Federal Republic of Nigeria, since 1979 till date. With regards to their provisions as they relate to the principle of separation of powers, particularly as it affects the judiciary. Since the aim is to provide a platform for politicians, lawyers, legislatures and educate readers on the principles and challenges of governance in Nigeria. The errors of federalism in Nigeria are that there is no entire separation of power between the legislature, judiciary and the executive. The stability and security of the United State of America Constitution is as a result of their wise principle of separation of powers within the various tiers of government. The present day menace in our system is as a result of our inability to practicalise federalism as it is obtainable in the civilized societies, example USA, Canada, Brazil, etc. It is a truism that if Nigeria adopts and implements the principle of separation of powers, it will go a long way in shaping the future of Nigeria's federalism, thereby making the country politically strong and democratically sustainable.

Keywords: *Federalism, Judiciary, Constitution, Separation of Power*

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Background to the Study

In Nigeria today, there are, undoubtedly, multi-dimensional issues which have continued to provoke heated arguments, passionate discourse and virulent controversies. Some of these contentious issues include consistent cry for judicial independence and true federalism in Nigeria. Since the restoration of democratic governance in Nigeria on May 29th 1999, there has been a remarkable rise in the regularity and gravity of the agitations for judicial independence, since the judiciary is seen as the last resort of the common man. The present government just as it rose to the problem of resource control by establishing the Niger Delta Development Commission (NDDC) need also to rise up to the inevitable cry for judicial independence and true federalism. The incessant interference by the executives in the judicial administration of matters vitiates the principle of separation of powers which is a basic feature of federalism. Examples of this interference include appointment of judges, the issuance of “nulli-prosecute” which means stop prosecution is un-ethical to the judicial institution.

1. Inducement of judicial officers to pervert the cause of justice;
2. Executive interventions in the appointment processes of judicial officers;
3. The abuse of the powers of nolle prosequi by Attorney Generals acting on behalf of the executive;
4. Starving the judiciary of needed funds; and
5. Recently the crass and undisguised intimidation of the judiciary by the present regime, in the name of fighting corruption is the greatest injustice to national development.

Nevertheless, the judiciary is the branch of government that is constitutionally responsible for the interpretation and application of the law of the state. People who contravene the law are punished by the judiciary through the judgments of the court. Any aggrieved person can go to court to seek redress rather than administrative sentiment. In the light of these, this paper will address the errors of federalism and the challenges of judiciary in Nigeria. It highlights the importance of judicial independence; a situation where the judiciary can exercise independent and freedom from the interference of the executive and the legislative arm of government. In other to create confidence among citizens, especially in the administration of justice in the state, the judiciary must be an independent agency bound by its own rules of procedure in conformity with the provisions of the constitution of the Federal Republic of Nigeria.

Methodology

This study makes use of qualitative method, by this, data and information were retrieved through secondary sources. This data/information was then described, explained and analysed within the context of the problem under investigation.

¹ See e.g. section 6 Constitution of the Federal Republic of Nigeria (hereinafter referred to as 1999 Constitution).

² K.C. Wheare, *Federal Government* (New York: Oxford University Press (1953), p. 10.

³ K.C. Wheare, *Federal Government* (New York: Oxford University Press, (1953), p. 10.

⁴ *Supra* at p. 3.

Conceptual Literature

The Judiciary

Although the term judiciary, is used in the constitution¹, the term unfortunately is not defined anywhere in the constitution. This deficiency notwithstanding, from the totality of the provisions of the constitution, it is clearly inferable that judiciary simply refers to the arm of government that is vested with the powers to interpret laws made by the executive.

Federalism

However, the term federalism has gained tremendous popularity and frequency in usage, it has no generally acceptable definition. Indeed, as there are many commentators, there are diverse definitions in conceptualizing federalism. K. C. Wheare², it foremost contemporary exponent, draws his classic formulation from the structure and processes of the government of the United States of America as the ideal model of federal government, and avers:

“By the federal principle, it means the method of dividing power so that general and regional governments are each within a sphere coordinate and independent³.

The judiciary under a Federal Constitution

The 1999 constitution makes elaborate provision for the separation of powers amongst the three tiers of government viz, the legislature, executive and judiciary. Section 6 of the 1999 constitution states that:

The judicial powers of the federation shall be vested in the courts... being courts established for the federation⁴.

In a bid to x-ray the role of the judiciary under federalism, we shall place the judiciary vis-à-vis the legislature, and also the judiciary vis-à-vis the executive.

Judiciary and Legislature

The judiciary from its nature and function appears to be the least dangerous to the liberty of the citizens. In support of this, Hamilton states that;

The executive not only dispense the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society and can take no active resolution whatever. It may truly be said to have either FORCE NOR WILL but merely judgment and must ultimately depend upon the aid of the executive arm even for the efficiency of the judgments⁵.

⁵ H. Hamilton, J. Madison, and J. Jay, *The federalist* (London: J. M. Dent & Sons, 1970), paper No. 78.

⁶ Young, Asari. *The Judiciary and Separation of Powers in Nigeria* (Calabar: Wusen Publishers, 2003), p. 26.

⁷ Young, A. op cit at p. 5.

⁸ Section 287, *The Constitution*.

From this, one can agree with Hamilton that the judiciary is in comparison the weakest of the three organs of government; that it can never attack the success either of the other two organs and that all possible care is necessary to enable it to defend itself against their attacks. The threat to liberty thus, comes not from the judiciary which has to arbitrate, separate and protect according to law, any form of unjust treatment from the executive and the legislature which are repugnant to the true tenet of federalism is unjust. So we strongly posit that there will be no liberty if the power of the judiciary is not separated from the legislature and executive⁶.

Judiciary and Executive

According to Young, A;

The power to interpret law is vested in the judiciary by the constitution while the execution of judgements delivered by the courts is the duty of the executive. The judiciary, in adjudication of disputes is supreme, since this is its assigned area under the constitution. It is however, wrong to presume that this gives judiciary immunity from executive interference⁷.

Though the judiciary sits to interpret and apply the law in a disputed case, an ultimate safeguard is necessary. None can be entrusted with power without some guarantee against its abuse. A judge within the limits of its jurisdiction can be arbitrary or abuse his power. Though the right of appeal from a lower court to a higher court is restraint in the last resort. Judges have been made subjects to the general power of the executives⁸, this should not be so, "In America for example, the Supreme Court has the final say in American democracy. This is true to the point that, it was once said that America practices judicial dictatorship". This final guarantee is a check on the judiciary though it should be exercised in such a way that political expediency is not to affect the status of the judiciary.

Judicial Independence vis-à-vis Separation of Power

Judicial independence has been a contentious and current political discourse amongst scholars, lawyers, politicians etc. The freedom of the judiciary in its assigned field is not intended to debar the executive from having any say in the judicial set up. The independence here is restrained as far as interpretation and judicial application of law is concerned in the adjudication of disputes.

In our view, we strongly uphold that the independence should extend to composition, appointment and financing of this arm of government to ensure optimal performance.

On the appointment, let's Examine the Controversial case of Rivers State.

Rivers State of Nigeria was effectively a threat to liberty of the citizens without an incumbent Chief Judge from 20 August, 2013 (when the immediate past Chief Judge of the state, Hon. Justice Iche N. Ndu retired from service). Up until 31st Day of June, 2015 when the incumbent Governor Nyesom Wike swore in a new Judge. The crisis began when the immediate past Governor posited that he had the prerogative to reject the recommendation of National Judicial Council (hereinafter refer to as NJC) on the recommendation for the appointment of a person to occupy the office of a Chief Judge. This according to him was in line with the constitution of the land.

⁹ See section 271(1) of the Constitution.

Constitution of the Land

Putting the record straight, the mode of appointment of a person to the office of a Chief Judge of a state is governed by section 271(1) of the constitution which provides that:

The appointment of a person to the office of Chief Judge of a State shall be made by the Governor of the state on the recommendation of the National Judicial Council subject to confirmation by the State House of Assembly⁹.

DESPITE this provisions of the constitution, the then Rivers State Governor in the person of Rt, Hon. Rotimi Chibuike Amaechi went ahead and appointed a Judge without the recommendation of the NJC. These infringed on the independence of the judiciary and separation of powers as embedded in the constitution. The errors of federalism in Nigeria are that there is no entire separation of power between the legislature, judiciary and the executive. The consequence of this and other imperfections is unending instability in the country with far-reaching negative implications for national development. The stability and security of the English Constitution is as a result of their wise principle of separation of powers within the various tiers of government. The present day menace in our system is as a result of our inability to practical's true federalism as it is obtainable in the civilized societies.

Federalism in Nigeria

In political philosophy, federalism is defined as “the theory or advocacy of federal political orders where final authority is divided between sub-units and the centre”¹⁰. Sovereignty is constitutionally divided between at least two territorial levels so that units at each level have final authority and can act independently of the others in some areas. As a consequence, citizens have political obligations to have at least two authorities. However, allocation of authority between the centre and the sub-units may vary from country to country. One may wish to know how Nigeria fits into the picture of federalism. As a starting point, it may be necessary to observe that given the territorially-based diversity and cleavages bounding in Nigeria and the historical legacy of divisions among its ethnic groups regions and sections, the federal imperative has for so long been recognized as fundamental issue that will guarantee national unity and promote good governance that even military governments attached importance to the continuation of a federal system of government in the country. It is also important to observe that the Nigerian federalism is one of the competing decisions to hold together sub-units that began as a decentralized unitary state. It is therefore another example of “holding together” federalism.

Furthermore, Nigerian federalism is not ideal compared with other countries such as U.S.A., Switzerland, Brazil and India. In Nigeria, though some basic features of federalism such as operation of a written constitution, coordinate supremacy of the two levels of government, existence of bicameral legislature, constitutional provision for human right, independent electoral systems, multi-party system, existence of independent judiciary but in practice reverse is the case as the judiciary and the electoral system are not independent poses a threat to our federalism.

¹⁰Andreas Follesdal, Stanford Encyclopedia of Philosophy (<http://www.andreas.follesdal@filosoft.uio.no>), (2003), p. 1.

¹¹Wheare, *supra*.

Again, Nigerian federalism is surrounded with a lot of controversies e.g. in Nigeria resources are being controlled by the centre without recourse to the state where this resources are located. Again, there have been procedural problems of protocol arising from confusing the operation of parliamentary and presidential democracy. Lastly, how to work the presidential democracy so as to respond positively to the centrifugal and centripetal pulls of ethnic, religious, social and idiosyncratic pluralism in Nigeria's federalism in order to douse social tension and foster national integration remains a cumbersome challenge to national development.

Ideal Federalism: A Study of U.S.A

In conceptualizing federalism, K. C. Wheare (1953), its foremost contemporary exponent draws his classic formulation from the structure and processes of the government of the United States of America as the ideal model of federal government, and avers:

By the federal principle, it means the method of dividing power so that general and regional governments are each within a sphere coordinate and independent¹¹.

Accordingly, he said the federal principles specify the following:

1. Constitutional divisions of powers among levels or tiers of government.
2. The operation of a written constitution showing this division.
3. Coordinate supremacy of the two levels of government with regard to their respective functions.
4. The existence of a bicameral legislature.
5. An independent judiciary and Supreme Court.
6. An independent electoral system for both levels of government.
7. Constitutional provision for human rights
8. Existence of multi-party democracy, among others¹².

The America theoretical model of K. C. Wheare was adopted for Nigeria, although the adaptation of American federal democratic principles in Nigeria is at a crossroads, due to discrepancies in the internal contradictions of the country's political economy.

Lastly, according to Ikejiani Clark (1991), the ideal features of classical federalism include the following:

1. the desire of concerned communities to be under a single independent government for some purpose;
2. the desire of the federating units to retain regional autonomy in some areas at least and;
3. the imperative that the federating units must be reasonably proportional in size in order to ensure a fair distribution of political power, in coping with sectional diversities of geography, heterogeneity of social culture, nationality, language and religion¹³.

¹²Onah F. E. Fiscal Federalism in Nigeria (Nsukka: Great AP Express Publishers Ltd., 2006), p. 9

¹³M. Ikejiani Clark, "Main features of the Nigerian political since independence", A paper presented to the Nigerian Institute of Policy and Strategic Studies, Kuru, March 4, 1991.

The following are observations from the Nigerian federalism viz:

1. Unlike the USA where states control resources in Nigeria, the federal control the resources located in the state.
2. The judiciary in Nigerian federalism is not completely independent.
3. The electoral body in Nigerian federalism is not also independent.
4. There is no desire of concerned communities to be under a single independent government etc. The Niger Delta Avengers claim of being independent, the Indigenous People of Biafra (IPOB) claim of being a sovereign state etc.

Conclusion and Recommendations

The paper took a panoramic view of judiciary and federalism in Nigeria. From the exposition and analysis, it is irresistible to conclude that the current practice of the federal system in Nigeria, is not in accord with the well-established principles of federalism, Nigeria as a Federal State, should be amenable to the true tenets of federalism.

Hence, the way forward for Nigeria includes the following:

- a. Constitutional and legal reforms may be carried out in order to ensure true federalism in Nigeria.
- b. The appointment of Judges may be done solely by the National Judicial Council (NJC) in line with the provision of the constitutional reform.
- c. There should be a restructuring of the Nigerian Judicial system.

The House of Representatives has recently announced plans by the house to make laws which will put an end to joint accounts between states and Local Government Areas, thereby granting financial autonomy to Local Government Areas, which constitute one of the federating units in Nigeria's federal system.

The paper maintains that if these errors and challenges that have bedeviled true federalism in Nigeria are adequately addressed, the socio-political and structural reforms of the system of governance together with massive support of the people may lead to effective separation of powers among the tiers of government in Nigeria. This would go a long way in fine-tuning the future of Nigeria's federalism, thereby making the country politically stronger and democratically sustainable in the 21st century.

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