THE INDEPENDENCE OF THE JUDICIARY AND THE GUARDIANSHIP OF HUMAN RIGHTS

By

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If Cyprain Okafor Anah, SAN, were to be alive, he would have attained the age of 90 on 30 September this year. He is no longer with us physically. This colloquium in memory of a multi-dimensional man – banker, sportsman, writer, restauranter, father, lawyer, Bar leader, Senior Advocate of Nigeria, man of faith, lover - reminds us of the continuing relevance of the things that mattered to him and which defined his life and struggles.

It is a privilege to be able to join this colloquium this year. I only met C.O. Anah briefly, not more than twice in his lifetime. We both worked in different capacities on the successful campaign of Olisa Agbakoba, SAN, for the presidency of the Nigerian Bar Association (NBA) in 2006. Both he and Olisa were of the Nigerian Law School set of 1978. He was indeed Olisa's polling agent for the count. As a former chair of the Onitsha Branch from the 1978 set, he was well suited for the part and he accomplished the role with charm, thoroughness, attention to detail and polish. The previous year, he took Silk. He had also served as chair of the Onitsha Bar, the second from the storied Anah family of Adazi-Ani

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in Anambra Central to do so after his cousin, Senator Nathaniel Nwadike Anah, SAN.

The brain and inspiration behind this event, however, is C.O Anah's daughter, Adaeze, herself a lawyer who is beating her own inspiring path in legal practice and advocacy. I consider this significant. In this part of the world, most aspire to leave behind sons who will step into their shoes and preserve the family name. In reality, no child has a better claim to the family name or genes than any other and the capacity to advance the values or name or family is not determined by chromosomes or hormonal handouts of estrogen or testosterone.

Adaeze's investment in this undertaking makes the most eloquent point possible of the kind of man her Dad was and the kind of egalitarian values that guided his life. This, more than any other thing, is why I consider it important to be present at this colloquium. Those egalitarian values are what is at stake when we discuss the independence of the judiciary and the guardianship of human rights in any context, particularly in the context of a developing country like Nigeria.

The Judiciary and Human Rights

An independent judiciary has both inherent and functional or instrumental value in organized society. It is important to explain this a little. A state theoretically enjoys three monopolies. One is a monopoly of fiscal prerogatives or of legitimate taxation, which finances public revenue; the second is the monopoly of legitimate dispute resolution through the courts and tribunals at all levels which is an essential pre-condition for coexistence; and the third is the instrumentality of legitimate violence and coercion. The First monopoly finances the state including the other monopolies. The second stabilizes the state and its communities,

guaranteeing the atmosphere in which citizens can conduct and pursue lawful livelihoods. The third embodies the capability that guarantees that the first two monopolies are viable

The second monopoly in particular is antecedent to the last and its failure guarantees that the last becomes a free-for-all. So, the state has a duty to ensure the delivery of justice because when those who seek justice find themselves habitually denied of it, they default to questioning the presumed monopoly of the state over legitimate violence. At that point, the state will no longer be able to guarantee basic safety and security and the result is a society in which everyone is for themselves because the authority of government has broken own. This, many would argue, is where we are in Nigeria presently.

This makes it essential to focus a little on the second monopoly concerning the institutions for legitimate dispute resolution. In Nigeria, the integrity of the judicial system which underpins the guarantee of fair trial is no longer a given. As evidence of this, of six Chief Justices of Nigeria since 2011 preceding the current incumbent, only two – Aloma Mukhtar and Mahmud Mohammed – served out their tenures without controversy. Of the last three CJNs preceding the current one, two were effectively fired in circumstances that tarnished the judiciary institutionally and the penultimate scandalized the judiciary with a compulsive disposition towards hawking judicial appointments in a bazaar of undisguised insider-dealing that usually was accompanied by a whiff of political, filial, or genital relations.

Legitimacy is at the heart of the presumptive monopoly of the state over legitimate dispute resolution. This is why independence is inherent in the judicial

function. Notionally, the judiciary embodies the very essence of what Professor SA De Smith described in constitutional design as "politically neutral zones."[2]

Judicial Independence as a Norm

It is no surprise, therefore, that the United Nations Special Rapporteur on Independence of Judges and Lawyers has argued that judicial independence belongs to the domain of a peremptory norm of international law (*jus cogens*), although he stops short of explicating the elements of such a norm.[3]

Judicial independence is human right under both the constitution of Nigeria and international law. Under section 36(1) of the 1999 Constitution, "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." At the African continental level, State parties to the African Charter on Democracy, Elections, and Governance (ACDEG) undertake to "establish and strengthen national mechanisms that redress election-related disputes promptly."[4] They also agree to "strive to institutionalise good political governance through an independent judiciary."[5] In the African Charter on Human and Peoples' Rights, they equally subscribe to a "duty to guarantee the independence of the courts."[6]

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[2] S.A. de Smith, *The Commonwealth and its Constitutions,* (London: Stevens & Sons, 1964), 136
[3] *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayan*, A/77/160, 8, para 34, (July 2022).
[4] African Charter on Democracy, Elections, and Governance (hereafter called "ACDEG"), adopted 30 Jan. 2007; entered into force, 15 Feb. 2012, https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf, accessed 30 Sept. 2023, Art. 17(2), (hereafter, called "ACDEG").
[5] *Id.,* Article 32(3).
[6] African Charter on Human and Peoples' Rights, adopted June 27, 1981, **CAB/LEG**/67/3 rev. 5, 21 I.L.M. 58 (hereafter called "African Charter").

Scope of Judicial Independence

In Nigeria, therefore, wherever the judiciary or the courts are not constituted in a manner as to guarantee their independence and impartiality, there is a foundational violation of a constitutional bargain. A natural question, therefore, arises: what does an independent judiciary entail? Ordinarily, it imports structural and institutional assumptions which recognise the judiciary as an arm of government in a scheme of separation of powers coexisting in juxtaposition with the legislative and executive branches but free from interference or manipulation from the latter two.[7] To assure this, formal standards of judicial independence are recognised internationally,[8] and instituted in the constitutions of different countries,[9] addressing such issues as processes of appointment; security of tenure, discipline and removal; remuneration; and preclusion of reprisals or liability for exercise of judicial function.[10] By and large, judicial independence embodies at least three complementary elements. These include adjudication by "a neutral third", institutional insulation from political interference or pressure, and guarantees of effective coexistence as a separate branch of government.[11] However,

[7] See *R. v Director, Serious Frauds Office*, (2008) 4 *All England L. Rep.*, 927 para. 76; J. Mark Ramseyer; (n28).
[8] See, for instance, Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, (26 August - 6 September 1985), UNGA Res. 40/146 of 13 December 1985, http://www.worldlii.org/int/other/UNGA/1985/163.pdf, accessed 29 September 2023; Bangalore Principles of Judicial Conduct, ECOSOC Res. 2006/23, E/2006/INF/2/Add.1, Annex, adopted 27 July 2006, https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2000-2009/2006/ECOSOC/Resolution_2006-23.pdf, accessed 29 September 2023.
[9] S.A de Smith (n5), 136 *et seq*.
[10] See, Abimbola Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Oxford, Clarendon Press, 1994). In Nigeria, the National Judicial Council (NJC) is the body charged with supervising judicial independence, tenure, and related matters. See, Constitution of the Federal Republic of Nigeria 1999 (hereafter "1999 Constitution"), 3rd Schedule, Part 1, Item I (20)-(22).
[11] Christopher Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis", (1996) 44:4 *Am. J. Comp. L.*, 605, 608-612. Owen Fiss emphasizes three elements he refers to as party detachment, individual autonomy of judges and political insularity of the institution. See Owen Fiss, "The Right Degree of Independence" in Irwin Strotzky (ed), *The Transition to Democracy in Latin America: The Role of the Judiciary*, (Boulder, Co, Westview, 1993), 55; Jenifer Widner broadly agrees but also calls attention to informal intrusions into judicial independence. See Jenifer Widner, *Building the Rule of Law,* (n28), 27-28. Siri Gloppen, *et al* similarly note the social and political dimensions of judicial independence. See Siri Gloppen *et al*, *Courts and Power in Latin America and Africa*, (n1) 120.

around the world, the judiciary is also widely seen as a political institution,[12] which functions in the role of political accountability.[13]

Howsoever the judicial function is conceived, independence is widely seen as constitutive of its being. The scope and meaning of judicial independence exist in a zone of contradiction and dynamic ambiguity that encompasses institutional as well as procedural; inherent and instrumental; normative and situational; structural and behavioral; prophylactic and propositional; as well as formal and informal dimensions.[14]

Yet, political rulers can often suborn the judiciary to legitimise themselves,[15] and the effectiveness of the judicial institution is reputedly shaped by political context.[16] Courts and judges are at once institutions and employees of the state and yet, agents of the government. Notwithstanding its description by Baron de Montesquieu as "in some measure next to nothing",[17] the judiciary is nevertheless eulogised in comparative jurisprudence as the ultimate custodian of constitutional government,[18] the "lifeblood of constitutionalism",[19] and as the avatar of the people against autocracy.[20]

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[12] See generally, Jack Walter Peltason, *Federal Courts in the Political Process: Short Studies in Political Science*, (New York, Random House, 1955); Yoav Dotan & Menachem Hofnung, "Legal Defeats – Political Wins: Why Do Elected Representatives Go to Court", (2005) 38:1 *Comp. Pol. Studies*, 75.
[13] Okechukwu Oko, 'The Lawyer's Role in a Contemporary Democracy, Promoting the Rule of Law, Lawyers in Fragile Democracies and the Challenges of Democratic Consolidation: The Nigerian Experience', (2009) 77:3 *Fordham L. Rev*., 1295; J. Mark Ramseyer, 'The Puzzling (In)Dependence of Courts: A Comparative Approach', (1994) 23:2 *J. Legal Studies*, 721.
[14] See Owen Fiss, 'The Limits of Judicial Independence', 25:1 *U. Miami Inter-American L. Rev.*, 57; Mariana Llanos *et al*, 'Informal Interference in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases', (2016) 23:7 *Democratization*, 1236.
[15] Tamir Moustafa & Tom Ginsburg, 'Introduction: The Functions of Courts in Authoritarian Politics', in Tom Ginsburg & Tamir Moustafa (Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, (Cambridge, Cambridge Univ. Press, 2008) 1 at 4-5.
[16] Robert Barros, 'Courts Out of Context: Authoritarian Sources of Judicial Failure in Chile (1973-1990) and Argentina (1976-1983)', in Tom Ginsburg & Tamir Moustafa (Eds), *Id.*, 156 at 177-178; Siri Gloppen *et al, Courts and Power in Latin America and Africa*, 12 (2010)
[17] Baron de Montesquieu, *The Spirit of the Laws*, Thomas Nugent, Trans (New York, Hafner Publishing Co., 1949), 156
[18] *Kimani v. Attorney-General, Kenya* [2009] *Kenya L. Rep*., 1 at 11.
[19] *Beauregard v. Canada* [1986] 2 S.C.R, 56 at 70.
[20] *Myers v. US*, 272 US 106 at 293 (1926).

State of the Judiciary: A Duty of Candour

This is a colloquium and I do not intend to be extensive in my remarks. In any event, I have recently had my say on the state of independence of the judiciary in Nigeria in a book-length offering – *The Selectorate* - which is about to hit the book-stands shortly. The case I make in the book is a very straightforward one. It is that contrary to popular notions, Nigeria, as a colonized territory, has never had an independent judiciary. Instead of seeking to build one at independence, we swallowed a colonial myth that one existed. In reality, colony was antithetical to and could never bequeath independent institutions. The question is not whether we have ever had independent institutions. The answer to that is no we have not. Rather, it is how bad the lack of independence has progressively grown. That, hopefully, will become clearer by the end of our conversation today.

Law professor, Senior Advocate of Nigeria (SAN), and penultimate Vice-President of Nigeria, Yemi Osinbajo, recently said of the Nigerian judiciary in an address to the Nigerian Bar Association in Yenagoa earlier this month that "Nigeria's judicial system is crumbling under the weight of corruption, ethical violation and poor standards."[21] It is mu intention to allow others on this panel to speak to the specifics of the manner in which this has ensued. I am delighted for this purpose that we are joined in this conversation by a recently retired judge of the High Court (of Kogi State) who is now also a law professor.

The instinctive, reflexive response to any criticism of the judiciary in Nigeria is defensiveness. The traditional attitude of worshipful deference to judges

[21] Julius Osahon, "Nigeria's Legal System Crumbling under Corruption, Ethics Violations, Says Osinbajo", *The Guardian*, 17 May 2025, available at https://guardian.ng/news/nigerias-legal-system-crumbling-under-corruption-ethics-violations-says-osinbajo/

was founded on an implicit bargain that about judicial comportment. In Nigeria, that bargain broke down a long time ago. There remain a good many occupants of high judicial office who indeed are doing their best under enormously challenging circumstances to hold the balance of justice together. Increasingly, many of these are beleaguered in a system that has become hostage to the Nigerian condition. Judicial accountability, therefore, has become an essential part of the discussion about the judiciary. According to the report of Committee IV on "The Judiciary and the Legal Profession under the Rule of Law" of the International Congress of Jurists in New Delhi, India, in 1959:

> An independent Judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the Executive or Legislative with the exercise of the judicial function, *but does not mean that the judge is entitled to act in an arbitrary manner*. His duty is to interpret the law and the fundamental principles and assumptions that underlie it.[22] (italics supplied)

It is this tendency towards arbitrariness in both judicial appointments and in judicial comportment that necessitates this conversation. I look forward to joining in it. I should make one important point. The tendency to regard as adversaries or enemies (I have got tired of counting death threats over this matter) those who offer critical feedback on the judiciary in Nigeria is self-defeating. Citizens owe the judges and the courts a duty of candour; for there is something more damaging and more adversarial than being critical of the judiciary in Nigeria; it is ignoring it entirely. May that day never come.

[22] International Commission of Jurists, *African Conference on the Rule of Law, Lagos, Nigeria, January 3-7 1961: A Report on the Proceedings of the Conference*, (Geneva, ICJ, 1961)