



## THE JUDICIARY AND DEMOCRACY IN NIGERIA

By

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### Abstract

*Judiciary is an arm of government that interprets and adjudicates the law. It plays great role in justice dispensation, rule of law, constitutionalism and due process. The paper adopts the Montesquieu theory of separation of powers as its theoretical framework. It uses secondary method of data collection, which involves documentary evidences like textbooks, Newspapers, magazines, and internet materials to obtain information relevant to the study. The study reveals that Nigerian judiciary is not living up to expectation due to unnecessary executive interference, the presence of administrative tribunals, corruption, and lack of judicial autonomy. Therefore, the paper recommends for a reform in the nation's judicial system to ensure judicial autonomy and effective administration of justice.*

**Key words: Judiciary, Democracy, Constitution, Constitutionalism, Human Rights**

## **Introduction**

Globally, judiciary is an arm of government that interprets and adjudicates the law and ensures the administration of justice. It adjudicates between government and citizens, and between citizen and citizen. The judiciary is a lender of last resort, it settles disputes between parties whether Legislature, Executive, corporate bodies or individuals. It acts as a check on the Legislative and Executive arms of government by declaring null and void any of their action that run contrary to the provisions of the constitution.

Before 1<sup>st</sup> October 1960, Nigeria judicial system was operated through statute and Ordinance made in Lagos to apply throughout the federation of Nigeria. The statute and ordinance had their origin in England but extended to Nigeria as federal laws. The Judicial Committee of the Privy Council then remained the highest Court in the land (Agunbiade, 2008). After independence on the 1<sup>st</sup> October, 1960, and subsequent emergence of the Nigerian state as a Republic in 1963, the Supreme Court was established and became the highest court in the land. The court has appellate jurisdiction in civil and criminal cases. It entertains appeals from lower courts particularly Court of Appeal. However, the military interventions into the Nigerian politics have done a lot of damages to the courts or the nation's judicial system as the constitution was always suspended.

The 1999 constitution provides that the judicial powers of the federation shall be vested in the court. The court is a very important component of the nation's judiciary. The judiciary consists of all the courts and tribunals in the state given the judicial powers by the constitution to adjudicate on all cases between members of the society and even between government and members of the society (Okechukwu, 1997). The 1999 Nigerian constitution empowers the courts to interpret the laws, guardian of the constitution and the rights enshrined in it.

Since the country returned to democratic rule on the 29<sup>th</sup> May, 1999, judiciary contributes greatly in advancing the course of democracy and good governance in Nigeria owing to the role it plays in justice dispensation, ensures rule of law, constitutionalism and due process. Judiciary is the backbone of any democracy as it serves as guardian to the constitution, the government and the governed, and protection of the fundamental human rights and freedoms enjoyed by the citizens. .

Nigerian judiciary settles disputes between federal government and state government, inter and intra states disputes, inter and intra party disputes. But the viability and efficiency of the judiciary in Nigeria has been hampered by the executive interference, corruption, the existence of administrative tribunals and lack of judicial autonomy. The paper therefore examines judiciary, challenges of judiciary in Nigeria and the way forward.

## **Clarification of Concepts**

### **Judiciary**

The judiciary is the organ of government that is principally committed to interpret the laws made by the legislature. It is the third organ of government responsible for interpretation and application of the law when they are broken or violated (Anyaele, 2003). It adjudicates in conflict between the legislature and executive, government and citizens as well as citizens and citizens. It serves as the lenders of last resort to the government and people. It protects the rights and property of the citizens whenever they are tempered with (Ali, 2017).

## **Democracy**

The term democracy is derived from the Greek word “demo” means people and “kratia” means government. Therefore democracy implies government by the consent of the people where the majority rules while the minorities are protected. According to Adedeji, 2013 Democracy is a system of government in which the exercise of political power and authority is vested in the people through their elected representatives.

Democracy is direct where people come together to discuss their common problems or welfare and indirect where people elect their representatives to act on their behalf. Generally democracy is attributed to the concept of rule of law, popular participation, constitutionalism, separation of power, checks and balances, periodic election, the presence of opposition and freedom of speech and association.

## **Constitution**

Constitution is a fundamental law of the state. Iganga (2010) defines a constitution as the institutional and regulatory framework of government which defines the condition for the exercise of legitimate power. It also serves as the steering wheel of the state out of which a country can be operated and by which the citizens can be controlled.

A constitution could be referred to as a collection of rules and regulations that guide social relations between individuals, organizations, corporate bodies, institutions and the state. It contains statements intended to define the relations between the ruler and the ruled, the basic institutional framework of government, the rights and duties of citizens and many important procedures to be followed in connection with those matters (Anifowose and Enemuo, 1999).

The Report of the Presidential Committee on the Review of the 1999 Nigeria constitution defines a constitution as the body of rules in accordance with which the powers of government are distributed and exercised. Also a constitution is the collection of principles according to which the powers of the government, the right of the governed and the relations between the two are adjusted. A constitution is the system or body of fundamental principles according to which a nation, state or body politics is constituted and governed (Nwankwo, 1990). Also, it is observed that a constitution is an agreed set of rules and principles that regulate the conduct of government, institutions or organizations. Constitution is the whole body of fundamental rules which is either written or unwritten according to which a particular government or state operates.

## **Constitutionalism**

Constitutionalism refers to adherence to the fundamental laws of the state by the government, the citizens, the corporate bodies and organizations. It is associated with limited government, a system of restraints on both ruler and the ruled; it is bound up with the notion of the rule of law, embracing the idea that a government should not be permitted to do whatever its official please but should conduct itself according to equitable and agreed procedures (Mahajan, 2000). This means that the powers of government should be defined and limited by the dictates of the body of the fundamental laws of the land known as the constitution.

However, the principle of constitutionalism is not constitution in itself but, limits government and individual actions and activities according to constitutional restraints

(Johnson, 1994). This indicates that there is a relationship between the constitution, the people, and the government; the way the constitution is made to work and the respect it generates constitute the strength of the Nation. However, the essence of constitutionalism is to avoid excessive use of state power by the government and safeguard fundamental human rights of the citizens such as right to life, right to freedom of movement, right to freedom of association and the press among others.

## **Human Rights**

Human rights are the freedoms the individuals enjoy as the legal members of the state. These freedoms include rights to life, dignity of human person, personal liberty, right to freedoms of association, assembly and press. All these freedoms are provided in the constitution and every citizen is entitled to them. Sections 33 to 44 of the 1999 Nigerian constitution contain the fundamental human rights to be enjoyed by the Nigerian citizens.

## **Theoretical Framework**

The paper uses the theory of separation of power as its theoretical perspective, whose basic proposition was centered on apportioning distinct and different responsibilities to the three arms of government, legislature, executive and judiciary. The theory craves for a situation where the three arms of government act independent of one another, to avoid dictatorship or absolutism; and to ensure that justice prevails. And this theoretical perspective was developed and popularized by a French political thinker and Jurist, Baron de Montesquieu, in his book titled “*esprit des lois*” which mean the spirit of law published in 1748. The theorist argues that if liberty and freedom are to be guaranteed then the three arms of government, that is executive, legislative and judiciary must be kept separate and entrusted to different people.

Montesquieu believes that if the three arms of government are separated from one another, it would provide a safeguard against too much concentration of power in one central authority. He goes further to say that each of the three arms or branches of government must be conformed to the exercise of its own functions and not allowed to encroach upon the functions of the other arms. However, the theory of separation of powers is just an utopia as no country all over the world is able to apply strictly its basic postulations, governance is a process and the principal actors or institutions must interact with one another and sometimes interwoven to achieve a set goal.

## **Principles of Separation of Powers and Checks and Balances in Nigeria**

Separation of powers and check and balances is one of the fundamental attributes of presidential democracy, where the three arms of government, legislature, executive and judiciary are separated from one another and at the same time serve as a check on each other. The rationale behind the principle of separation of power is to avoid dictatorship, excessive and abuse of powers by the three arms of government. Separation of power leads to division of labour, specialization, efficiency and orderliness in administration. The principle of separation of powers is enshrined in the 1999 Nigerian Constitution, in part II, titled THE POWERS OF THE FEDERAL REPUBLIC OF NIGERIA, in sections 4(1), (2) 5(1), and 6(1) among others.

- 4 (1) The Legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of the Senate and a House of Representatives.
- (2) The National Assembly shall have power to make laws for the peace, order and good governance of the Federation or any part thereof with respect to any matter included in Exclusive Legislative list set out in part 1 of the Second Schedule to this constitution.
- 5 (1) ... The Executive Powers of the federation (a) shall be vested in the President...
- 6 (1) The judicial powers of the federation shall be vested in the courts...

However, the above constitutional provisions have stated clearly the powers of three arms of government in running the affairs of the Nigerian State. This is in line with the requirement of the principle of separation of powers. But in practice there are a lot of interplay in terms of power between or among the three arms of government –legislature, executive and judiciary. The President appoints members of the executive council and the legislature (National Assembly) screens and approves such appointment. Also the President presents budget to the National Assembly and the National Assembly deliberates on it, sometimes adjust the budget. Thus, some time there is intergovernmental frictions particularly between the executive and legislature in the process of discharging their constitutional duties or responsibilities.

The conflict between the legislature (National Assembly) and the President Muhammadu Buhari over budget padding in 2016; and the removal of the Chief Justice of the Federation, Justice Walter Onoghen in 2019 without recourse to the constitution is an indication of frowzy relationship among the three arms of government. Sometimes conflicts occur among the arms of government but the constitution provides common grounds where these conflicts can be resolved.

The 1999 Nigerian constitution ensures that the three arms of government can co-exist harmoniously in carrying their constitutional responsibilities. In furtherance of ensuring harmonious relationship, the legislature performs certain judicial or quasi-judicial duties like the impeachment of public office or the investigatory power of committees which is an oversight function of the legislature (See section 88 of the 1999 Nigerian constitution). Also the 1999 Nigerian constitution empowers the judiciary to declare an act null and void (See Section 233 of the 1999 constitution). The executive exercises powers which are either legislative or judicial as the constitution empowers it to exercise the powers of reprieve and pardon (see section 175 of the 1999 constitution) (Ali, 2017).

### **The Role of the Judiciary in Nigerian Democracy**

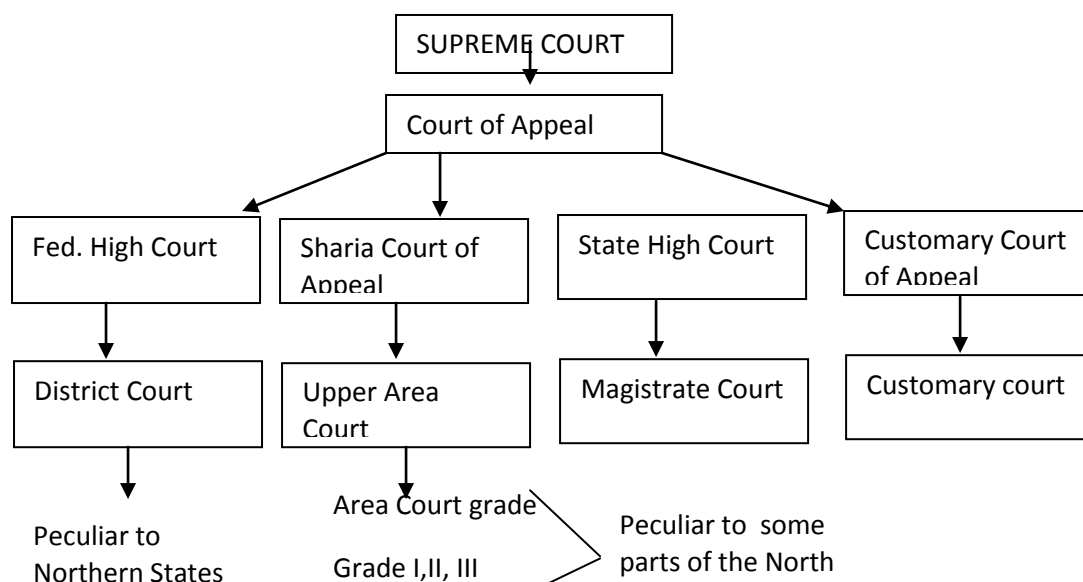
The major constitutional functions of the judiciary are:

- i. Interpretation of law: The primary duty of the judiciary is to interpret the law in order to ensure peace, justice and orderliness in the society.
- ii. Guardian of the constitution: It is also the responsibility of the judiciary to protect the constitution of the country from flagrant violations by the government and powerful individuals in the society.

- iii. Protection of citizens' rights: The judiciary protects the fundamental human rights of the citizens, rights such as freedom of movement, association, dignity of human person, religion, public opinion and many more.
- iv. The judiciary determines electoral petitions in a bid to ascertain the real winner in the election. The electoral tribunals and courts make sure elections are conducted in line with the constitution and electoral laws. The entire elections that were conducted in Zamfara State in 2019 where the All Progressive Congress (APC) won were cancelled by the courts because of noncompliance to the constitution and electoral law and the runner-up which was the Peoples Democratic Party (PDP) was declared the winner.
- v. The judiciary serves as the watchdog of the society; it ensures that laws and orders are maintained and awards punishment to the wrongdoers.
- vi. Legislative function: The judiciary gives important pieces of advice on constitutional preparation and amendment, the passing and signing of bills by the legislature and executive organs of government.

### Composition of the Nigerian Judiciary

The judiciary is made up of many courts like Supreme Court, appeal courts, high courts, magistrate courts, customary courts, for the judiciary to be effective and efficient in the performance of its duties it has to be independent of other organs of government and powerful individuals in the society.



Source: Nigeria Legal System: 40

The Supreme Court is the court of appellate jurisdiction. It is the highest court in Nigeria and it is headed by the Chief Justice of Nigeria and supported by other Justices of the Supreme Court who may not be less than 15 as may be decided by the Act of the National Assembly, Decisions taken by the Supreme Court cannot be disputed by any court.

### The 1999 Constitution, Rule of Law and Judiciary in Nigeria

Nigeria's effort at instituting democratic governance had met serious challenges due to frequent military intervention in politics, lack of respect to rule of law, and human rights.



The prevalence of the military at the corridor of power has thrown the country into state of arbitrariness, dictatorship and unstable transition to civil rule. The spillover of the military peculiar culture to the arena of politics in the democratic dispensation and the hitherto closed political space and the process of demilitarization of the polity is gradually taking shape (Bonnie, 2008). This has had negative tendencies on the country's constitutional democracy and rule of law. The political space has been militarized and political class found it very difficult to assimilate democratic values into governance. This is clearly shown in the way the 1999 Nigerian constitution was put together by military and their civilian apologists.

The procedures, modalities and processes leading to the drafting and adaptation of the 1999 Nigerian constitution have not actually encouraged rigorous and effective citizens participation, it was marred with seclusion. (IDEA, 2001) provides that the process of making the 1999 constitution allowed only a very limited consultation with the people. Even after the committee set up to collate the views of the people on the draft, the Provisional Ruling Council of the military still made amendments which were justified on the basis of public interest. The constitution was highly defective and short of a document rich enough to promote the culture and value of democracy. The constitution as an operating document was inherently full of contradictions and this marked the beginning of the problem of constitutional democracy and rule of law in Nigeria.

The constitutional democracy requires that the structure of government should be based on some concepts and structures where function of law making resides with the legislature, implementation of governmental policy rests on the shoulder of the executive and adjudication and interpretation of law falls on the crest of the judiciary (Ayodele, 2004). However, the three arms always interact with one another. For instance, the President sends bills to the National Assembly; he has veto power over the laws made by it; Senate's consent or approval is needed for major appointments made by the President, and the treaties entered into by him. In addition, the President appoints judges and has the power of pardon; the legislature can impeach the President if the need arises (Ali, 2017).

The President or the Governor shares the law making power of the legislature by virtue of the constitutional provision for President's or Governor's assent to bill before they become law. Although in case the President or Governor withhold assent to bills, a  $\frac{2}{3}$  majority by members of the legislature can override such refusal. The President exercises the power of Prerogative of Mercy as contained in section 175 of the 1999 constitution. This power succinctly derogate from power of the judiciary to impose sentence after due process of adjudication.

Furthermore, the President or Governor appoints judges through the approval of the National Assembly or State Assembly; the judges may play the cards of the chief executive. The legislature confirms major appointments made by the chief executive shows that there is a derogation of the theory of separation of Powers. The survival of democracy and the greatest constitutional safeguard from the vicissitudes of politics lies in the strength of the character of the institution of the judiciary (IDEA, 2002). Whatever the rule of law stands for can only be meaningful under an independent judicial institution (Nwankwo, 2004).

However, the President or Governor exerts some level of influences on the judiciary since they play significant role in the appointment of the judges as provided in the 1999 Nigerian constitution. The unconstitutional impeachment of Governors Raheed Ladoja of Oyo State, Peter Fayose of Ekiti State, Peter Obi of Anambra State, Joshua Dariye of Plateau State and Murtala Nyako of Adamawa State got the support of their respective Chief Judges.

The 1999 constitution gives the chief executive of the country excessive powers to the extent that the chief executive always acts against the state and the decisions of the courts. For instance President Olusegun Obasanjo withheld the Lagos councils fund despite the Supreme Court judgment that they be released. Obasanjo commits another blunder when he unilaterally declared the post of his Vice, Atiku Abubakar vacant and asked for his replacement. Also President Goodluck Jonathan removed Justice Ayo Salami, former President of the Customary Court of Appeal without any recourse to the constitution. Likewise, President Muhammadu Buhari removed the Chief Justice of the Federation, Justice Walter Onoghen without recourse to the constitutional provisions. These developments have serious negative consequences on the country's efforts at instituting democracy, rule of law and effective administration of justice.

In democracy all government institutions, agencies and persons are subject to the laws of the land. The judiciary has to step in to ensure all actions and conducts of the government, and any other persons exercising legislative and executive powers conform, observe and adhere to the provisions of the constitution. The Federal Government of Nigeria under Late President Umaru Yar Adua adhered to the Supreme Court ruling on Lagos council fund; the judiciary played great role in reversing impeachments of Governor Rasheed Ladoja of Oyo state and Peter Obi of Anambra state.

### **The Independence of the Judiciary**

The ideas of the independence of the judiciary can be traced from the theory of separation of power by Baron de Montesquieu. He stated that if liberty and freedom are to be maintained then the three branches of government that is the executive, the legislature and judiciary must be kept separate and entrusted to different people. But the three branches must be coordinated and mutually independent, each having a indisputable power in its sphere of jurisdiction.

Independence of the judiciary connotes a situation in which the judiciary discharges its duties without being molested and subjugated by the external bodies. The judiciary is insulated from the control of the other two organs of government, its officials are free to take judicial decisions without any fear or favour (Anyaele, 2003). The effectiveness of the judiciary is not determined by the structure of court but by its very independence. The Supreme Court is the highest court in Nigeria; its jurisdiction cannot be challenged by any court in the country.

Given the growing influence of judiciary in a democracy, the issue of maintaining its independence becomes important. This is because quick and effective dispensation of justice cannot be achieved without judicial independence. One thing that is critical to judicial independence is judicial autonomy, which envisages the idea of freedom to the judiciary in terms of appointment and security of tenure. Rod Haque (2010) provides that if the selection of judges is controlled by politicians who appoint their own placemen, the judiciary may just reinforce partisan authority, providing integration rather than a separation of powers.

Therefore, to ensure independence of judiciary in Nigeria, appointment and security of tenure of judges is of paramount significance. The method or procedure of selection of judges should be based on merits. An independent body or commission should be constituted to determine the method of selection of judges, and judicial officials, their welfare and conditions of service. And the judges and judicial officials should have no definite tenure of office. It will help to ensure independence of the judiciary.



Also crucial to judicial independence in Nigeria is the issue of immunity, which is a kind of special protection given to judges and magistrates in discharging their duties. The judges should be immune from persecution so as to enable them carry out their official responsibilities without any fear or favour. This will guarantee their safety, credibility, viability and focus.

Also for the judiciary to be independent in Nigeria, the judges and magistrates should be politically neutral and should not allow any forms of sentiment to dominate their sense of reasoning as judicial officers. The judges and magistrates should not be involved in active politics, they should not belong to any political party, take part in political meetings, rallies and campaigns if judicial independence is to be maintained.

Of significance to the issue of judicial independence is the rumination and the welfare of the judges and judicial officials. The salaries of judges, magistrates and judicial officials should be paid from the consolidated fund. The judges and judicial officials should be given better treatment in order not to make them look beggarly (Ali, 2017).

Furthermore, for the judiciary to be independent in the country, the three arms of government, which is the legislature, the executive and the judiciary should be separated from one another in discharging their constitutional responsibilities. There should be a clear constitutional provisions on the doctrine of separation of power between the judiciary and other arms of government. This will pave way for clear and effective administration of justice and good governance in Nigeria.

### **The Challenges of Judiciary in Nigeria**

Judiciary as an arm of government in Nigeria is confronted with a lot of challenges. The arm of government is almost overwhelmed as it makes her very difficult to live up to expectation in the discharge of its duties. First and foremost, the judiciary is always incapacitated when a state of emergency is being declared in any part of Nigeria. State of emergency becomes necessary when a situation requires urgent attention to restore sanity, peace and orderliness in particular department, area or section of the country. With emergency declared by the government in Nigeria, It places restriction on its citizens to restore peace in troubled areas, thereby deny them of their fundamental human rights and judiciary will not be able to do anything about it. State of emergency can lead to government acquiring wider powers such as indiscriminate arrest and detention without trial (Ali, 2017). For example when a state of emergency was declared in the North Eastern states of Adamawa, Borno, and Yobe states of Nigeria, the people of the affected states were denied their fundamental human rights such as right to freedom of expression, movement, personal liberty, fair hearing among others.

Second, the type and characteristic disposition of government in a country constitute a threat or challenge to the judiciary. The leadership of the government in power makes or mars the judiciary. If government exhibits totalitarian, dictatorial and arbitrary tendencies in running the affairs of the state, the judiciary will be undermined, sets aside the constitution of the land and govern with might not law. Civilian government with arbitrary and totalitarian tendencies rules without adhering to the fundamental laws of the state. For instance, President Olusegun Obasanjo was accused of committing a lot of constitutional blunders by withholding Lagos State funds despite court order to release the funds to Lagos State government.

Third, another challenge of the judiciary is lack of independence of the judiciary, a situation where the judiciary cannot exercise its power of discretion in the dispensation of

justice. The efficiency and effectiveness of the judiciary is not determined by the structures of the court but by its independence. The unconstitutional removal or suspension of the Chief Justice of Nigeria Justice Walter Onnoghen by President Muhammadu Buhari over allegation bordering on non declaration of assets is a threat to judicial independence, rule of law and constitutional democracy in Nigeria.

Fourth, further challenge to the judiciary in Nigeria is the proliferation of all kinds of administrative or special tribunals. In some instances special or administrative tribunals are constituted by the government to investigate and sometimes make some pronouncement that ordinarily would have been done by the court of law. These tribunals adopt special system of trial different from that of the ordinary courts process which the rule of law forbids and they do not allow appeal against their judgments (Ali, 2017).

Fifth, the judiciary in Nigeria is confronted with the challenge of finance or money due to lack of financial autonomy. This has made it difficult for judiciary to carry out its functions effectively as an arm of government. The judiciary in the country is financially under the control of the executive as the executive determines their allocation, salaries and allowances. This situation is contrary to the spirit of separation of powers, which is one of the guiding principles of constitutional democracy. Thus, lack of judicial autonomy has forced the judiciary to embark on industrial actions severally, a situation that has hampered quick dispensation of justice in Nigeria.

Sixth, corruption is another challenge of judiciary in Nigeria. Sorkaa (1999) observes that corruption exists when an individual illegally or illicitly puts personal interest above those of the people and the ideals he or she pledge to serve. It involves immoral actions or behaviours by public officials for pecuniary or status benefits. Allegations of corruption are leveled against law enforcement officials or agencies and the courts. Judicial corruption plays on the relative position of buyers in the social structure and the use of wealth to secure police attention, bails and court ruling favours. Barnes, (2011) provides that the manipulation of byelaws, constitution, court injunctions and the neglect of judicial procedures by the powerful is a fundamental form of judicial corruption. Ali (2017) argues that when wealth, status and position are used to determine judicial and court processes, rule of law is bound to be undermined.

## **Conclusion and Recommendations**

The paper concludes that judiciary generally is an arm of government that interprets and adjudicates the law and ensures effective administration of justice. Also Judiciary is the corner stone of any democracy as it serves as guardian to the constitution, the government and the citizens, as well as the protection of the fundamental human rights and freedoms enjoyed by the citizens. Nigerian judiciary plays great role since the country returned to democratic rule on the 29<sup>th</sup> May, 1999. It settles disputes between federal government and state government, inter and intra states disputes, inter and intra party disputes. However, the efficiency, viability and efficiency of the judiciary in Nigeria have been undermined by the unnecessary executive interference, corruption, the existence of administrative tribunals and lack of judicial autonomy. Therefore, the paper recommends for the following:

- i. A reform in the nation's judicial system should be carried out to ensure judicial autonomy and speedy dispensation of justice. This is because autonomous judiciary is a necessary ingredient for democratic governance, rule of law and constitutionalism.

- ii. The appointment of chief justices, judges or magistrates should be done by an independent body established by government and such body should be politically neutral in the discharge of its duties. The body will be mandated to show some levels of professionalism and competence in the appointments of judicial officers who would act independent of the executive and legislative arms of government.
- iii. The principle of separation of powers among the three arms of government, the legislature, executive, and judiciary should be strengthened in the nation's constitution to avoid clash of interests among the three arms and abuse of power.
- iv. The judiciary should create synergy with the anti corruption agencies like Independent Corrupt Practices and Other Related Crime Commission (ICPC), Economic and Financial Crime Commission (EFCC) and other intelligence agencies to help fight against corruption.
- v. The judiciary should interpret the nation's electoral laws without any fear or favour to make sure that all forms of electoral malpractices are eschewed, electoral offenders are prosecuted and true winners emerged. By so doing, the judiciary would have deepened the nation's democracy and democratization process.

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