

# The Provisions of 1999 Constitution of Nigeria on Appointment, Discipline and Removal of Judicial Officers and Implications for an Effective and Independent Judiciary

JOSHUA, Samson Ayobami

Faculty of Law, Adekunle Ajasin University, Akungba-Akoko, Ondo State of Nigeria

E-mail: [ayobamijoshua0312@gmail.com](mailto:ayobamijoshua0312@gmail.com)

## ABSTRACT:-

The subject of an effective and independent judiciary has more often than not, engaged the interest of drafters of Nigerian Constitutions. The issues of appointment, discipline and removal of judicial officers were carefully enshrined, having regard to their sensitive nature, with a view to enthroning an independent and effective judiciary. However, of all the constitutions ever enacted in Nigeria, the 1999 Constitution, which is in use currently, stands out clearly with its salient provisions aimed at ensuring judicial effectiveness and independence. The introduction of the National Judicial Council (NJC), for instance, is a noteworthy innovation of the 1999 Constitution, particularly with reference to the appointment, discipline and removal of judicial officers. This paper examines how well these constitutional provisions enshrined in the 1999 have succeeded in producing the intended effectiveness and independence. The paper also highlights the limitations and challenges experienced so far in the course of applying those provisions. The paper draws conclusion and suggests practical recommendations for a manifestly independent and effective judiciary.

**KEYWORDS:** Judiciary, Judicial officers, judicial effectiveness, judicial independence

## INTRODUCTION

The Nigerian judiciary, a creation of the Constitution (Sections 6, 230 – 296 Constitution of the Federal Republic of Nigeria (CFRN) 1999) is the 3<sup>rd</sup> organ of government in the much espoused doctrine of the triumvirate of government. The judiciary, together with the executive and legislature hold the tripod of state affairs (Azinge and Rapu: 2002). However, of all the 3 organs of government, the judiciary is the most accessible to the citizenry; hence, Azinge and Rapu described it as the last bastion of hope for the common man. Section 6(1) and (2) of the CFRN 1999 vests the judicial powers of the Federation as well as the States in the courts.

The judicial powers vested in the courts.

- (a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law, (and)
- (b) shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person (section 6(6) CFRN, 1999).

From the foregoing, it is clear that the most significant task of the judiciary is the authoritative adjudication of controversies over the application of law in specific situations (Uwakwe: 2013). Uwakwe further posits that in the course of the performance of its duties and powers, the judiciary does the following:-

- (i) Determine which laws the legislature intended to apply to any case
- (ii) Determine whether a law is unconstitutional
- (iii) Determine how the legislature meant the law to apply to disputes
- (iv) Determine how laws should be interpreted to ensure uniform policies via the appeals process.

The judiciary covers the personal and social institutions through which the laws of the country are interpreted in the determination of the rights and obligations of the citizens, as that of the government.

Consequently, the judiciary has been described as a mighty fortress against oppressive and tyrannical laws, as it is constitutionally invested with the power to compel the legislature to act within its constitutional limits, by striking down as unconstitutional all laws that the legislature either has no power to enact, or else that conflict with the spirit or letter of the constitution. It also ensures that the State or government (that is, the executive) is subject to the laws (Oputa: 1993). Accordingly it has been rightly posited that.

*“the judiciary is the guardian of our constitution, the protector of our cherished governance under the rule of law, the guardian of our fundamental rights, the enforcer of all laws with or without which the stability of society can be threatened, the maintainer of public order and*

*public security, the guarantee against arbitrariness and generally the only insurance for a just and happy society(Ojukwu:2001)”*

Having asserted vehemently, in the foregoing, the primal role of the judiciary in ensuring that both the government and the governed act in accordance with the law, and the unique position it evidently occupies in any constitutional democracy, it is imperative to quickly add that to discharge the onerous responsibilities placed on it by the constitution, the judiciary must be independent for it to be effective.

An independent judiciary is required in order to ensure the rule of law, and effectively protect the fundamental rights and freedoms of the human person (Azinge, Rapu: 2002).

The Nigerian Constitution, 1999 expressly provides for “the independence, impartiality and integrity of courts (section 17(e) CFRN, 1999). It further provides that, in the determination of civil rights and obligations, a litigant is entitled to fair hearing by a court or tribunal established by law and constituted in such manner as to secure its independence and impartiality (section 36(1) CFRN, 1999).

### **INDEPENDENCE OF THE JUDICIARY UNDER THE 1999 CONSTITUTION**

The question whether the 1999 Constitution of the Federal Republic of Nigeria operates, both in principle and practice, to guarantee the independence of the judiciary, and whether it operates to exclude influence or control by other arms of government shall be examined under a tripartite rubric, namely: (i) appointment of judicial officers (ii) discipline of judicial officers and (iii) removal of judicial officers from office.

### **APPOINTMENT OF JUDICIAL OFFICERS**

The first significant characteristic of the current constitutional structure for the judiciary is that, though one of the chief duties of the judiciary is to defend the liberty of the individual against the powers of the State, the Judicial officers are appointed by the Chief Executives of the States, that is the President or the Governor of a State, as the case may be (Aguda: 2000).

As is remarked elsewhere in this paper, one of the most significant innovations of the 1999 constitution is the introduction of the National Judicial Council (NJC). The body plays a pivotal role in the appointment, discipline and removal from office of judicial officers.

Under the erstwhile 1979 constitution, judicial officers were appointed by the State Governor on the recommendation of the State Judicial Commission which consisted mainly of the nominees of the Governor, thus, making it possible for a Governor to influence the appointment of his loyalists as judges (Osipitan: 2004). Osipitan further avers that under the 1979 constitution, a Governor could remove from office or humiliate judges who delivered judgments considered unpalatable to the executive. The NJC was therefore supposedly introduced to safeguard the independence and integrity of the judiciary. The body was a product of the 1994/1995 Constitutional Conference convoked during the military regime of Late Gen Sanni Abacha. One of the chief reasons behind its adoption was, according to the report of the conference, “to enhance the independence of the judiciary and improve the administration of justice” (Osipitan: 2004). It was therefore with relative ease that the idea of NJC found its way into the 1999 constitution.

### **THE NJC AND THE APPOINTMENT OF JUDGES**

The NJC is established under section 153(1) of the Constitution, but its composition, powers and functions are outlined in part 1 of the Third Schedule to the Constitution. It consists of 23 members including the Chairman. The Chairman is the Chief Justice of Nigeria (CJN) while other members are either ex-officio or are appointed by him. The next most senior Justice of the Supreme Court is the Deputy Chairman of the Council (paragraph 20, part 1, 3<sup>rd</sup> schedule, CFRN, 1999). its other members are the President of the Court of Appeal, 5 retired Justices selected by the CJN from among retired Supreme Court or Court of Appeal Justices, the Chief Judge of the Federal High Court, 5 Chief Judges selected by the CJN from among the Chief Judges of the States and the Federal Capital Territory, one Grand Kadi and one President of a Customary Court of Appeal, both selected by the CJN, 5 legal practitioners with at least 15 years post-call experience (one of whom must be a Senior Advocate of Nigeria) appointed by the CJN on the recommendation of the National Executive Committee of the Nigerian Bar Association and 2 non legal practitioners appointed by the CJN.

For the purpose of appointment of judicial officers, the constitution also established Judicial Service Commission for each State (section 197 CFRN, 1999) and the Judicial Service Committee for the Federal Capital Territory (section 304 CFRN, 1999). The NJC must receive nominations from these bodies for its recommendations to the President or the State Governor, as the case may be, for the appointment of judicial officers.

## **CRITICISM OF THE PROCEDURE FOR APPOINTMENT OF JUDICIAL OFFICERS**

The first noteworthy argument against the procedure of appointment of judges is its promotion of a skewed federal arrangement. In other words, it violates the principle of federalism by centralizing the powers of appointment in a federal body that is the NJC. This view was shared, for example by Prof Jadesola Akande who argued that *“the establishment of this body (that is the NJC)... has violated the cardinal principle of Federalism, that is, autonomy of the federating units. The argument that the State Judicial Commissions have not been abolished and to this extent, the State through this body advise the NJC is not strong enough justification for taking a most important arm of the three arms of government and governance away from the States if there is true federalism (Akande: 1999).*

This author shares the above view of the late renowned constitutional scholar. It is a cardinal principle of federalism that in a federal state, the federating units should not be made subservient to the central government, by subjecting the States’ judicial organ to the whims and caprices of NJC, the Constitution has indirectly violated the true essence of federalism.

No other example reinforces this position than the current Rivers State’s Chief Judge Appointment crisis. Although, the facts of the crisis are already in the public domain, it is still necessary here to revisit the facts.

Upon the retirement on August 19, 2013, of the immediate past Rivers State’s Chief Judge, Justice Iche Ndu, the State Governor, Chibuike Rotimi Amaechi appointed Justice P.N.C Agumagu as the Acting Chief Judge of the State on August 20, 2013, this generated a furore, chiefly on the ground that the appointment of the Acting C.J was not in consonance with section 271(4) of the Constitution as the appointed CJ was not the most senior Judge as stipulated under the section referred to above. Subsequently, a court of competent jurisdiction invalidated the appointment. In the course of events, the NJC had recommended for appointment as CJ the presumed most senior Judge, Justice Daisy Okocha.

However, the Rivers State’s Governor upon the confirmation by the State’s House of Assembly went further to appoint, as substantive CJ, Justice PNC Agumagu, whose earlier appointment as Acting CJ had generated lots of controversy. Accordingly, the NJC reacted by declaring Justice Agumagu’s appointment illegal for non-compliance with section 271 of the constitution which stipulated that a State Governor must appoint a CJ on the recommendation of NJC. Furthermore, the NJC suspended the appointed CJ and also issued a query which may eventually lead to his dismissal (The Guardian: 2014). The action of the Rivers State Governor was however validated by a Federal High Court.

The above facts immediately present two questions: Can the present constitutional arrangement guarantee an effective and independent judiciary? Should the appointment of a Judge of a State High Court be left in the hands of the NJC, a federal body, given that Nigeria is a federal state?

It is respectfully submitted that, the best apparatus of State that is competent to recommend to the Governor of a State the appointment of a Judge of a State High Court is the State’s Judicial Service Commission, as a federating unit of a federal state is entitled to a measure of autonomy, the appointment of judges being one of them. Besides, the State Judicial Service Commission is better placed to have a good knowledge of each prospective judge in a state and how well he can contribute to building an effective judiciary.

Furthermore, the Constitutional provisions which empower the Executive (either the President of the Federation, or a State Governor, as the case may be) to appoint Judges as is currently done may undermine the independence of the judiciary.

## **DISCIPLINE AND REMOVAL OF JUDGES**

In addition to its powers and functions of making recommendations to the President and State Governors for judicial appointments, the NJC also exercise discipline over, and to recommend to the President and State governors as the case may be, the removal from office of Judges (Aguda: 2000).

It was in the exercise of these powers that recently the NJC sanctioned a number of Judges. On 26th February, 2014 the NJC recommended the compulsory retirement from office of Justice G. K Olotu of the Federal High Court and Justice U.A Inyang of High Court of Justice of the Federal Capital Territory, Abuja, respectively for gross misconduct. Besides, the Presiding Justice of the Court of Appeal, Kaduna, Justice Dalhatu Adamu; Justice A. A. Adeleye of the Ekiti State High Court; and Justice D. O. Amachina of the Anambra State High Court were also sanctioned. Prior to this, in 2013, the NJC sacked two Justices, namely: Justice Thomas Naron of the Plateau High Court and Justice Charles Archibong of the Federal High Court for sundry unethical

behaviours and misconduct (National Mirror: 2014). So far, the public has continued to applaud the disciplinary measures taken against the affected judges.

However, the pertinent question at this juncture is how do the constitutional provisions on powers to discipline and remove from office erring judges affect the effectiveness and independence of the judiciary?

The first factor that attracts immediate attention is that the involvement of the legislative and executive arms of government in the removal of the Chief Justice and heads of other Courts (section 292(1) CFRN, 1999) undermines judicial independence and ultimately its effectiveness. Where, for example, the executive controls and exercises influence on the legislative arm of government, it would not be easy to remove from office a Chief Judge who has been recommended for removal by the NJC. A good example is the River State's CJ appointment crisis which is still playing out.

On the other hand, where there is a disagreement between the executive and the legislative arm, a head of Court that has the wherewithal to lobby the legislature may prove difficult to be removed from office, regardless of the request by the executive for his removal.

Besides, the Constitution by its provisions impliedly allows a situation where the legislature could indirectly over-rule the decision of the NJC on the removal of an erring judge. This is not healthy for judicial effectiveness and independence (Osipitan: 2014).

Another critical area of constitutional inadequacies is the over-centralisation of powers in the Chief Justice of Nigeria (CJN) by making him responsible for the appointment of almost all the composition of NJC (paragraph 20, part 1, 3<sup>rd</sup> schedule CFRN, 1999). The inevitable question that arises is thus: when the CJN is accused of wrong doing (as he was in recent times, during the Hon. Justice Aloysius Katsina-Alu(CJN-rtd)/President of the Court of Appeal (PC) Hon. Justice Ayo Salami saga), is whether the impartiality of the NJC is guaranteed, given the high level of influence the CJN wields among the members of the CJN.

It is submitted with respect that for the law to be effective, it must be framed objectively. It is obvious that these few inadequacies, amongst others, contained in the 1999 constitution relating to the appointment, discipline and removal of judicial officers need to be revisited dispassionately in order to remove the judiciary from interference from other organs of government, and make it more effective in the discharge of its constitutional duties.

## CONCLUSION

This paper examined the relevant provisions of the 1999 constitution regarding the appointment, discipline and removal of judges, with a view to discovering inadequacies contained in the constitutional provisions.

More emphasis has been laid on the need to wean off the judiciary from interference by the other two arms of government, as the independence of the judiciary from these other organs constitute a veritable cornerstone of a true constitutional democracy. Evidently, a country gets the kind of judiciary it deserves. Henry Cecil wrote "justice is such a precious commodity that everything reasonable should be done to attain the highest standard"(Cecil:1970)

## RECOMMENDATIONS

To achieve the desired effectiveness and independence of the judiciary the following recommendations have to be put in place

- The Judiciary must enjoy institutional independence, in that, it must be independent of the other branches of government, namely, the Executive and Legislature;
- The Judiciary must be independent as to internal matters of judicial administration, including the assignment of cases to judges within the court to which they belong;
- The Judiciary must have independence in financial matters and have sufficient funds to perform their functions efficiently;
- The Judiciary must be independent as to decision-making: both the Government and other institutions have the duty to respect and observe the decisions handed down by the Judiciary;
- The Judiciary has both the right and the duty to ensure fair court proceedings and issue reasoned decisions
- Individual judges must be adequately remunerated;
- The promotion of individual judges must be based on objective factors;

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