A COMPARATIVE ANALYSIS OF THE INDEPENDENCE OF JUDICIARY IN NIGERIA AND MALAYSIA

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ABSTRACT

Independence of judiciary is a foundation and lubrication for the sustainability of the rule of law and good governance. Judiciary has been described as a watch dog in the society that adjudicates between individuals and checkmates the government excesses. As a detached umpire, it shall always be independent and autonomous. In Nigeria and Malaysia, attempts have been made by their Constitutions to enact some provisions restricting the executives from unnecessary interference with the judiciary. Thus, the Constitutions have laid out the procedure for the appointment of judges, which is a little -bit restrictive in nature. Similarly, same Constitutions have also provided for the financial autonomy and funding of judiciary, whereby it can be charged directly from the consolidated revenue fund. However, despite all these, there is still a need to add some restrictive measures on the appointment and removal of the judicial officers.

KEYWORDS: Judiciary, Independence, Nigeria, Malaysia

1. INTRODUCTION

Judiciary is the arm of Government which is saddled with the primary responsibility of adjudication or interpretation of law. And for it to perform such function effectively, it shall be allowed to operate as independent and distinct body. No democratically constituted government will succeed without ensuring the compliance with the rule of law. Thus, one of the principal building blocks of the rule of law is the independence of the judiciary. The term “independence” has been understood as a subjective phenomenon, due to the variations in practice of different system of governance around the globe. However, the term sometimes has been used interchangeably with the word “autonomy” which has been broadly explained as “non-interference”. Countries in the world differ in their judicial system as well as the nature and the limitations of their judiciary. Indeed, this should have nexus with the system of administration in a particular country. Nigeria and Malaysia are
two commonwealth countries with constitutions and democratically elected governments but have a slight difference in the administration of justice particularly the nature and operation of their judiciary. It is based on this, the paper examines and analyzes the nature and extent of the independence of the Nigerian and Malaysian judiciary with a view to identifying the areas of convergence and divergence. In doing so, a brief overview of the judicial systems of both countries will be made. Thereafter, discussion will equally be canvassed simultaneously on the nature and extent of the judicial independence in Nigeria and Malaysia. Finally, the paper ends with conclusion.

2. CONCEPTUALIZATION OF THE KEY TERMS:

A. Judiciary:
The term “judiciary” derived from the word judicial which refers to doing something with fairness and honesty.¹ According to the free Online Dictionary, “a judiciary is the judicial branch of Government or a system of courts of law for the administration of justice.”² Thus, the Black’s Law Dictionary assimilates the definition of judiciary from the meaning of court, in which, it defines judiciary to mean “an organ of government belonging to the judicial department whose function is the application of the laws to controversies brought before it and the public administration of justice.”³ In the light of some of the states’ constitution,⁴ judiciary is an organ of government which is exclusively committed with the exercise of judicial powers (powers to adjudicate); the guardianship of specially entrenched fundamental rights; interpretation of the constitution; and the power, where necessary, to strike down as unconstitutional, enactments of the legislature and or actions of the executive.⁵ To this end, judiciary is said to have been playing a multi functional role in a state, which may inter alia include: adjudication of disputes in order to resolve conflicts between parties. The judiciary while interpreting the existing laws also performs the role of lawmakers. This may sound surprising, but 'judge-made' laws are common to all systems of jurisprudence. Such occasions arise when the provisions of the existing laws may be ambiguous, or sometimes two or more laws may apply to a particular issue and when dispute arise in such cases, it will be the court which will settle the matter by holding which of the two laws should apply in a given circumstance.

In federal states like Nigeria and Malaysia, the judiciary serves as a guardian and shield to the Constitution. That is to say, in a federal state, conflicts in jurisdiction and authority frequently occurs, as there are several law making and executive authorities, each showing
its power to the Constitution. In the circumstances, the judiciary becomes an umpire in solving disputes in the society. In case if there is any conflict or constitutional dispute between arms of governments or laws enacted by the states and the Constitution, or between various laws, the judiciary is indeed empowered to declare the relevant legislation illegal. In the case of Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur, vi where the Supreme court quashed the decision concerning a development order made under section 22 of the Federal Territory (planning) Act 1982 (Act 267), granting planning permission for the building of two blocks of apartments on a piece of land in an exclusive residential area on the ground that no notice of the application for planning permission as required under rule 5 of the planning (Development) Rules of 1970. vii In the case of Ooi Kean Thong & Anor v Public Prosecutor, viii where the applicants were accused of behaving in a disorderly manner (hugging and kissing in Public) contrary to section 8(1) of the parks (Federal Territory) by-laws 1981. The applicants refused to pay the fine imposed on him and filled an action before the High court on a constitutional point and requested that the question be referred to Federal High court pursuant to section 84(1) of the court of Judicature Act 1964. The question was whether section 8(1) of the park (Federal Territory) by-law of 1981 is ultra vires section 108 of the local Government Act 1976, with the effect that the application has been deprived of their constitutional right of freedom, and whether the charge against them is contrary to Article 5(1) of the Federal constitution regarding liberty of person.ix Where the Federal court held that the general power to make by-laws addressed under section 102 was phrased broadly enough to allow city Hall to enact the impugned by-laws.x However, in the case of Re Lee Kian Soo, xi by-law No. 13 of the Architects Bye-laws 1941 was held to be bad because it was ultra vires to section 8 of the Ordinance. xii Similarly, in the case of Ghazali v P. P. xiii the appellant was charged with breach of a condition attached to his licence which prohibited his taxi from being driven by a person other than “Malay”.xiv This condition was imposed as a result of a general directive issued by the minister of transport under power conferred by certain provisions of the road Transport Ordinances, 1958. The court allowed the appeal on the ground that the board was acting ultra vires by imposing such a condition.xv In addition, the judiciary serves as a protector of the fundamental rights. The term fundamental human right has been defined by Justice Kayode Eso JSC (as he then was) in Ramson Kute v Attorney General of Federation xvii thus “It is a right which stands above the ordinary laws of the land and which in fact is antecedent to political society itself. It is a primary condition to a civilised existence-mind what has been
done by our constitutions since independence, is to have these rights enshrined in the constitution so that the rights could be “immutable” to the extent of the “non” immutability” of the constitution itself.xvii

However, it should be noted that these rights are spelt out with limitations. This is due to the fact that the right of a person ends where others right begin.xviii Thus, in the case of Ojiegbi & Others v. Ubali,xx an election was fixed for Saturday December, 27, 1969 and because it was Saturday, the people of seventh Days Adventist Church boycotted the election. They now went to court to challenge the fixing of election to Saturday because it violated their freedom to religion. The court decided against them on the ground that, nobody is forced to vote in all election; and that if the election was fixed for another date, the people in other religion could also sue of violation of their right.xx

B. Independence:

The word independence according to the online Oxford Dictionary is an ability to act for oneself without influence by others; or a state of being independent; or separation from something; or free standing.xx Similarily, according to the Blacks’s law Dictionary, Independence means "the state or condition of being free from dependence, subjection, or control. Thus, political independence is the attribute of a nation or state which is entirely autonomous, and not subject to the government, control, or dictation of any external power.xxii

Independence can also be considered in two perspectives, namely: from the independence of mind and independence of appearance. The former deals with the state of mind that permits the performance of an attest service without being affected by influences that compromise professional judgment. Whereas, the latter is the avoidance of facts and circumstances that would cause an informed third party, having knowledge of all relevant information to reasonably conclude that the integrity, objectivity, or professional scepticism of a firm or an attest engagement team member had been compromised.xxiii

C. Independence of judiciary

Independence of judiciary can be defined in different perspectives. Some definitions have been connected with any of the following items, namely: impartiality of the judiciary; or ability to pose confidence in people; free from interference by any external force or other arms of government. Hence, the independence of the judiciary means, free from other organ
of the state, especially executive and legislative body. xxiv It must be free from power pressure or other undue influence. xxv The independence of the judiciary shall be guaranteed by all states and shall be enshrined in the constitution or the laws of the countries. That is to say, it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. xxvi To this end, the Universal Declaration of Human Rights provides that: “Everyone is entitled in full, equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” xxvii Similarly, the International Covenant on Civil and Political Rights (ICCPR) provides:

“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” xxviii

According to the African Charter, the states party should guarantee the independence of judiciary. Thus, the Charter provides:

“State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.” xxix

In the Asian continent, the concept of independence of judiciary has also been guaranteed by the law. To this end, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWSIA region has enjoined its members to ensure and guaranty the independence of judiciary within their respective domain. Thus, it provides: “The Judiciary is an institution of the highest value in every society.” xxx Therefore, its independence shall be guaranteed. The Statement further states:

“The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable to the implementation of this right.” xxxi

To this effect, the Beijing Statement reiterates that the maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the rule of law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law. xxxii Therefore, by virtue of the Statement, independence of the judiciary reflects either or both of the following items:
The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and the judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.xxxiii

The concept of independence of judiciary has been categorized into two, which is, the institutional independence and individual independence. The former deals with the institutional autonomy of the judicial arm of government, whereas the latter focuses on the independence of an individual judge.xxxiv However, in a broader sense, independence of judiciary connotes some factors like impartiality, financial autonomy or security, appointments of judicial personnel, condition of tenure, etc.xxxv More importantly, according to International Commission of Jurists, the concept of independence of judiciary could be summarized as follows:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary;
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason;
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by the law;
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary in accordance with the law;
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals;
6. The principle of the independence of the judiciary entitles and requires the Judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected;
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.xxxvi

Furthermore, the concept of independence of judiciary has also been guaranteed by some religions in the world. Thus, in Islam the independence of judiciary has been considered as independence of an individual judge or a collective judiciary to decide impartially according to the injunctions of Islam. It has also been interpreted to mean, that the decision of a judge must not be influenced by any kind of pressure from any person and nothing or no one could deviate him from correct and impartial decision which is the basic objective of the administration of justice.xxxvii

Nowadays, most of the judiciaries in the world have been experiencing so much interference in the exercise of their duties as detached umpire. Such interference jeopardizes the independence nature of the judiciary and therefore causes a lot of injustices in the judicial system. To this end, Montesquieu stated that there shall be no liberty, if the judiciary is not separated from the legislative and the executive arms of government.xxxviii He further said, if it were joined with the legislative arm, the life and liberty of the subject would be exposed to arbitrary control; the judge would then be the legislator. If it were joined with the executive, the judge would behave with violence and oppression.xxxix The principle of separation of powers according to him (Montesquieu) is the foundation for a democratic state based on the rule of law. The judicial power dispenses justice in disputes between citizens and government and its agencies. Therefore, there is a need to vest this judicial power in a mechanism independent of the legislative and executive powers of the government with adequate guarantees to insulate it from political and other influence to secure its independence and impartiality.xl

3. **THE JUDICIAL SYSTEMS IN NIGERIA AND MALAYSIA**

A. **The Nigerian Judicial System**

The Nigerian judicial system is a kind of hybrid system which comprises the English system, Islamic system and customary practices. The history of the judiciary in Nigeria dates back to the period before the advent of the British colonial administration in territories (Southern Protectorates, Northern Protectorates and a colony of Lagos) which together now constitute Nigeria. Historical records have shown clearly that long before the 19th century, each of the Protectorates which together now constitute Nigeria had a peculiar system of
administration of justice. In other words, before the advent of colonial rule and the amalgamation of the Protectorates of Northern and Southern Nigeria to form what is now known as the Federal Republic of Nigeria, there was in existence the system of administration of justice in the colonies including the court systems. In the North, the practice was based on the Islamic system, whereas in the South, it was based on customary and received English systems.

Today in Nigeria the judicial system exhibits a kind of unitary approach, in the sense that there is a nexus between the courts established by the states and those established by the federal government. Similarly, there is also a linkage between the shari’ah/customary courts and the civil courts in the country. The Supreme Court is the apex court of the country; then followed by the Court of Appeal (in descending order); then High Courts, Shari’ah Court of Appeal, Customary Court of Appeal and National Industrial Court (all on the same footing); followed by the inferior courts (these include: Magistrates courts, Shari’ah courts, Area courts and customary courts, depending on individual state). All the judges/justices of the Nigerian courts are appointed by the President or Governor of a state depending on the nature of the court. If the court is a federal court, then the appointment shall be made by the President. Meanwhile if the court is an establishment of the state, the appointment shall be made by the governor of the state. Some of the appointments shall first of all be recommended by the National Judicial Council (NJC) and thereafter be confirmed by the Senate or the States Houses of Assembly as the case may be. Such appointments comprises that of the Chief Justice of Nigeria (CJN) and the Supreme Court justices; President of the Court of Appeal; Chief Judge of the Federal High Court; President of the National Industrial Court; Grand Kadi of the Shari’ah Courts of Appeal; and President of the Customary Courts of Appeal. The appointments of some judges or justices of the courts other than those mentioned earlier, after being recommended by the NJC, do not require confirmation by the Senate or the States Houses of Assembly as the case may be. Similarly, the appointments of the judges of the inferior courts shall be made in accordance with various enactments establishing the courts in various jurisdictions.

B. The Malaysian Judicial System
Malaysia is a Federation of thirteen states and Federal Territories. The Federal Constitution is the supreme law of the federation. The Constitution vested the judicial power in the hands of the judiciary. Just like in some of the commonwealth countries, the Malaysian judiciary
is a component of the civil courts which are based on the English system and Shari’ah courts which are based on Islamic system. The civil courts have a single structure judicial system consisting of two parts, the superior courts and subordinate courts. The latter consists of the Magistrate’s Courts and the Sessions Courts, while the former comprises the two High Courts in the country (i.e the High Court of Malaya and that of Sabah and Sarawak); the Court of Appeal; and the Federal Court. Similarly, the Shari’ah courts in descending order comprises the Shari’ah Appeal Courts, Shari’ah High Courts and the Shari’ah Subordinate Courts. All the Shari’ah Courts have been established by various states governments and Federal Territories in order to entertain matters of Islamic law or matters connected thereto. In fact, all matters of Islamic laws are exclusively vested in the Shari’ah Courts.

The appointment of the judicial personnel in Malaysian civil courts shall be made by Yang di Pertuan Agong acting on the advice of the Prime Minister after consulting the Conference of Rulers. Thus, the Constitution provides:

“The Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and (subject to Article 122C) the other judges of the Federal Court, of the Court of Appeal and of the High Courts shall be appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers.”

In the case of Shari’ah Courts, the appointment of the judges of the Shari’ah courts can be made by Yang di Pertuan Agong or Islamic Rulers of individual states as the case may be, on the advice of the Minister after consultation with the Majlis.

4. NATURE AND EXTENT OF THE JUDICIAL INDEPENDENCE IN NIGERIA AND MALAYSIA

The independence of the judiciary in Nigeria may encompass so many factors responsible for the maintenance of judicial integrity, transcends judicial ethics and professional conduct. It may also among other things encompass judicial independence, judicial accountability, judicial transparency, judicial ethics and the fair and effective enforcement of judgments.

The Constitution of Nigeria has guaranteed the right to fair trial of all citizens by an independent, impartial and competent tribunal constituted by law. Thus, by implication, there should be a need to have adequate resources and appropriate funding in order to ensure the independence of the judiciary in the country. To this end, the Constitution has provided for the establishment of Consolidated Revenue Fund from which the money shall be paid
directly to the judiciary. That is to say, funding of judiciary shall be made from the Consolidated Revenue Fund. Thus, the Constitution provides:

“Any amount standing to the credit of the judiciary in the consolidated Revenue Fund of the Federation shall be paid directly to the National Judicial Council for disbursement to the heads of the courts established by the Federation and the states under section 6 of the Constitution.”

The above provision has attempted to give the judiciary a financial autonomy in the country so that there would not be interference and control by the government over funding of the judiciary. However, there is still a reservation as to the absolute power of the executive in controlling the affairs and governance of the country including the overall control of public fund or source of the Consolidated Revenue Fund. In view of this, it has been said that the concept of judicial independence still remains deficient and incomplete. However, the most popular opinion is that judiciary can not be detached completely from the government since it has to rely on the government for staff, accommodation, salary, allowances, transport, stationery and other things.

Furthermore, another important thing relating to independence of judiciary in Nigeria is the issue of appointment of judges. Even though the Constitution has tried to reduce and balance the executive powers of appointing judges in the country, but still it has been seen as just a mirage, since the executives remain alpha and omega in controlling the country’s finance including the budget appropriations. In fact, other responsible bodies for the appointment of the judicial personnel are just considered as government agencies but not as an independent umpire. To this effect, one may conclude by saying that the independence of judiciary is nothing more than the possession of autonomy from external direction by any political and administrative superiors in the dispensation of individual cases; and being inwardly free from the influences of personal gain and partisan or popular bias. The independence of judiciary should connotes both defacto and dejure independence; structural independence as well as the financial independence, hence it shall be all encompassing. To this end, according to Justice Chukwudefwu Oputa, “a judge must enjoy complete independence if he is to render, satisfactory service to the cause of justice”.

The nature of independence of the judiciary in Malaysia is also similar to that of Nigeria, in which the Federal Constitution vested the judicial powers of the country in the courts. Similarly, the Constitution has vested the responsibility of appointing the judicial personnel in the hands of different personalities in order to regulate and check mate the excesses of

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those who are in power. Depending on the nature and jurisdiction of the court, the appointment of the judicial officers in Malaysia shall be made by the Islamic Rulers in the country. For instance, all the civil courts and those courts established under the Federal Territories Acts, the appointment shall be made by Yang di Pertuan Agong (prime Islamic Ruler) who shall act on the advice of the Prime minister, and after consulting the conference of Rulers.\textsuperscript{lxvii} This implies a check and balance in order to minimize the abuse of power. In addition, such officers cannot be removed from the office except in accordance with the provision of the Constitution.\textsuperscript{lxviii} That is to say, it shall be made if the Prime Minister or the Chief Justice after consulting the Prime Minister, represents to the Yang di-Pertuan Agong that he ought to be removed on the ground of any breach of the code of ethics; or inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office.\textsuperscript{lxix} Furthermore, in an attempt to ensure independence of the judiciary, the Federal Constitution has also provided for the remuneration of judges to be charged from the Consolidated Fund. To this end, the Constitution provides: “Parliament shall by law provide for the remuneration of the judges of the Federal Court, and the remuneration so provided shall be charged on the Consolidated Fund.”\textsuperscript{lxx}

5. CONCLUSION

The significance of the independence of judiciary and the role judiciary plays in sustaining the rule of law is enormous. The concept of the judicial autonomy has for long been championed by the international community under the auspices of the United Nation and various states constitutions. This has been done to ensure neutrality and impartiality in a judicial process. Both Nigeria and Malaysia have enacted some provisions in their constitutions for ensuring and promoting the concept of the independence of judiciary. Such provisions include the nature and procedure upon which judicial officers can be appointed and removed, as well as the mode of funding of the judiciary. These are very important factors in determining the independence of the judiciary. However, it has been noticed that despite all the provisions enacted to promote the independence of judiciary, the executive arm of government has still remained the alpha and omega in fine-tuning the affairs of the government including the absolute control over the finance and administration. It has also been understood that the Malaysian judicial system is relatively autonomous compared to Nigeria, due to the fact that the Shari’ah courts are completely spared from the civil courts. There has been also no link between them, as all matters related to Shari’ah ends at the states
Shari’ah Appeal Courts. This is not the case in the Nigerian judicial system, where an appeal from a state Shari’ah Court of Appeal will go to the Court of Appeal (a civil court) at the federal level. Finally, the paper revealed that in both Nigeria and Malaysia, judiciary operates relatively in a conducive atmosphere. However, still there is a need to add some restrictive measures on the appointment and removal of judges and other judicial officers in order to reduce the executive excesses to the bearable level.

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6 Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur (1992)2 MLJ 393
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8 Ooi Kean Thong & Anor v Public Prosecutor (2006) 3 MLJ 389
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12 Ibid
13 Ghazali v P. P. (1964) M.L.J 156
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31 Ibid, Article 2
32 Ibid, Article 4
36 International Commission of Jurists, International Principles of Independence and Accountability of Judges, Lawyers and Prosecutors, 82-83
37 Ata Ur Rehman, Mazlan Ibrahim, Ibrahim Abubakar, “The independence of Judiciary in Islam”, International Journal of Business and Social Science Vol. 4 No. 2; February 2013, p 68
xxxix Ibid
xl See Obilade, A. O the Nigerian legal system (Ibadan: Nigeria, Spectrum Books ltd, 2009), 17
xlv The Federal courts comprises the Supreme Court, the Court of Appeal, the Federal High Court, National Industrial Court, High Court of the FCT, Shari’ah Court of Appeal FCT and Customary Court of Appeal FCT
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xlvii See for instance Section 270 (2) (a) & (b), 271 (1-3) of the Constitution in respect of the appointment of the judges of the High Courts; section 275(2) of the Constitution in respect of the states’ Shari’ah courts of Appeal Kadis and section 281 of the Constitution in respect of the States’ Customary Courts of Appeal judges.
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v Article 122B (1) of the Federal Constitution
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viii Ibid, see also section 36 of the Constitution of the Federal Republic of Nigeria 1999 as amended
ix Section 80 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)
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