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EBERECHI N. A. OKERE (MRS) , Utmost Good Faith in Insurance Contracts: Who Bears The Burden?	457
Dr. CHINENYEZE J. AMAECHI Exploring the Interrelationship between the Economic Policies of a State and Financial Stability: A Focus on Nigeria	467
TOBY, BOMA GEOFFREY The Law and Plagiarism, Pitfalls and Safeguards: <i>Are You Involved or Affected?</i>	485
V. NDUKAUBA C. NWAGBO Fuel Subsidy and Trade Dispute In Nigeria – Does Removal of Fuel Subsidy Constitute a Trade Dispute?	501
G.O. AKOLOKWU (MRS) An Examination of Unit Trusts and the Promotion of Investments in Nigeria	516
Dr. (MRS.) B. O. ALLOH Violence against Women in Nigeria	526
Dr. OKUBOR CECIL NWACHUKWU A Reflection of Rules of Engagement in Tax Audits and Investigations under the Nigeria Companies Income Tax Act, 2004.	536
Dr. E.A. UDU The Jurisprudential Examination of the Concept of lifting the Veil of Incorporation as a Balance of the Powers of the Organs of a Company	550
AKATUGBA, AKPOVIRI MICHAELA Reflection on Pollution and Pollution Control Mechanisms in Nigeria	564
EMMANUEL M. WOSU The Legal Effect of Revocation of Banking Licence and Winding-Up order on the Legal Personality of a Bank	577
KUDIRAT MAGAJI W. OWOLABI Constitutional Powers of the National Judicial Council	589
AHMAD ALIYU, PROF. M. L. AHMADU and MU'AZU ABDULLAHI SAULAWA Relevance of E-Commerce in Tax: The Nigerian Legal Perspective	598
CHUKWUMA A.J. CHINWO Federalism in Nigeria: Division of Taxing and Spending Powers between The Federal Government and Constituent States and the Challenge of Justice	608
Dr. (MRS.)B. O. ALLOH An Evaluation of the Limitation of Testator's Right to Dispose of Property By Will	628
ORIAIFO HELYNN An Appraisal of Child Abuse in Nigeria: Legal Frame Work for Child Protection	638
OLAGUNJU IBRAHIM RIDWAN O. Anti-Economic and Financial Crime Measures of the Nigerian Legal Regime and Islamic Law: A Comparative Analysis of Depth and Effectiveness	651
ODIGIE-EMMANUEL OMOYEMEN LUCIA A Comparative Analysis of Liability for Insider Trading and Market Abuse in the United Kingdom, United States and Nigeria	667

CONSTITUTIONAL POWERS OF THE NATIONAL JUDICIAL COUNCIL

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ABSTRACT

The Nigerian judiciary, a creation of the Constitution is the 3rd organ of government in the much espoused doctrine of the triumvirate of government. However, of all the three organs of government, the judiciary is the most accessible to the citizenry and has been described as the last bastion of hope for the common man. The subject of an effective and independent judiciary has more often than not, engaged the interest of drafters of Nigeria Constitutions. 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 to the judiciary.

INTRODUCTION

Although the coming into existence of the Nigerian Judiciary dates back to the earliest colonial era, the National Judicial Council as it is known today did not feature in the Nigerian Constitution until 1999. Before the 1999 Constitution, the appointment, discipline and removal of judicial officers from office were the responsibilities of the President, Prime Minister and Parliament under the 1963 Republican Constitution.¹ Under the 1979 Constitution, at the federal level/ the President and the National Assembly were vested with the responsibility to appoint, discipline and remove federal judicial officers, while at the state level, the powers to appoint, discipline and remove state judicial officers were vested in the Governors and State Houses of Assembly.²

It is manifestly clear from the relevant provisions of the 1963 and 1979 Constitutions referred to above that the powers of appointment, discipline and removal of judicial officers both at the federal and state levels were vested in the legislative and Executive arms of Government. The imperative for an independent Judiciary is the ultimate reason for the establishment of the National Judicial Council.

1. NATIONAL JUDICIAL COUNCIL UNDER THE 1999 CONSTITUTION

For the first time in the history of Constitution making in Nigeria, provisions were made for the establishment of the National Judicial Council in the 1999 Constitution as amended. As we have pointed out above, before the 1999 Constitution, the powers of

¹ See Sections 112, 113, 123 and 124 of 1963 Republican Constitution of Nigeria.

² Sections 255 and 256 of the 1979 Constitution.

appointment, discipline and removal of judicial officers of Superior courts of record were vested exclusively in the legislature and Executive acting together. Under this arrangement, the independence of the Judiciary could not be assured or guaranteed. As a departure from the above practice, the 1999 Constitution vested judicial powers in the Courts in the following manner;

"The judicial powers vested in accordance with the foregoing provisions of this section-

- (a) Shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law;*
- (b) Shall extend to all matters between persons, or between government 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."*³

The National Judicial Council as established under the 1999 Constitution was first constituted in the year 2000 under Hon. Justice Muhammadu Uwais, then Chief justice of Nigeria as the highest regulatory and supervisory body in the judiciary.

However, With the above Constitutional provisions vesting the exercise of judicial powers exclusively in the Superior Courts of record, the independence of the Judiciary was both enhanced and guaranteed. It was thus left to the Courts to assert their independence by translating the Constitutional provisions into reality. And to a large extent, the Courts have demonstrated their resolve to uphold their independence implicit in the interpretation of the Constitutional provisions in several cases. A few examples will suffice for illustration.

In **Lakanmi & Anor v. A.G(West) & ors**,⁴ the supreme court while declaring Decree No. 45 of 1968 as null and void held thus:

*"We must once again point out that those who took over the Government of this country in 1966 never for a moment intended to rule but by the Constitution. They did, in fact, recognize the separation of powers and never intended an intrusion on the judiciary. Section 3(1) of the Decree No.1 of 1966 does not envisage performance of legislative functions as a weapon for exercise of judicial powers, nor was it intended that the Federal Military Government should, in its power to enact Decrees, exceed the requirements or demands of the necessity of the case. In the present case we are satisfied that Decree No. 45 of 1968 did go beyond the necessity of the occasion."*⁵

Also in **MILITARY GOV. OF LAGOS STATE & ANOR V. OJUKWU & ANOR**,⁶ the legendary Kayode Eso famously stated that:

"Under the Constitution of the Federal Republic of Nigeria 1979, the executive, the legislature (while it lasts) and the judiciary are equal partners in the running of a successful government. The powers granted by the Constitution to the organs by section 4 (legislative

³ Section 6(6) of the 1999 Constitution of the federal Republic of Nigeria.

⁴ (1970) NSCC Vol.6 143

⁵ Ibid page 163

⁶ (1986) 2 SC 277

powers), section 5(executive powers) and section 6(judicial powers) are classified under an omnibus umbrella known under part 11 to the Constitution as, 'powers of the republic of Nigeria'. The organs wield those powers and one must never exit in sabotage of the other or else there is chaos. Indeed there will be no federal government.⁷

The excerpts from the above two cases cited illustrate the determination of our Courts to jealously guide and protect the independence of the judiciary as enshrined in the Constitution.

However, the powers conferred on the National Judicial Council under the 1999 Constitution offer more protection and safeguard not only for the independence of the judiciary but also for the appointment, discipline and welfare of judicial officers. The relevant provisions are as follows:

"There shall be established for the federation the following bodies, namely:

*National Judicial Council."*⁸

*"In exercising its power to make appointments or to exercise disciplinary control over persons, the code of conduct Bureau, the National Judicial Council, the Federal Civil service Commission, the Revenue Mobilization and Fiscal Commission, the Federal Character Commission, and the Independent National Electoral Commission, shall not be subject to the direction or control of any other authority or person."*⁹

2. COMPOSITION OF THE NATIONAL JUDICIAL COUNCIL

The National Judicial Council shall comprise of the following members :

- "(a) the Chief Justice of Nigeria who shall be the chairman;*
- (b) the next most senior Justice of the Supreme Court who shall be the Deputy chairman;*
- (c) the President of the Court of Appeal;*
- (d) five retired Justices selected by the chief Justice of Nigeria from the Supreme Court or Court of Appeal;*
- (e) the Chief Judge of the Federal High Court;*
- (f) five Chief Judges of states to be appointed by the Chief Justice of Nigeria from among the Chief Judges of the States and of the High Court of the Federal Territory, Abuja in rotation for two years;*
- (h) one President of the customary Court of Appeal to be appointed by the chief Justice of Nigeria from among the Presidents of the customary Courts of Appeal to serve in rotation for two years;*
- (i) five members of the Nigerian Bar association who have been qualified to practice for a period of not less than fifteen years at least one of whom shall be a Senior Advocate of Nigeria, appointed by the Chief Justice of Nigeria on the recommendation of the National Executive Committee of the Nigerian Bar Association to serve for two years and subject to re-appointment;*

⁷ Ibid page 296

⁸ Section 153(1)(i) 1999 Constitution.

⁹ Section 158(1) 1999 Constitution

Provided that the five members shall sit in the Council only for the purposes of considering the names of persons for appointment to superior courts of record; and

(j) Two persons not being legal practitioners, who in the opinion of the Chief Justice of Nigeria, are of unquestionable integrity."¹⁰

At a glance, the comprehensive provisions appear clear and unambiguous in their intendment and meaning. However, as will be seen presently, the exercise of these powers has not been free from controversies and indeed injustices particularly as of recent.

There has been no problem in the appointment of Justices and Judges of the Superior Courts by the President of Nigeria and the Governors of states respectively upon the recommendation by the National Judicial Council. Pursuant to the Constitutional requirements¹¹, appointments to the offices of the Chief Justice of Nigeria, Justice of the Supreme Court, President of the Court of Appeal and Chief Judges of the Federal High Court the High Court of the Federal Capital Territory, the Grand Kadi of Sharia Court of Appeal and the President of the Customary Court of Appeal of the Federal Capital Territory, Abuja also require the confirmation by the Senate after such appointments must have been made by the President upon the recommendation of the National Judicial Council. Similarly, appointments to the offices of the Chief Judge and Judges of the High Court of a state, Grand Kadi and Kadis of the Sharia Court of Appeal of a state, and President and Judges of the Customary Court of Appeal of a state, shall be made by the Governor of the state upon the recommendation of the National Judicial Council, and subject to the confirmation of the state House of Assembly.¹²

In the exercise of its powers of recommending any person for appointment as a judicial officer to the offices referred to above, the National Judicial Council is not bound by the list of persons submitted to it by either the Federal Judicial Service Commission or a State Judicial Service Commission. This is so because in the performance of its duties, the National Judicial Council is not subject to the direction or control of any other authority or person.¹³ In fact, there have been instances when the National Judicial Council refused to recommend for appointment names submitted to it by states Judicial Service Commission for good reason(s). Also recently, the Chief Justice of the Federation Honorable Justice Aloma Mariam Muktar(Rtd), acting on a petition from Imo state, refused to swear in a candidate already cleared by the Federal Judicial Service Commission, National Judicial Council and appointed by the President as a Federal High Court Judge on account of controversy over her state of origin. She was later sworn in after the resolution of her state of origin issue. It is thought that this type of controversy should never have arisen since the same chief Justice of the federation is both the Chairman of the National Judicial Council and the Federal Judicial Service Commission. On account of this episode, the possibility of the National Judicial Council refusing to

¹⁰ Paragraph 20, 3rd Schedule, Part 1.

¹¹ See sections 231, 238, 250, 261 and 266 of the 1999 Constitution

¹² See sections 271, 276 and 281 of the 1999 Constitution.

¹³ See section 158(1) of 1999 Constitution

recommend for appointment a candidate submitted to it by the Federal Judicial Service Commission cannot be ruled out.

a. The Defect in the Constitutional Provision For Composition of the Council

The National judicial Council as presently constituted is defective. These defects have denied the Council the required freedom and powers to act decisively. The Council is made up of twenty three members inclusive of the Chief Justice who is the chairman. Fourteen, out of the twenty three members are singularly appointed by the Chief Justice of Nigeria and is not subject to any control or consultation with any person or body in making the appointments.

Furthermore, the five members from the Bar are also appointed by the Chief Justice upon the recommendation of the Nigerian Bar Association. In effect, the Chief Justice appoints nineteen out of the twenty -three members of the Council.¹⁴

Under this undemocratic scenario in the appointment of members of the Council, it is not surprising that majority members perform their duties with predetermined mindset of the chief justice of Nigeria, their appointor.¹⁵ The apparent mischief inherent in such bizarre arrangement was brought to the fore in what is now known as '*Hon. Justice Isa Ayo Salami Saga*'.

The importance and the need for an independent National Judicial Council cannot be overemphasized if the Council must live up to expectation in the performance of its Constitutional duties. As the Ombudsman of the Judiciary with enormous responsibilities, its members must be free from the influence of the Chairman of the Council in the performance of their duties. Members of the Council must exhibit unqualified loyalty to the Nation and the Constitution. It is for the above reasons that changes in the appointment of members of the Council has become imperative and urgent too.

3. NATIONAL JUDICIAL COUNCIL AS BASTION OF INDEPENDENCE OF THE JUDICIARY

Under the 1999 Constitution as amended; the National Judicial Council is vested with enormous powers in the areas of appointment, discipline and removal of judicial officers. The relevant provisions of the Constitution are as follows:

Section 158 (1) & (2), paragraphs 20, 21 and 22 of the 3rd schedule of the 1999 Constitution. Section 158(1) provides that:

"In exercising its power to make appointments or to exercise disciplinary control over persons... National Judicial Council... shall not be subject to the direction or control of any other authority or person."

Paragraph 21 to the 3rd schedule provides that:

"The National Judicial Council shall have power to-
a. *Recommend to the President from among the list of persons submitted to by-*

¹⁴ See paragraph 20(i) of 3rd Schedule, 1999 Constitution.

¹⁵ T.J.O. Okpoko, SAN : " Reinvigorating National Judicial Council for a Stronger Judiciary in Nigeria" Paper presented at the two day seminar of the NBA Anti corruption Commission on 1/7/2013

- i. the federal Judicial Service Commission, persons for appointment to the offices of the Chief Justice of Nigeria, the Justices of the supreme Court, the President and Justices of the Court of appeal, the chief Judge and the Judges of the Federal High Court, and
- ii. The judicial service committee of the federal capital territory, Abuja, persons for appointment to the offices of the chief Judge and the judges of the High Court of the federal capital territory, Abuja, the Grand Kadi and Kadis of the Sharia Court of Appeal of the Federal capital territory, Abuja, and the President and Judges of the customary Court of Appeal of the federal capital territory, Abuja;
- b. Recommend to the President the removal from office of the Judicial officers specified in sub-paragraph (a) of this paragraph, and to exercise disciplinary control over such officers."

The above provisions vest exclusive powers and authority in the National Judicial Council on matters of appointment and discipline of judicial officers. The recent decision in the case of: **HON.JUSTICE RALIAT ELELU HABEEB (CHIEF JUDGE OF KWARA STATE) V. NATIONAL JUDICIAL COUNCIL & ORS**¹⁶ is unarguably supported by the above powers vested in the National Judicial Council particularly under section 158(1) and paragraph 21 of the third schedule of the Constitution. The apex Court's pronouncements on these constitutional provisions deserve reproduction here to wit:

"That it is quite plain from the provisions of paragraph 21 Sub-paragraphs (c) and (d) of part 1 of the Third Schedule to the Constitution of the federal republic of Nigeria 1999, that the National Judicial Council is the body that had been assigned the duty and responsibility of recommending to the Governors of the states of the federation suitable persons for appointments to the office of chief Judges of the states and judicial officers in the states. In addition to its role in the appointment of chief Judges of the state and other judicial officers, the same National Judicial Council is also empowered under Sub-paragraph (d) of paragraph 21 to recommend to the governors of the state the removal from office of the chief Judge of the state and other Judicial officers of the state and also to exercise disciplinary control over such Chief Judges of the states and other judicial officers of the state. Therefore, clearly from these provisions of the Constitution, the Governors of the states and House of Assembly of the states cannot exercise disciplinary control touching the removal of the Judges of states or other Judicial officers of the states.

That from Section 271(1) of the 1999 Constitution, it is also glaringly clear that the National Judicial Council has been given a role to play in the appointment of Chief Judges of the states where the section states :

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

That though the Governor of a state has been vested with the power to appoint the Chief Judge of his state, that power is not absolute as the

¹⁶ (2012) 2 SC(PT.1) 145

Governor has to share the power with the National Judicial Council in recommending suitable persons and the state House of Assembly in confirming the appointment. It is in the spirit of the Constitution in ensuring checks and balance between the three arms of Government that the role of the Governor in appointing and exercising disciplinary control over the Chief Judge of a state is subjected to the participation of the National Judicial Council and the house of assembly of the state so as to ensure transparency and observance of the rule of law".

The said provisions also mark out the National Judicial Council as the watchdog and guardian of the independence of the Judiciary as guaranteed by section 6 of the 1999 Constitution. In addition, the Courts have demonstrated as in **Hon. Justice Elelu-Habeab's case** above their resolve to protect the independence of the Judiciary as an arm of Government.¹⁷ It behooves the National Judicial Council to be vigilant, alert, assertive and proactive always in the discharge of its duties under paragraph 21 of the third schedule of the Constitution to ward off interference and incursion into the sphere and powers of the Judiciary by the other arms of government especially the Executive as has been demonstrated not only in the above case of Elelu-Habeab, but in the unfortunate case of Hon. Justice Isa Ayo Salami, the suspended President of the Court of Appeal in August 2011.

It is unarguable that suspension of a judicial officer falls within the disciplinary powers vested in the National Judicial Council within the meaning of **paragraph 21 of third schedule of the Constitution** reproduced above. It is also beyond argument that the abatement of suspension and recall from suspension of a suspended judicial officer are within the exclusive powers vested in the National Judicial Council. In the exercise of this disciplinary powers, subsection (1) of section 158 of the 1999 Constitution forbids any form of interference, control or direction by any person or authority.

If as it were, the unfortunate suspension of the President of the Court of Appeal is within the exclusive powers of the National Judicial Council it remains a mystery how and why the resolution passed by the National Judicial Council sometime in May 2012 for the recall and reinstatement of Hon. Justice Salami was, contrary to the Constitution referred to the President for approval, when indeed the President lacks the **vires** to do so.

The act of referring the resolution to recall the President of the Court of Appeal to the President by the National Judicial Council is tantamount to abdication of its Constitutional duty. The National Judicial Council acted in clear violation of the unambiguous provisions of section 158(1) and (2), paragraph 21(b) of Part 1, Third schedule, and doctrine of separation of powers as provided for under sections 4, 5 and 6 of the 1999 Constitution.

Unlike the situation which gave rise to the famous pronouncements by Hon. Justice Eso (of blessed memory) in the notorious case of **GOVERNOR OF LAGOS STATE V.OJUKWU (Supra)** the matter of suspension and recall of the President of the Court of

¹⁷ Ibid at pages 167-168

appeal presents a case of self inflicted sabotage on the part of the National Judicial Council by ceding its Constitutional powers to the President unsolicited through acts of commission.

It is human to make mistakes as the National Judicial Council has done in Hon. Justice Salami's case. But there is no justification whatsoever to have perpetuated the error by failing to recall the President of the Court of Appeal from suspension up to the time of his retirement even when it has realized and admitted its mistakes.¹⁸ See the written address of NJC's Counsel in **JITOBO AKANIKE & 10 ORS V. PRESIDENT OF FRN & 4 ORS**¹⁹

It is doubtful if the retire Justice Ayo Salami's matter would have gone the ugly way it did, if the then Chief Justice of the Federation and Chairman of the Council had not used his position as the appointor of the nineteen members of the Council to influence the controversial suspension of Hon. Justice Salami, allegedly by the votes of only five members of the Council out of the nine members allegedly present at the meeting who voted in support of the suspension. No doubt a very bad precedent has been set in Hon. Justice Salami's matter, the consequences for the Judiciary no one can foretell.

This brings to mind, the remarks by the Hon. Justice Eso, JSC (of blessed memory) at the heat of the Salami's Saga in 2012 when he asked rhetorically *"who judges the Judex when the Judex is on trial."*

4. CONCLUSION

The judiciary is the mighty fortress against tyrannous and oppressive laws. The importance of the judiciary cannot be over emphasized. Independence judiciary is the greatest asset of a free people. The judiciary by the nature of its functions and role is the citizen last line of defence in a free society that is the line separating constitutionalism from totalitarianism²⁰

Interestingly, the constitution itself as interpreted by the courts lied against itself in section 17(2)(e) of the 1999 Constitution. The section provides:

"The independence, impartiality and integrity of the courts of law and easy accessibility thereto shall be secured and maintained"

Impressive as this provision may appear to be, it is however placed under Chapter II of the 'Fundamental Objectives and Directive Principles of State Policy' whose provisions are non-justiciable by virtue of section 6(6) (c) of the Constitution. However, to revive the seemingly lost confidence in the judiciary and boost the independence of the judiciary, the following changes in the National Judicial Council are proffered:

1. Appointment as Chairman of the Council the immediate retired chief justice in place of a serving Chief Justice.

¹⁸ Section 291 of the 1999 constitution as amended and Section 4 of the Court of Appeal Act 2011.

¹⁹ Suit No. FHC/ABJ/CS/409/12 DATED 16TH Oct 2012 and filed 28th November 2012.

²⁰ Umaru E, 'The Role of the Judiciary in sustaining Democracy in Nigeria', in Oyeyepo, Gummi, Umezulike (eds), *Judicial Integrity, Independence and Reform: Essays in Honor of Hon. Justice M.L Uwais (GCON)*, Enugu: Snapp Press Ltd, 2006 at 176

2. All serving justices of the Supreme Court and the President of the Court of Appeal should be consulted by the Chairman before appointing non- statutory members of the Council.
3. The five members from the Nigerian Bar Association should participate in all activities of the Council.
4. A standing investigating body of none members of Council should be constituted to carry out investigations.
5. The Council should be pro active in taking action against erring judicial officers without waiting for petitions.