

**THE IMPROPRIETY OF THE APPOINTMENT AND REMOVAL OF JUDGES BY THE
EXECUTIVE**

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BENIN CITY**

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**BEING A LONG ESSAY WRITTEN AND SUBMITTED TO THE
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FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF
BACHELOR OF LAWS (LL.B) DEGREE OF THE UNIVERSITY OF
BENIN, BENIN CITY.**

DECEMBER, 2022

CERTIFICATION

I, **Eberechukwu C. UMUNNNAKWE**, with Matriculation Number **LAW1604763**, hereby certify that apart from the references made to other people's work as duly acknowledged herein, this entire project is the product of my personal research, and has neither in part nor in whole been presented for another degree elsewhere.

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APPROVAL

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DEDICATION

I dedicate this work first, to the Almighty God for the grace made available, to my loving parents and my siblings as well as my friends for their endless support, advice, and encouragement towards an excellent and effective academic journey.

ACKNOWLEDGEMENTS

All reverence and thanks goes to God who made this work possible, and for His all-sufficient grace ever made available to all men. May the light of His peace and blessings continually overflow the sphere of men, Amen.

My sincere appreciation goes to my supervisor, Barr. David Aigbekaen for ordering my steps by means of materials, texts, thorough supervision and directions from the inception of this work. I say, I am most obliged and grateful sir.

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I am heartily indebted to my brother and colleague, Egwu Lawrence and a host of other colleagues who helped out. I owe them a lot of thanks for their support and encouragement.

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TABLE OF ABBREVIATIONS AND ACRONYMS

AC	-	Appeal Cases
CFRN	-	Constitution of the Federal Republic of Nigeria
FWLR	-	Federal Weekly Law Reports
JAC	-	Judicial Appointments Commission
N.L.R.	-	Nigerian Law Reports
NCLR	-	Nigeria Commercial Law Reports
NJC	-	National Judicial Council

ABSTRACT

The Executive, Legislative, and Judicial arms of government comprise the three branches of government in Nigeria. As the third branch of the government, the judiciary's main responsibility is to dispense justice. In order to critically assess the judicial branch of government and the laws governing judicial officers in Nigeria, this research will concentrate on the process for the appointment and removal of judicial officers in Nigeria by the executive.

The Constitution of the Federal Republic of Nigeria 1999 (as amended) expressly grants executive authority to nominate, dismiss, and execute disciplinary measures against judicial officers. Judicial officers are those people who occupy any judicial post that is specifically mentioned in the Constitution. Unfortunately, there have been some disagreements on which branch of government has the authority to name, suspend, and remove judicial officers from office. According to the provisions of section 292 (1) (a) (ii) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), there have been attempts by some Governors to remove senior judicial officers, in particular the Chief Judge, based on a resolution passed by a two-thirds majority of the relevant House of Assembly.

Having looked into the appointment of judges in other jurisdictions, it has been noted that while the appointment of judges is done by the Executive, which is similar to the position we have under our laws in Nigeria, it is my opinion that the NJC should recommend, followed by the approval of the National Assembly before the president can appoint them. It is also my opinion that the members of the NJC should not be appointed by the executive so as to ensure an impartial nomination of persons that should constitute the Bench.

However, the removal of judicial officers should not be subject to the wills of the executive but rather, the judiciary should have among its members an independent body tasked with investigation, discipline and dismissal of judicial officers as it relates to misconduct. This is because the retirement age of judicial officers is constitutionally provided for, hence, the decline and removal of judges on the grounds of misconduct should be done by the judiciary to ensure the independence of the judiciary.

CHAPTER ONE

INTRODUCTION

1.1 Introduction

Judges are an integral part of the judiciary which makes the third arm of Government without which justice cannot be made readily available to the common man in the society. It is saddled with the function of interpretation of laws and adjudication in cases of disputes between parties as well acting as a means of check and balance on the other two arms of government so they do not act beyond the scope of their powers. The Court of law is seen as the last resort of the common man and it is for that fact that the appointment and subsequent removal of judges is one which importance cannot be over emphasized. The essence of this work is targeted at the appointment and removal of judges. It is understandable that in our current legal system and administration of justice, most things are mostly political and it is this political nature of the appointment of judges that makes their removal one which is worthy of having a look into. A judge who was appointed by a political class would be subject to the whims and caprices of that political class to avoid offending the appointer. This work is targeted at exploring loopholes in our legal system particularly the constitution to see to the realities that exist in the improper removal of judges. We will be dividing this work into several part so have an overview of the precolonial and history of the Judiciary, the current position with regards to our legal system, as well as the position of other jurisdictions with regards to this topic. This is done to get a comparative analysis between our legal system and that of other jurisdictions and we hope that this work is one which helps whoever comes across it understand the procedures for the appointment and removal of judges and the improprieties attached to it.

One of the aims of this work is to point the legal loopholes in the appointment and removal of judges as well as explore the improper removal of judges and the biases that surrounds the appointment of judges. A situation where judges are appointees of the executive is one which from their assumption of office impedes on their independence as they're left subject to the wills of their appointers who also have the power to remove them if and when need be. This work seeks to explore the improprieties involved as well as provide possible solutions that'll ensure that the judiciary enjoys it's independence free from interference from the other arms of government.

This paper will attempt to answer the following questions: Are there improprieties that exist with the appointment and removal of judges in Nigeria, What are the limitations and liabilities that judges have as right which affect their removal, What are the proper modes of appointing and removing judges and are there loopholes in the law regulating them, What are the recommendation that can help Nigerian judges protect their tenure from inappropriate removal.

In times of disagreements between or among citizens of the state, the judiciary is one of the institutions or branches of government whose main duty is to ascertain the truth and to interpret and apply the law and the constitution. From state to state, there are differences in how the judiciary interacts with the other arms of government. In particular, the law courts are thought of as being protected by the judiciary, which is a legal institution.

It is for this purpose that a thorough look has to be given to the appointment and removal of judges as the decisions of judges in the course of dispensing justice and doing their duty should be one that is free from interference from the other arms of government. Looking at our legal system as it relates to the appointment and removal of judges can we truly say that they enjoy

such freedom as their appointment and removal is at the behest of the executive in the person of the president who appoint Judges.

To prevent an impediment to judges performing their functions and duties which includes the interpretation of the law under which the judiciary gives meaning to the wordings of statutes to the effect that even an ignorant person would understand the law of the land and be able to obey the law of the state. The function of punishing offenders is one which the judiciary cannot properly administer if they're afraid of biting the fingers of their appointees and by so doing, a limit to the judiciary carrying out this function has been limited. Another function which can easily be impeded upon is the function of acting as a means of check and balance on the other two arms of government and preventing them from acting ultra vires. The question here is would judges be able to declare a law passed by the executive and legislative arm act ultra vires there by declaring such law as unconstitutional and void by virtue of being against or in contrast with the provisions of the constitution if the judges do not have guaranteed job security.

An insight into this as well as the laws regulating the appointment and removal of judges, an outlook into the history of the judiciary and it's formation as well as the laws regulating the appointment and removal of judges in other jurisdictions to help better our understanding on which is the best approach to take. Is the process of appointments and removal of judges under our legal system the proper one or are there lessons to be learnt from looking at the laws of other jurisdictions relating to the topic at hand.

It is our hope that this paper is one which will clear and questions regarding the appointment and removal of judges and not one which would only be seen as a source material in answering test or examination questions.

This study will be limited to discussing the impropriety of the appointment and removal of judges by the executive as well as the limitations, liabilities and obligations attendant to the exercise of such right which accrues to judges for their protection and independence. However, we appreciate that fact that this work is not solely pinned on the appointment and removal of judges under the Nigerian legal system. Thus, we will restrict this discussion to Nigerian Constitution as well as the legislation of other jurisdictions on the topic and will as well limit ourselves to the jurisdiction already selected for discourse.

Removal of judges has been a very common issue in modern day politics and judicial system. This work however is not intended towards exploring whether judges should be removed or not, rather our major focus is directed and targeted towards exploring the impropriety that is associated with the removal of judges and possibly find possible solutions that can help relegate such practices because it is infectious to our justice system.

Taking this for what it is, a situation where judges are scared of carrying out their duties because of some external biases that surrounds the process through which they get into office, it will be in doubt to ascertain the truism in justice dispensation that is if it even exist. So, in this work, we will see the extent to which this impropriety affects justice system in our time.

Also of importance and worthy of consideration is the fact that we will try to inquire into the jurisprudence behind the appointment and removal of judges and see if there is any justification for such on the part of the executive. We will inquire into the intricacies of such arrangements and for certainty sake, the case of *AG Federation v. AG Bendel State*¹ would be used to appreciate the powers and functions of the judiciary.

1.1 Functions of the Judiciary

¹ [1983] 3 NCLR 1 at 40

The functions carried out by the judiciary are as stated under the provision of Section 6(6) of the constitution ² These functions include the interpretation of laws. The judiciary's job is to ensure that the laws passed by the legislature are correctly understood. It will be feasible for the uneducated to comprehend the law and be able to abide by state law thanks to judicial interpretation of the law. Another function of the judiciary is punishment of offenders. Punishing individuals who break the law is one of the judiciary's main duties. If someone violates the law, they will be charged in court and, if proven guilty, will receive the appropriate punishment. The judiciary is also tasked with the enforcement of judicial process. The judiciary uses a variety of techniques to uphold its own rules and procedures. For instance, if someone violates an injunction, they could be instantly found in contempt of court and given a penalty without a jury trial. The judiciary are also tasked with judicial review. The ability to judge whether a law is constitutional is the most amazing function a judiciary may have. The judiciary makes sure that the legislative and the administration don't go beyond their authority. A statute passed by the administration and legislature may be deemed "ultra-vires" by the judiciary if it violates the state constitution. Therefore stating that such law or laws are unconstitutional, void, and without force or effect. The judiciary is also tasked with the maintenance of peace and order. The preservation of law and order, the safeguarding of life, and proper security in the state are additional crucial duties of the judiciary. This is accomplished by the application of justice, the rule of law, and measures to stop harm from being done to society.

² The Constitution of the Federal Republic of Nigeria 1999 (as amended)
< <https://www.walyben.com/judiciary-functions-structure-of-nigeria-judiciary/>> Accessed 21st December 2022

CHAPTER TWO

LITERATURE REVIEW/ HISTORICAL DEVELOPMENT OF NIGERIA JUDICIARY

In every constitution, whether ancient, colonial, or modern, the judiciary has been acknowledged as an active member of the executive branch. In Nigeria, the judiciary is the third branch of the executive.³

The different court systems found across all of Nigeria's regions make up the country's judiciary. The "Bar" and the "Bench" are the two main institutions that make up Nigeria's judicial system. They collaborate and work together in unison. The Nigerian judiciary is organized to meet the nation's federal system. This essay's goal is to give a theoretical overview of the function and development of the Nigerian judicial system throughout history. In doing so, the article will emphasize the significance and role of the judiciary in Nigeria.

2.1 Literature Review

Separation of powers is the constitutional doctrine of division of government powers and functions into the three arms of government, that is, the Legislature, the Executive and the Judiciary. The doctrine of separation of powers as known today comes from the works of Baron de Montesquieu, which is an expansion of the works of John Locke.⁴ According to Montesquieu:

Political liberty is to be found only when there is no abuse of power. Experience Shows that every man invested with power will abuse it by carrying as far as it Will go... To prevent this abuse, it is necessary from the nature of things that one Power should be a check on another... When the legislature. Executive and Judicial powers are united in the same person or body... there can be no Liberty... Again, there is no liberty it the judicial power is not separate from the Legislative and executive... There would be an

³ The Constitution of the Federal Republic of Nigeria 1999(as amended).

⁴ John Locke is the originator of the doctrine of separation of powers. Baron de Montesquieu, *Espirit Des Lois* xi ("The Spirit of the Law") 3 b in Malemi (n i) 83 84; *Lakan/ni v A.G. Western State* (19/1) 1 UllR 201; *liyanage v The Queen* (1967) AC 2S9 PC. *Governor of Kuduna State v House of Assembly Kaduna State* (1981) 7 NCLK 444 HC.

end to everything if the same Person or body. Whether to the nobles or of the people, were to exercise all three Powers.

From the foregoing, it can be shown that concentrating power in one person or entity will undoubtedly result in tyranny because absolute power corrupts absolutely. For power to be used safely, there must be a defined restriction on it. Power without restraint is equivalent to a car without brakes.

Nwabueze made the following statement regarding the problem of the separation of powers: “Concentrating all of the government’s powers in the hands of one person is the exact definition of a dictatorship, and unlimited authority is by its very nature arbitrary, capricious, and tyrannical.”

Counte de Montesquieu in 1748 propounded that “if in a Magistracy two organs of government were so embedded there is bound to be tyranny.”

Olisa Agbakoba SAN while writing on the need for judicial reform under the Nigeria legal system stated:

The rationale for justice administration and the rule of law is the Desirability and indeed necessity of resolving conflicts within, and not Outside, the legal and judicial system and framework. In the absence of A properly functioning legal and judicial system, force rather than law Would rule and anarchy would result. But the much-sought-after. Functional judicial system requires an enabling environment made up of Certain features. First and foremost, all persons and authorities no Matter their status must be subject to the law and equal. Before it. Second, the judiciary must be truly independent and totally free from Executive or other interference. The courts must have capacity and Freedom to apply principles of justice without let or hindrance. Access to The courts to air genuine grievances and seek redress should be open to All without unnecessary constraints. (In the case of the poor, adequate “Arrangements must be made for legal aid.)

Hon Justice A.F.D. Kuti⁵ stated “The doctrine of Separation of Powers had been with us for a long time but it is its application by some African Nation that is giving us sleepless nights. Invariably all our Constitutions from the dawn of time speak of Separation of Powers. As if each of organ of the three arms of government can be tucked into pigeon holes one labeled "Sacred" the other labelled "Profane". That of course can not be a token of good government. Or that each organ should assume a stream running on parallel lines with others in which waters do not mix; each going its separate ways. Nothing could be further from the truth than Separation of power and the Independence of the Judiciary.

It can be reduced from his statement that what is more important and practical has been demonstrated by historical experience. To put it mildly, what took place under a military dictatorship or stratocracy is not helpful. Additionally, it is a different case entirely. That game reflects the realities of power well and is one of necessity.

Aare Afe Babalola, OFR, CON, SAN in his paper stated:⁶

“...In.. the sixties when I began the practice of Law, appointment to the Bench was strictly on merit. At that time, appointments were by invitation, after, at least, 10 years in practice. Sitting Judges were always quick to identify legal practitioners who possessed sterling qualities suitable for appointment to the Bench.”

Aside from having a strong understanding of the law, several of the judges chosen at the time stood out for having honesty and honor. But the 1963 Constitution, which was in effect at the time, made it conceivable. According to this Constitution, the President appoints, acting on the advice or proposal of the Prime Minister, the Justices of the Supreme Court as well as a Judge of the High Court of Lagos. Although this process appears straightforward, it was still successful

⁵ A. F. D Kuti “Constitutionalism in Nigeria”

⁶ A. A. Babalola “The Appointment of Judges in Nigeria” available at: <<https://www.vanguardngr.com/2021/06/appointment-promotion-and-remuneration-of-judges-in-nigeria-the-need-for-a-change/>> Accessed 21st December, 2022.

and well known for producing the judges who were most competent and well-suited for the Bench.

This approach prevented the appointment of judges from being influenced by political affiliation, nepotism, or favoritism, which has undoubtedly come to characterize the system in place now. Without a doubt, the 1999 Constitution's provision on the appointment of judges and justices strongly promotes the politicization of this revered office.

The process has become more politicized and simpler to manipulate to suit the whims and caprices of the political class because a Justice of the Supreme Court must now be appointed by the President on the recommendation of the National Judicial Council, subject to the confirmation of such appointment by the Senate.

With the recent democratization of Nigerian politics, respect for the law is becoming more and more important in all spheres of Nigerian society, but especially in the military. Sensitizing military personnel to their constitutional obligations under a democratic government is more important than ever. The military's progressive intrusion into governance not only resulted in the military's poorest performance but also in egregious violations of human rights. This precluded the establishment of a solid democratic political culture in the nation.

The Commission is aware of the urgent need to continuously educate the military on human rights standards and norms as well as on the role they are expected to play in a democratic environment.

Although judges have constitutional independence, in reality they are subject to strong societal and political constraints when making decisions. There is a belief that government organizations, litigants (or their legal representatives and proxies), and politicians still try to sway judges to secure favorable outcomes in legal matters, despite the fact that the evidence is anecdotal and the

number of published cases is small. For instance, Justice Abass of the Oyo State Judiciary excused himself in July 2003 from continuing to hear the murder trial against a well-known politician and senator. Since issuing a remand order for the accused Senator, Justice Abass stated that he has come under “untold pressure and threats from numerous places asking me to arrive at a particular verdict even before I listen the accused.” He added that he was further concerned because “unexpected quarters,” whom he did not identify, were putting undue pressure on him. Given their crucial roles and substantial powers, political influence in the appointment of State’s Chief Judges is of even more importance.

Ameh SAN maintains that independence of the judiciary is an arm of Government in which the courts in modern era should have freedom to adjudicate without Any person interfering. He excludes financial independence because the judiciary relies on Fund appropriated annually by the legislature.

A legal scholar stated that a country is governed through law hence each Government should respect rights of every individual through the rule of law. Besides, Effective instruments should be provided to enforce the law. He adds that judges need Proper guidance of the rule of law which they are to use to insulate and enforce fearlessly And without any encroachment by party politics or any government that intervenes. The Contrary, according to him must be resisted. Lawyers globally protect the independence Attached to their profession and uphold protection of rights of the people embedded in the Rule of law while ensuring that application of fair hearing is sacrosanct because every Individual is entitled to it. With reference to declaration of Delhi of January 1959 which Affirmed Act of Athens, the author adds educational and cultural framework to civil and Political right.

Another scholar maintains that separation of powers is an attribute of the rule of Law. When adjudicating, law should be separated from government, politics and religion. This will give room for the purpose of law to be achieved as regulator of powers of the Government.

It is clear that while there is a constitutional provision for the independence of the judiciary, that however is not the case in our legal system as there has been classes of interference with the independence of the judiciary there by impeded on the judges right to try cases without fear for lack of job security.

2.2 Nigeria Judiciary Before 1914

In any of the territories that today together make up Nigeria, the history of the judiciary extends back to the time before the British arrived. History clearly demonstrates that each of the areas that together make up Nigeria had a system of judicial administration even before the 19th century. In other words, the pre-colonial institutions included courts before the onset of colonial authority and the union of the protectorates of northern and southern Nigeria to become what we now know as Nigeria.

The region that is today known as Nigeria saw a shift in sovereignty in the year 1900. The societies have up till now been ruled by themselves and their traditions. However, colonialism established the British in Nigeria as the sole power with full control over the nation. The obvious outcome is that English laws were brought to Nigeria and implemented there while the British also engaged in creating laws for Nigeria's efficient government. According to Lord Dunedin, "in all circumstances (of change of sovereignty), the conclusion is the same." The outcome is catastrophic. Only those rights that the new sovereign has, through his agents, acknowledged as rights that he had under the rule, are those that any citizen may enforce in municipal courts formed by the new sovereign.

However, the development of the modern Nigerian judiciary—which, of course, adopts the British model—was primarily a colonial effort to address the flaw in the old system of adjudication. The colonial power established courts after King Dosemu ceded Lagos to the British crown in 1861; some were formed by statutory provisions and others through administrative procedures.

The British developed statutes that allowed for the establishment of numerous courts in the southern region of Nigeria between 1843 and 1913 using a combination of the Foreign Jurisdiction Act of 1843 and 1893. More specifically, in 1854, the British established the first courts known as “Courts of Equity” in southern Nigeria, mainly in Brass, Benin, Okirika, and Opobo.

Courts established by the Royal Niger Company ran concurrently with the courts of equity and consular courts. The company had the authority to rule and carry out justice in its sphere of operations under a Royal Charter given in 1886 until the Charter was revoked in 1899. However, the foundation of these British courts did not exclude the operation of local courts, provided that the customs upheld by the latter were not incompatible with fairness, equality, and morality. The Supreme Court of Lagos and a Supreme Court for the protectorate of Southern Nigeria were founded in 1863 and 1900, respectively. The latter exercised the same powers and competencies granted to Her Majesty’s High Court of Justice in England, whilst the former had both civil and criminal jurisdiction.

2.3 Nigeria Judiciary From 1914 – 1960

The first colonial Governor-General of the amalgamated province, Sir Frederick Lord Lugard, harmonized the legislation of the two colonies after the merger of the Southern and Northern protectorates. The first Chief Justice of Nigeria, Sir Edwin Speed, was imported from Britain, Nigeria’s colonial ruler, effectively creating a single Supreme, Provincial, and Native court

system.⁷ So, Nigeria had five colonial Chief Justices of the Federation before Independence on October 1, 1960: They were: Edwin Speed, Ralph Combe, Donald Kingdom, Sir John Verity, and Stafford Foster-Sutton.

The Northern and Southern Protectorates of Nigeria were combined in 1914, ending this system. Provincial courts were eliminated. High courts with Chief Judges were established in its place. Judges and judges' assistants. Magistrate courts were situated below these High Courts. Native courts continued to be at the very bottom of the judicial hierarchy. The High Court was subject to appellate jurisdiction by the Supreme Courts. Supreme Court appeals went to the Supreme Court between 1934 and 1954. West African Court of Appeal (WACA). The WACA sent appeals to The Privy Council. However, since 1954, appeals from the Supreme Court of The Privy Council was then immediately contacted by Nigeria. This is due to the establishment of the Federal Supreme Court in 1954, which is presided over by the Chief Justice of the Federation. A Chief Judge served as the head of the High Court at the regional level. While appeals from Customary or Native Courts Grade A went to the Regional High Courts, appeals from each of the Regional High Courts went to the Federal Supreme Courts.

Native law and customs were to be applied by the Native courts the English colonial overlords established, and the laws were to be codified. In 1945, the native Authorities received this power. Once created and accepted, these regulations have legal authority.

Although the British colonialists permitted the use of customary law, the law had to first pass a number of tests before it could be put into practice. It was these tests that essentially altered the structure and content of customary law. Tests include; Disrespect for equity, morality, and natural justice conflict with regional regulations.

⁷ <<https://infomediang.com/chief-justice-of-nigeria-1914-till-date/>> Accessed 21st December 2022

Each of Nigeria's three regions—the Western, Northern, and Eastern—was given the authority to form its own court with the entry into effect of the Federal Constitution in 1954. The Regional Constitutions established the High Courts, Magistrate Courts, Customary Courts, and Native Courts for each region, as appropriate. Appeals from the High Court of a Region to the Supreme Court are permitted.

The Privy Council still remained the highest court in the land until 1963. When the constitution of that year was enacted and Nigeria became a Republic.

2.4 Nigeria Judiciary From 1960 Till Date

Nigeria split into a federation of 12 states in 1967, each with an own state judiciary. A sophisticated judiciary needed to be established in order to handle the issues of an emerging quasi-federal state as a result of the socio-political and economic advancement of the nation. As a result, the Western State formed a Regional Court of Appeal in the same year with Court of Appeal Edict No. 15 of 1969.⁸

Additionally, the Federal Revenue Court was founded by the Federal Revenue Court Decree No. 13 of 1973 in order to address the requirement for disputes impacting the revenue of the Federal Government to be decided quickly.⁹ Regarding a specific specification matter, the court had national jurisdiction.

The Supreme Court, the Court of Appeal, the Federal High Court, the High Court of the Federal Capital Territory, Abuja, the Customary Court of Appeal, the Sharia Court of Appeal of the States, the State High Courts, and the Customary Court of Appeal of States are the superior courts recognized as constituting the judiciary under the 2011 Amended Constitution of the Federal

⁸ The implication of the later state of affairs is that in the Western State, the Supreme Court of the Federation ceased to have direct jurisdiction to hear and determine appeals in any matter from the High Court of the Western State (including appeals in any proceeding pending in any court in the western state) except in any case in which the Notice of Appeal to the Supreme Court had been filed by 1/6/1967.

⁹ Now known as "The Federal High Court by virtue of section 230(2) of the 1979 Constitution of the Federal Republic of Nigeria

Republic of Nigeria.¹⁰ In accordance with the authority granted to them, these courts have the responsibility of administering justice. The Federal Courts are responsible for exercising the nation's judicial authority by deciding legal issues that arise between people, corporations, and governments when they interact with one another domestically or abroad. In this regard, the following discussion of the roles, authority, and duties of the numerous courts making up the Federal Judicature is presented:¹¹

2.4.1 The Supreme Court

This is Nigeria's highest court. On all appeal matters, it is the final stop. In regards to any appeals, it is the final resort. Its members are the Chief Justice of the Federation and however many Supreme Court Justices may be required by an Act of the National Assembly.

2.4.2 The Court of Appeal

The President and the Justices of the Court of Appeal, of whom at least three must be skilled in Islamic law and three in customary law, make up the Court of Appeal. The Federal High Court, the High Court of the Federal Capital Territory, the State High Court, the Sharia Court of Appeal, the Customary Court of Appeal, the National Industrial Court, a court-martial, or other tribunals specified by an Act of the National Assembly are among the courts from which it has the sole jurisdiction to hear and decide appeals.

2.4.3 The Constitutional Court

The Constitutional Court is composed of its President and a minimum of 20 Justices, as determined by law. Among other responsibilities, it has initial jurisdiction over issues involving the application or interpretation of the Constitution.

2.4.4 The Federal High Court

¹⁰ It should be noted that the establishment of a Sharia Court of Appeal or Customary Court of Appeal by a state is optional.

¹¹ <<https://www.fhc-ng.com/judiciary.htm>> Accessed 21st December 2022

This Court has sole jurisdiction over civil disputes and issues involving the federation's taxation, customs, and excise charges, banking, copyright, admiralty, citizenship, etc.

2.4.5 The High Court of the Federal Capital Territory

It consists of a Judge and any other Judges as the legislation may specify. It essentially shares an infinite range of jurisdiction with the State High Courts.

Other Courts of the Federal Capital Territory

The Customary Court of Appeal and the Sharia Court of Appeal both have jurisdiction in the Federal Capital Territory. While other judges and the President of the Customary Court preside over the Customary Court of Appeal, the Grand Khadi and Khadis preside over the Sharia Court. The Sharia Court of Appeal has appellate and supervising jurisdiction over cases involving Islamic law in civil court. The Customary Court of Appeal has appellate and supervising jurisdiction over cases involving civil application of customary law. County Courts

2.4.6 The High Court of a State

Every State has a High Court that is governed by a Chief Judge and supported by however many other Judges the State's laws may specify. Any civil or criminal case brought under any state statute may be heard by the High Court, which has unrestricted jurisdiction to do so.

2.4.7 Other Courts of a State

For any State that need any of them, there is a Court of Appeal for Sharia and a Court of Appeal for Custom. Each State in the Federation has an Election Appeal Tribunal in addition to the aforementioned Election Tribunals.

In Nigeria, the administration of justice is significantly influenced by the judiciary. The court has complete state judicial authority under Section 6 of the 1999 Constitution. Therefore, the judiciary's participation in the administration of justice is crucial and unavoidable. The foundation of the rule of law is an independent, effective, and adequately resourced judiciary.

There is no way to overstate the importance of the court in Nigeria. First, the judiciary is designated as the final arbiter of constitutional interpretation, and it is charged with the delicate task of determining the breadth and depth of the authority granted to each branch of government, the constitutional restrictions on it

This was the position of the Court in the case of *Attorney General of Bendel State v. Attorney General of The Federation*,¹² where Supreme Court ruled that Nigeria's courts, as the country's guardians of the constitution, must always stand to declare any alleged violations of the law null and void. As defenders of the constitution, Nigerian courts have also ruled When a constitutional question is brought up in a proceeding, they first make sure to closely evaluate the situation at hand to avoid treating it carelessly, anything else would be considered a contempt for the constitution.

The judiciary ensures that in the exercise of their power, the other organs of government do not abuse it and apply such powers in compliance with the Rule of Law. In *The Military Governor of Lagos State v. Ojukwu*¹³ the court in giving it's judgement stated :

The Nigerian constitution is founded on the rule of Law, the primary meaning of which is that Everything must be done according to law.

The judiciary is also tasked with supervisory powers on the actions of the other two organs of government and also to declare them null and void if and when necessary. This view-point was

¹² (1983) 3 NCLR 1 at 40

¹³ (1986) 1 NWLR (Pt. 18) 621.

emphasized by Fatai-Williams CJN (as he then was) in *Attorney-General of Bendel State v. Attorney-General of the Federation and 22. Ors.*¹⁴ in the following words:

...courts of law in Nigeria have the power and Indeed the duty to see to it that there is no infraction of the exercise of legislative power, whether Substantive or procedural as laid in the relevant Provisions of the constitution.

Fourthly, the judiciary renders judgment in a variety of issues, including those between states, between the state and its citizens, and between its citizens and businesses or corporate entities. The country's laws are interpreted by the judiciary. For instance in *Attorney-General of Lagos State v. Attorney General of the Federation and 35 ors.*¹⁵ the Supreme Court held that section 2(2) of the 1999 constitution of Nigeria re-enacts the doctrine of Federalism. According to the Supreme Court, in that case, the section not only ensures the Autonomy of each government in the sense of being able to exercise its own Will in the conduct of its affairs within the constitution, free from direction by another unit of government; but also shows that none of the government is subordinate to the other.

Overall, the judiciary must play a crucial part in the delivery of justice. If defeated candidates or other aggrieved parties contest the election results, the judiciary makes the final decision. The judiciary rules on the legality or otherwise of certain behaviors that litigants bring before it. Additionally, the judiciary actively participates in the investigation of allegations of corruption against the President, Vice President, Governor, and Deputy Governors as well as in the impeachment proceedings against them. It is also important to emphasize the judiciary's ability to enact laws through the interpretation of the law and the stare decisis principle.

¹⁴ (1981) All N.L.R. 85

¹⁵ (2003) FWLR (Pt. 168) 909

CHAPTER THREE

APPOINTMENT AND REMOVAL OF JUDICIAL OFFICERS

The majority of the time, those who drafted Nigerian constitutions were interested in the issue of an efficient and independent judiciary. In order to entrench an independent and effective judiciary, the issues of nomination, discipline, and removal of judicial officers were carefully established, taking into account their delicate character. The extant Constitution¹⁶, which is still in existence today, stands out among all Nigerian constitutions because of its key provisions that support judicial independence and effectiveness. One notable feature of the Constitution of the Federal Republic of Nigeria 1999 (as amended) is the National Judicial Council (NJC), which is particularly relevant to the nomination, discipline, and removal of judicial authorities.

The judiciary in Nigeria was established by the Constitution¹⁷ (Sections 6, 230–296 of the Federal Republic of Nigeria (CFRN) 1999), making it the third branch of government according to the widely accepted triumvirate of government theory. The judicial branch of government sits atop the executive, legislative, and judicial branches¹⁸. The court is the most easily accessible of the three branches of government, making it, in Azinge and Rapu's words, the last hope for the average person. The judicial authority of the Federation and the States is granted to the courts under Section 6(1) and (2) of the CFRN 1999. The courts were given judicial authority.

- (a) shall apply to all inherent powers and sanctions of a court of law, notwithstanding anything to the contrary in this Constitution

According to section 6(6) of the CFRN (1999), "(b) shall extend to all matters between persons, or between any government or authority and any person in Nigeria, and to all actions and

¹⁶ Constitution of the Federal Republic of Nigeria, 1999 (as Amended).

¹⁷ Constitution of the Federal Republic of Nigeria, 1999 (as amended).

¹⁸ Azinge. E and Rapu. J. F. (2012) Road map to judicial transformation: Through the Lens of Retired and serving Jurists of the Supreme Court. In Azinge and Idornigie (eds), *The Supreme Court of Nigeria, (1990-2012)* Lagos: NIALS Press p1

procedures therewith, for the decision of any question as to the civil rights and obligations of such person."

From the aforementioned, it is evident that the judiciary's most important duty is the authoritative resolution of disputes over the application of the law in particular circumstances.¹⁹ Uwakwe, a professor also claims that the judiciary carries out the following actions when carrying out its obligations and exercising its authority: Determine which laws the legislature intended to apply in any given situation (i) whether a law is constitutional (ii), and how the legislature intended the law to apply to disputes (iii) Using the appeals procedure, decide how legislation should be read to guarantee uniform policy.

The judiciary includes the private and public institutions that determine how the country's laws are to be interpreted in order to determine the rights and obligations of its citizens as well as those of the government.

As a result, the judiciary has been compared to a powerful fortress against oppressive and tyrannical laws because it has the legal authority to force the legislature to act within the bounds of the constitution by declaring unconstitutional any laws that the legislature either lacks the authority to enact or that violate the letter or spirit of the constitution. Additionally, it guarantees that the State or government (i.e., the executive) is governed by the law²⁰. It has therefore been correctly suggested that.

According to Ojukwu²¹, "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

¹⁹ Uwakwe. F. C (2013). The Suspension of the former President of the Court of Appeal; Justice Ayo Isa Salami: Threat to Independence of the Judiciary, *Confluence Journal of Jurisprudence & International Law*, Kogi State University, Vol 6 No 2, p163

²⁰ Hon Justice Chukwudifu Oputa (1993). The Independence of the Judiciary in a Democratic Society: Its Positive and Negative Aspects In Elias F. O and Jegede M. L (eds) *Nigerian Essays in Jurisprudence* MIJ Pub Ltd, Lagos p228

²¹ Ojukwu E. (quoting Hon Justice Augustine Nnamani) Reflection on the Judiciary's Position and Role under Separating Powers in a Democracy and 1999 Constitution. *The Nigerian Bar Journal* Vol 1 No 1, 2001 p3

of all laws without the enforcement of 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."

After vehemently asserting the judiciary's fundamental role in ensuring that the government and the governed follow the law and the distinct position it obviates in any constitutional democracy in the preceding paragraph, it is urgent to add that the judiciary must be independent for it to be effective in carrying out the onerous duties imposed on it by the constitution.

For the rule of law to be upheld and the basic liberties and rights of individuals to be successfully protected, an independent judiciary is necessary²².

Section 17(e) of the Nigerian Constitution of 1999 specifically mentions "the independence, impartiality, and integrity of courts." Additionally, it states that a plaintiff has a right to a fair hearing before a court or tribunal that has been legally founded and is set up to ensure its independence and impartiality (section 36(1) CFRN, 1999). It is therefore in view of the above that this work will be calibrated into two headings in this chapter, first, we will explore the process of appointing judges and secondly, we will look at the impropriety that exists around such appointment process. But before that, we are not oblivious of the fact that some persons who are legally inclined might want to inquire into the nature of the Constitution of the Federal Republic of Nigeria 1999 (as amended) with respect to independence of the judiciary.

The Federal Republic of Nigeria's 1999 Constitution's ability to guarantee the independence of the judiciary in both theory and practice, as well as its ability to prevent influence or control by other branches of the government, will be scrutinized under three headings: (i) appointment of judicial officers; (ii) judicial officer discipline; and (iii) removal of judicial officers from office.

²² Azinge. E and Rapu. J. F. (2012) Road map to judicial transformation: Through the Lens of Retired and serving Jurists of the Supreme Court. In Azinge and Idornigie (eds), The Supreme Court of Nigeria, (1990-2012) Lagos: NIALS Press
p1

3.1 The Nigerian position on the Appointment of Judges under the Nigerian Constitution 1999 as amended.

Although one of the judiciary's primary responsibilities is to protect an individual's freedom from the authority of the State, the first notable feature of the current constitutional structure for the judiciary is that judicial officers are appointed by the Chief Executives of the States, i.e., the President or the Governor of a State, as the case may be.²³ One of the most important changes to the 1999 constitution is the creation of the National Judicial Council, which is noted elsewhere in this essay (NJC). The body is crucial in the appointment, reprimanding, and removal of judicial officers from their positions.

A Governor might influence the appointment of his loyalists as judges under the previous 1979 constitution, which required that judicial officers be selected by the State Governor on the advice of the State Judicial Commission, which was predominately made up of the Governor's candidates²⁴. Osipitan adduces that, according to the constitution of 1979, a Governor might depose judges who handed down rulings that he or she found objectionable or humiliate them. In order to protect the judiciary's independence and integrity, the NJC was allegedly established. The 1994/1995 Constitutional Conference, which was called during the late General Sanni Abacha's military rule, produced the body. According to the conference report, "to promote the independence of the court and improve the administration of justice" was one of the main reasons for its acceptance.²⁵ Therefore, it was quite simple for the NJC concept to enter the 1999 Constitution. The statutory provision for the appointment of judicial officers in Nigeria is

²³ Aguda. O. (2000) Understanding the Nigerian Constitution of 1999 MIJ Publ Ltd, Lagos p97

²⁴ Osipitan. T. (2004) Safeguarding Judicial Independence under the 1999 Constitution In Akinseye-George Y and Gbadamosi G. (eds) The Pursuit of Justice & Development: Essays in Honour of Hon Justice M. O. Onalaja Diamond Publ Ltd, Abuja p17

²⁵ Osipitan. T. (2004) Safeguarding Judicial Independence under the 1999 Constitution In Akinseye-George Y and Gbadamosi G. (eds) The Pursuit of Justice & Development: Essays in Honour of Hon Justice M. O. Onalaja Diamond Publ Ltd, Abuja p17

contained under the provisions of Sections 231,238,250,256,271 and 281²⁶ which is to the effect that judges are appointed by the president on the recommendation of the NJC. In the case of *Hon. Justice S. O. Ajileye vs TheHon. Justice Emmanuel O. Fakayode*²⁷ the issue before the court was relating to the appointment of judges and the governing considerations involved in the appointment of judges.

It becomes unclear what this section is trying to accomplish upon closer inspection. Or, to put it another way, the Constitution makes it obvious that the court is at the mercy of a “cooperative or uncooperative Executive and Legislature” in its attempt to establish the notion of separation of powers. Except with the approval of the President, no one is appointed to the Supreme Court. The unsightly sight of heads of courts pleading with the President of the Federation or a state governor for money for overhead and general welfare draws attention to how the judiciary, which should be independent from the executive branch of government, appears to be in subservience to it. Because of this circumstance, there is a master-servant dynamic that completely undermines the judiciary’s independence. Even though it may seem unfortunate, the relationship between the judiciary and the executive in Nigeria today is what it is.

Sometime in October 2019, the NJC (the highest decision making organ of the Judiciary) recommended their Lordships Adamu Jauro (North-East), Emmanuel Agim (South-South), C. Oseji (South-South) and Helen M. Ogunwumiju (South-West) for appointment to the Supreme Court. Eight months later, the President refused to consider this recommendation, nor forward their names to the Senate for confirmation. Were the President to have done so, this would have made the number of Justices of the Supreme Court, sixteen. This is still below the twenty-two

²⁶ The Constitution of the Federal Republic of Nigeria 1999 (as amended)

²⁷ (1998) 4 NWLR (pt 545) 184

constitutionally approved number.²⁸ A revision of Sections 231(1) and (2) of the Constitution is therefore necessary in light of the excessive delays in Supreme Court nominations and their incalculable impact on Nigeria's judicial system. According to the clause, such appointments must be approved by the Senate after being recommended by the National Judicial Council (NJC) and made by the President.

3.1.1 The National Judicial Council (NJC) And Appointment of Judges

The NJC is founded by section 153(1) of the Constitution, although the Third Schedule, part 1, of the Constitution specifies its members, powers, and duties. There are 23 members total, including the Chairman. Others are either ex-officio or chosen by the Chairman, who is the Chief Justice of Nigeria (CJN). The Deputy Chairman of the Council is the next-oldest Supreme Court Justice (paragraph 20, part 1, 3rd schedule, CFRN, 1999). The Chief Judge of the Federal High Court, 5 Chief Judges chosen 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 chosen by the CJN, and 5 legal professionals with at least 15 years of post-call experience are its other members.

The constitution also established the Judicial Service Committee for the Federal Capital Territory and the Judicial Service Commission for each State for the purpose of appointing judicial officers²⁹. For its recommendations to the President or the State Governor, as the case may be, for the appointment of judicial officers, the NJC must obtain nominations from these authorities.

Rule 4(4)³⁰ states the qualifications considered for the appointment of judges to include:

In considering the candidates, Judicial Service Commission/Committee shall take into account the fact that

²⁸ T. Aderemi, Appointment of Justice of the Supreme Court: A Review of the President's Powers

²⁹ Section 197 and 304 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

³⁰ National Judicial Council Procedural Rules

Judicial Officers hold high office of State and occupy an office carrying enormous powers and authority. Accordingly, the National Judicial Council shall-

- (i) regard the following qualities as essential requirements for the selection of suitable candidates for the judicial office in any of the Superior Courts of Record in Nigeria;

In all cases:

- a) Good character and reputation, diligence and hard work, honesty, integrity and sound knowledge of law and consistent adherence to professional ethics;

As may be applicable:

- b) Active successful practice at the Bar, including satisfactory presentation of cases in Court as a Legal Practitioner either in private practice or as a Legal Officer in any Public Service;
- c) Satisfactory and consistent display of sound and mature judgment in the office as a Chief Registrar or Chief Magistrate;
- d) Credible record of teaching law, legal research in a reputable University and publication of legal works, and In addition to any or all of the above:

e) In the case of appointment of a candidate to the office of Kadi of a Sharia Court of Appeal, knowledge of Arabic language and grammar.

(ii) Consider that:

Candidate for the high office of Judicial Officers of the Superior Courts of Record including Court of Appeal and Supreme Court of Nigeria, shall be disqualified and shall not be recommended for appointment if found to have been involved in:-

- a. canvassing or lobbying for the appointment directly or indirectly in any form and/or through any person or persons, such as but not limited to, politicians, traditional rulers, public officers or other Judicial Officers;
- b. bad behaviour, whether in or out of Court;
- c. activity suggesting impecuniosities and/or display of lifestyle that indicates that the candidate has been living above his/her means;
- d. influence peddling;
- e. any act of dishonesty or corruption or corrupt practice either, on behalf of himself or of any other Judicial Officer or professional colleague;
- f. rendering dishonest or questionable legal opinion or advice or suppression of truth and suggestion of falsehood in any legal matter in dealing with colleagues, clients, or the Courts of Law;
- g. deliberate improper or wrong completion of NJC Form 'A' with intent to deceive or mislead;
- h. submission of false credentials and or deceitful or fraudulent curriculum vitae;

- i. or is shown to have nor very limited exposure to practice at the Bar and conduct of cases in the Superior Courts of Record.
5. The decision of the Judicial Service Commission/Committee in respect of nomination and advice for appointment of a Judicial Officer shall be authenticated by the Minutes of the Commission/Committee Meeting, duly adopted and signed by the Chairman and Secretary of the Commission/Committee.

3.1.2 Criticism of the Procedure for Appointment of Judicial Officers

The first notable criticism of the judicial nomination process is that it encourages an unbalanced federal structure. In other words, by concentrating the appointment authority in the NJC, a federal body, it breaches the federalism principle. Prof. Jadesola Akande, for instance, expressed a similar opinion when he claimed that "the creation of this body (the NJC) has breached the core premise of Federalism, namely, the autonomy of the federating units"³¹. If there is true federalism, the claim that the State Judicial Commissions have not been abolished and that the State still advises the NJC through this body is insufficient reason for taking away the States' most significant power from one of the three branches of government³².

The aforementioned opinion of the late eminent constitutional scholar is shared by this author. The Constitution has unintentionally violated the true spirit of federalism by subjecting the States' judicial branch to the whims and caprices of NJC. It is a fundamental principle of federalism that the federating units in a federal state should not be made subservient to the central government.

There is no better illustration for this argument than the present controversy over the chief judge appointment in Rivers State. Even though the crisis's details are previously known to the general public, a review is nevertheless necessary in this case. After Justice Iche Ndu, the most recent Chief Judge of Rivers State, retired on August 19, 2013, State Governor Chibuike Rotimi Amaechi

³¹ Akande. J. O. (1999) Introduction to the Constitution of the Federal Republic of Nigeria, MIJ Publ Lagos p271

³² Akande. J. O. (1999) Introduction to the Constitution of the Federal Republic of Nigeria, MIJ Publ Lagos p271

appointed Justice P.N.C. Agumagu as the Acting Chief Judge of the State on August 20, 2013. This appointment caused controversy, primarily because the CJ who was appointed was not the most senior Judge as required by section 271(4) of the Constitution. The appointment was subsequently declared unlawful by a court with appropriate jurisdiction. In the course of events, Justice Daisy Okocha, the presumptive most senior Judge, was recommended for nomination as CJ by the NJC. However, following the House of Assembly's ratification, the Governor of Rivers State went one step further and named Justice PNC Agumagu as substantive CJ, despite the fact that his prior appointment as Acting CJ had caused much controversy. In response, the NJC ruled that Justice Agumagu's appointment was unlawful because it did not follow the requirements of section 271 of the constitution, which required that a State Governor select a CJ on the suggestion of the NJC. The NJC also asked a question of the appointed CJ that could ultimately result in his dismissal and suspended him (The Guardian: 2014). But a Federal High Court upheld the governor of Rivers State's move.

The facts listed here instantly prompt two inquiries: Can an efficient and independent judiciary be guaranteed under the current constitutional framework? Given that Nigeria is a federal state, should the NJC, a federal organization, be allowed to nominate judges to State High Courts?

Since a federating unit of a federal state is entitled to a certain amount of autonomy, the appointment of judges being one of them, it is respectfully submitted that the State's Judicial Service Commission is the best State apparatus that is competent to recommend to the Governor of a State the appointment of a Judge of a State High Court. Additionally, the State Judicial Service Commission is better positioned to have a thorough understanding of each potential judge in a state and how well he can contribute to establishing an efficient court.

Additionally, the Constitution's provisions allowing the Executive (either the President of the Federation or a State Governor, depending on the circumstance) to name judges as they do at the moment could jeopardize the judiciary's independence.

3.2 Discipline and Removal of Judges

The NJC has the authority to discipline judges and to recommend their removal from office to the President and State Governors, as appropriate. This is in addition to its authority to recommend judicial appointments to the President and State Governors³³ (Aguda: 2000).

Recently, the NJC penalized several judges in the course of using these powers. For gross misconduct, the NJC recommended on February 26, 2014, that Justices G. K. Olotu of the Federal High Court and U. A. Inyang of the High Court of Justice of the Federal Capital Territory, Abuja, both be forced out of their positions. In addition, sanctions were imposed on Justice Dalhatu Adamu, the presiding justice of the Court of Appeal in Kaduna, Justice A. A. Adeleye, the chief justice of the Ekiti State High Court, and Justice D. O. Amachina, the chief justice of the Anambra State High Court. Prior to this, the NJC dismissed two justices in 2013 for a variety of unethical actions and misconduct, specifically Justice Thomas Naron of the Plateau High Court and Justice Charles Archibong of the Federal High Court. The public has thus far continued to support the sanctions imposed on the offending judges.

The crucial query at this point, though, is how the constitutional provisions on the ability to censure and remove from office disqualified judges impact the efficiency and independence of the judiciary.

The involvement of the legislative and executive branches of government in the removal of the Chief Justice and heads of other Courts (section 292(1) CFRN, 1999) undermines judicial

³³ Aguda. O. (2000) Understanding the Nigerian Constitution of 1999 MIJ Publ Ltd, Lagos p97

independence and, ultimately, its efficacy. This is the first factor that immediately draws attention. It would be difficult to remove a Chief Judge from office who has been recommended for removal by the NJC where, for instance, the administration controls and exerts influence over the legislative arm of government. The ongoing CJ appointment dilemma in the River State is a prime example.

On the other hand, a head of Court who has the resources to lobby the legislature may be difficult to remove from office, regardless of the request by the executive for his dismissal, when there is a disagreement between the administration and the legislative branch.

In addition, the Constitution's provisions implicitly permit a circumstance in which the legislature could subtly overturn the NJC's decision to dismiss an ineffective judge. This is detrimental to the efficiency and independence of the judiciary³⁴.

The judiciaries in Ekiti and Plateau states were also rocked by the political unrest that resulted in the contentious impeachments of Governors Joshua Dariye of Plateau State and Ayodele Fayose of Ekiti State in 2006. Following the dismissal of the then-incumbent, Justice Yau Dakwang (retd.), who was sixth in the hierarchy of high court justices in Plateau State, was unexpectedly sworn in by the governor as acting chief judge.

In retaliation, the NJC expelled Dakwang for consenting to his oath of office without recommending his appointment to the governors were also rocked by the political unrest that resulted in the contentious impeachments of Governors Joshua Dariye of Plateau State and Ayodele Fayose of Ekiti State in 2006. Following the dismissal of the then-incumbent, Justice Yau Dakwang (retd.), who was sixth in the hierarchy of high court justices in Plateau State, was unexpectedly sworn in by the governor as acting chief judge. In retaliation, the NJC expelled

³⁴ Osipitan. T. (2004) Safeguarding Judicial Independence under the 1999 Constitution In Akinseye-George Y and Gbadamosi G. (eds) *The Pursuit of Justice & Development: Essays in Honour of Hon Justice M. O. Onalaja* Diamond Publ Ltd, Abuja p17

Dakwang for consenting to his oath of office without recommending his appointment to the governor.

On May 4, 2009³⁵, the state House of Assembly requested that Justice Raliat Elelu-Habeeb appear before it in relation to a letter from the then-Governor of the state, Dr. Bukola Saraki, requesting that she be removed from office on the grounds of her alleged inability to perform the duties of her office. At the time, Justice Elelu-Habeeb had just over a year in her position as the Chief Judge of Kwara State.

The then-governor claimed that the Chief Judge's alleged wrongdoing violated the code of conduct for judicial officers in support of his plea for Justice Elelu-Habeeb's dismissal.

Elelu-Habeeb, who was on March 6, 2008, appointed by the governor as the Chief Judge of Kwara State based on the NJC's recommendation, said she wasn't present when the letter was sent to her through the Chief Registrar of the state's judicial system.

The House of Assembly of Kwara State, however, disregarded the Chief Judge's request for a new date and, on May 5, 2009, just 24 hours after giving her its invitation letter, met, deliberated, and ultimately removed her from office in what appeared to be the execution of a pre-planned agenda.

The over-centralization of authority in the Chief Justice of Nigeria (CJN), who is responsible for practically all NJC appointments, is another significant area of constitutional deficiencies (paragraph 20, part 1, 3rd schedule CFRN, 1999). The question that inevitably arises is whether the NJC's impartiality is guaranteed when the CJN is accused of wrongdoing (as he was recently, during the Hon. Justice Aloysius Katsina-Alu(CJN-rtd)/President of the Court of Appeal (PC Hon. Justice Ayo Salami saga), given the significant influence the CJN has among the NJC's members.

³⁵ A. Adesomoju, Judges who fell under NJC's hammer over executive lawlessness

Respectfully, it is suggested that the law must be written objectively in order to be effective. It is clear that these few flaws in the 1999 constitution, as well as others relating to the appointment, discipline, and removal of judicial officers, need to be reviewed objectively in order to free the judiciary from interference from other governmental organs and increase its effectiveness in carrying out its constitutional obligations.

CHAPTER FOUR

COMPARATIVE ANALYSIS

4.1 Appointment and Removal of Judges in India

The Constitutional Committee accordingly proposed that the Judges of the High Court should be appointed by the President of the Federation in consultation with the Chief Justice of the Supreme Court, the Governor of the Province and the Chief Justice of the High Court. Except when the Chief Justice himself was to be 'appointed.' 'Constitutional Adviser'¹³⁶

The constitutional provisions as they finally emerged on the subject of appointment of Judges of the Supreme Court and of the High Courts are contained in articles 124 and 217.³⁷

According to article 124, each judge of the Supreme Court must be appointed by the President by warrant bearing his signature and seal after consulting with any judges of the Supreme Court and of the State's High Courts that the President deems necessary for this purpose. Each judge of the Supreme Court must also hold office until the age of 65, with the caveat that the Chief Justice of India must always be consulted in cases where a judge other than the Chief Justice is being appointed. A person must be an Indian citizen, a judge of a High Court or of two or more such Courts in succession for at least five years, or an advocate of a High Court or of two or more such Courts for at least ten years, or, in the President's judgment, a distinguished jurist, in order to be eligible for appointment as a Supreme Court judge.

Article 124. Establishment and constitution of Supreme Court

There shall be a Supreme Court of India constituting of a Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other Judges

- (1) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High

³⁶ Shiva Rao, *The Framing of India*: Constitution (1968), Main Volume, page 497.

³⁷ *The Constitution of India 1949*

Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years: Provided that in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted:

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office in the manner provided in clause (4)

According to Article 217, each Judge of a High Court shall be appointed by the President by a warrant bearing his hand and seal following consultation with the Chief Justice of India, the Governor of the State, and, in the case of the appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. Each Judge shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in all other cases, until he reaches the age of sixty-two years. (This age was initially 60, but due to a later revision, it was raised to 62.) According to clause (2) of article 217, a candidate for appointment as a judge of the High Court must be an Indian citizen, have held a judicial office in Indian territory for at least ten years, have served as an advocate of at least two High Courts consecutively for at least ten years, or be, in the President's opinion, a distinguished jurist. The 42nd Amendment added a clause to article 217 that allowed the President to additionally select someone who, in his judgement, was a distinguished jurist; the 44th Amendment later repealed that clause.

Article 217³⁸. Appointment and conditions of the office of a Judge of a High Court

(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the chief Justice of the High court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years Provided that

³⁸ The Constitution of India 1949

(a) a Judge may, by writing under his hand addressed to the President, resign his office;

(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court;

(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession; Explanation For the purposes of this clause

(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an Advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;

(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947 , within India as defined by the Government of India Act, 1935 , or has been an advocate of any High Court in any such area, as the case may be

(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final

Article 224, to which article 217 deals with the appointment of additional and acting judges for the High Court. It states that if the President believes that the number of judges for a particular court should be increased for the time being due to a temporary increase in business or work

backlog, he or she may designate appropriately qualified individuals to fill those positions. The President may appoint a person who is suitably qualified to serve as a judge of that Court until the permanent judge has taken up his duties when any judge of a High Court other than the Chief Justice is unable to perform the duties of his office due to absence or for any other reason, or is appointed to act temporarily as Chief Justice, according to the further statement. However, after reaching the age of sixty-two, no one may be appointed as an additional or acting judge of a High Court.

Article 224. Appointment of additional and acting Judges

(1) If by reason of any temporary increase in the business of High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties

(3) No person appointed as an additional or acting Judge of a High Court shall hold office after attaining the age of sixty two years

The procedures for the dismissal of a sitting Supreme Court justice are set forth in Article 124(4).

Both Article 124(4) of the Indian Constitution and the Judges (Inquiry) Act, 1968, serve as the foundation for the Supreme Court judge's removal process. Judges of the High Court may be removed from office under Article 218 of the Indian Constitution.³⁹

Article 124(4) and (5) states:

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two –

³⁹ S. Choudhary, Overview: Removal of Judges in India

thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehavior or incapacity of a Judge under clause (4).

Article 218 states:

Application of certain provisions relating to Supreme Court to High Courts The provisions of clauses (4) and (5) of Article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court.

Any of the houses of Parliament has the authority to begin removal proceedings against a judge of the Supreme Court or the High Court. Given this:

A written notice may be submitted to the speaker by at least 100 Lok Sabha members, or A notice may be delivered in writing to the Chairman by a minimum of 50 Rajya Sabha members.

The speaker or chairman may seek advice from others and review pertinent information linked to the notification before deciding whether to accept or reject it.

4.2 Appointment and Removal of Judges in the United Kingdom

The Constitutional Reform Act of 2005 (CRA) altered the appointment process for judges and codified the judiciary's independence. The JAC was established on April 3, 2006 as a result of the Act, in order to make the appointment process more transparent and accountable.

The Judicial Appointments Commission (JAC) is an impartial organization that chooses applicants for judicial positions in tribunals and courts in England and Wales as well as some tribunals with UK-wide jurisdiction.

Judges are appointed by the King on the advice of the Prime Minister, who receives recommendations from a selection commission. The number of judges is set by s.23(2) Constitutional Reform Act 2005, which established the Court, but may be increased by the King

through an Order in Council under s.23(3). There are currently 12 positions: one President, one Deputy President, and 10 Justices. Judges of the Court who are not already peers are granted the style Lord or Lady followed by a surname, territorial designation or a combination of both, for life.

The Lord Chief Justice, Heads of Division, Lord Justices of Appeal, and Senior President of Tribunals are all chosen by the JAC.

Sections 25 to 31 and Schedule 8 of the Constitutional Reform Act of 2005, as modified by the Crime and Courts Act of 2013, govern the selection process for Justices of the Supreme Court of the United Kingdom. An overview of the method is provided in this note.

The statutory requirements for appointment are outlined in Section 25 of the 2005 Act⁴⁰. Sections 50–52 of the Tribunals and Enforcement Act 2007 have revised Section 25 to clarify the requirements as follows:

Section 25 Qualification for appointment

- (1) A person is not qualified to be appointed a judge of the Supreme Court unless he has (at any time)—
 - (a) held high judicial office for a period of at least 2 years,
 - (b) been a qualifying practitioner for a period of at least 15 years.
[F1(b) satisfied the judicial-appointment eligibility condition on a 15-year basis, or
 - (c) been a qualifying practitioner for a period of at least 15 years.]
- (2) A person is a qualifying practitioner for the purposes of this section at any time when—
 - (a) F2.
 - (b) he is an advocate in Scotland or a solicitor entitled to appear in the Court of Session and the High Court of Justiciary, or
 - (c) he is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland

Section 31⁴¹ of the Act establishes a Judicial Appointments Commission, which will be responsible for making all future judicial appointments (other than the Supreme Court).

⁴⁰ Constitutional Reform Act 2005

⁴¹ Constitutional Reform Act 2005

According to Schedule 12, the Commission will have a lay chairperson (defined as someone who has never served in a judicial position or been a practicing attorney), along with the following 14 additional members: 5 judges (one from the Court of Appeal, one from the High Court, one from either the Court of Appeal or the High Court, one from the circuit, one from the district), two practicing attorneys, five lay members, one member of the legal tribunal, and one lay magistrate. Sections 32 and 33 of the Act states the rules for the appointment of judicial officers.

States must have a procedure for removing judges from office. The difficulty lies in getting legal structures to make sure that judges cannot be punished or intimidated through the removal procedure. Judges “shall be liable to suspension or removal only for reasons of incapacity or misbehavior that clearly render them unfit to fulfill their duties,” according to the Commonwealth Latimer House Principles. A particularly serious type of judicial accountability is removal from office. When judges give reasons for their decisions, judicial accountability is typically satisfied. If the judge acted in good faith, the reasons may be reviewed or appealed without repercussions.⁴²

The rules governing the dismissal of judges in England and Wales differ slightly from those that apply to Scotland. Section 11(3) of the Supreme Court Act, 1981 contains the pertinent provisions for judges of superior courts in England and Wales. According to Section 11(3), a Supreme Court judge “shall hold that office throughout “good behavior,” subject to Her Majesty’s right to remove them upon an address delivered to Her by both Houses of Parliament.”⁴³

⁴² J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law

⁴³ [https://www.advocatekhoj.com/library/lawreports/judgesbill2005/22.php?Title=Judges%20\(Inquiry\)%20Bill,%202005&STitle=Removal%20Procedure%20in%20The%20United%20Kingdom](https://www.advocatekhoj.com/library/lawreports/judgesbill2005/22.php?Title=Judges%20(Inquiry)%20Bill,%202005&STitle=Removal%20Procedure%20in%20The%20United%20Kingdom) Accessed 21st December 2022

Section 6 of the Administrative Jurisdiction Act, 1876, contains a similar clause that applies to judges in the House of Lords (Lords of Appeal in Ordinary). (Prof. Shimon Shetreet provides a thorough analysis in “Judges on Trial,” Ch. IV, Part III, p. 87, 1976).

Currently, Judges of the higher Courts and Judges of the Court of Appeal may be disciplined under the Constitutional Reform Act of 2005. The latter portion of this chapter will go into more information about this Act.

Both Houses of Parliament have the power to petition The Queen for the removal of a judge of the High Court or the Court of Appeal. This power originates in the 1701 Act of Settlement and is now contained in section 11(3) of the Supreme Court Act 1981. It has never had to be exercised in England and Wales.⁴⁴

The Constitutional Reform Act of 2005 (CRA), which upholds the separation of powers, calls for renewed examination of the roles played by the administration and the legislative in the use of the authority to discipline and remove judges. Before the CRA, the Lord Chancellor, who is also the head of the judiciary, had the authority to impose punishment. The authority to censure judges is currently shared between the Lord Chief Justice and the Lord Chancellor, setting restrictions on its usage since the latter duty was transferred to the Lord Chief Justice in 2005. In addition to disciplinary measures, the impeachment and removal processes—which can result in the retirement of senior judicial office—are also taken into account.

4.3 Appointment and Removal of Judges in the United States of America

⁴⁴ < [40](https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/judges-and-parliament/#:~:text=Both%20Houses%20of%20Parliament%20have,exercised%20in%20England%20and%20Wales.> Accessed 21st December 2022</p></div><div data-bbox=)

According to the Constitution, the President nominates candidates for Supreme Court justices, judges for the Court of Appeals, and judges for district courts, and the Senate confirms those candidates.

Senators or occasionally House members from the president's political party will suggest names of potential nominees. Each nominee normally has confirmation hearings before the Senate Judiciary Committee. According to Article III of the Constitution, these judges are appointed for a lifetime.

There are no stated prerequisites for judges in the Constitution. However, the Department of Justice and members of Congress, who normally nominate possible nominees and assess their qualifications, have formed their own informal standards.

Except for the Chief Justice of the United States, no one is nominated or appointed to the role of chief judge; rather, seniority determines who holds the position. Both circuit and district leaders must meet the same standards. The senior-ranking judge in regular active service who is under the age of 64, has at least one year of judicial experience, and has never held the position of chief judge is the chief judge.

According to the Appointments Clause⁴⁵, the President may nominate any officer of the United States, subject to Senate approval, including judges of the Supreme Court. 1 Justices of the Supreme Court are therefore federal officers whose nomination must adhere to the Appointments Clause's guidelines. It is significant to note that the Constitution stipulates that presidential nominees are subject to Senate advice and approval. When the Senate decides whether to give its consent for nominations to the nation's highest court, a variety of factors may be relevant, including political factors, a nominee's judicial philosophy, fitness for the bench, prior

⁴⁵< <https://constitution.congress.gov/constitution/article-2/#article-2-section-2-clause-2>>Accessed 21st December 2022

statements on matters relevant to the Court, and the overall power dynamic between political factions.

Article II, Section 2, Clause 2:⁴⁶

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Although the methods for impeaching judges are various under federal and state constitutions, the procedure is typically two steps.

According to Article I of the US Constitution, the House of Representatives may impeach a federal judge, and the Senate may convene a trial to decide whether or not removal is necessary.

With a simple majority vote, the House can remove a judge from office. However, a judge can only be dismissed from their position following a trial and a two-thirds majority vote in the Senate to find them guilty.

The majority of states follow the same process as the federal government when it comes to impeaching and dismissing judges; for an example, Pennsylvania requires a majority vote in the lower house of the legislature and a two-thirds majority in the upper house. However, the trial that follows impeachment is conducted by a court made up of state officials and/or state judges in some states (such as New York and Nebraska). And in other cases, a different number of votes must be cast in order to convict or impeach.⁴⁷

⁴⁶ Constitution of the United States as Amended 2007

⁴⁷ <https://www.brennancenter.org/our-work/analysis-opinion/impeachment-and-removal-judges-explainer> Accessed

Federal judges may be removed after being impeached and found guilty of “Treason, Bribery, or other High Crimes and Misdemeanors,” as with other government officials; otherwise, under Article III, Section 1⁴⁸, judges “shall hold their Offices during good Behavior.” The United States Constitution offers little guidance regarding the offenses that constitute grounds for the removal of federal judges.

While state constitutions vary in their definitions of impeachable offenses, the few recent successful impeachment efforts in states confirm that legislators generally have limited that power to cases of serious ethical and criminal violations. For example, the 1994 removal of Pennsylvania Supreme Court Justice Rolf Larsen involved charges that Larsen had asked a doctor to write fraudulent drug prescriptions, improperly communicated with lawyers and a trial judge about a pending case and lied under oath. And New Hampshire Supreme Court Justice David Brock was impeached for improper communications in two cases and for lying under oath.⁴⁹

Only the House of Representatives and the Senate may impeach federal judges and convict them. Judges and Justices do not have a set tenure; they remain in office until they pass away, retire, or are found guilty by the Senate. By design, this shields them from the fleeting emotions of the populace and enables them to apply the law impartially, without regard to political or electoral considerations.

Comparing the Nigerian position to that of these other jurisdictions, it is clear that under the Constitution, the procedure for the appointment of the Justices of the Supreme Court, as well as a Judge of the High Court of Lagos, are similar – the President appoints, acting on the advice or

⁴⁸ Constitution of the United States of America as Amended 2007

⁴⁹ <https://www.brennancenter.org/our-work/analysis-opinion/impeachment-and-removal-judges-explainer> Accessed 21st December 2022

recommendation of the Prime Minister. Though this procedure seems simple, it was yet effective and notorious for producing the most qualified and best-suited judges on the Bench.

Comparatively, in some states in the United States of America, the appointment of judges is not totally in the hands of either the Governor or the legislature, but in the hands of the electorates.

However, in India, judges are appointed by the president on the recommendation of the Chief justice of the Supreme Court, the Governor of the Province and the Chief justice of the High court.

While in the United Kingdom, judges are appointed by the King on the advise of the Prime minister who receives recommendation from the selection commission. It is clear from the above they share the similarity of appointment by the executive but on recommendation. However their removal are different but each in it's unique way following the procedure prescribed in their legislative enactment.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1 Recommendations

1. **Granting Proper Judicial Independence to the Judiciary:** The Nigerian judiciary as it is currently lacks judicial independence, and this is as a result of the intrusion of other arms of government in their appointment, removal and even remuneration. The Nigerian judiciary is the watchman of the rule of law and also expected to be the impartial arbiter between the various tiers of government as well as between the state and the people. This is however not going to be possible unless the judiciary is indeed independent. Therefore, it is imperative that the Nigerian judiciary be granted independence as regards its operations, especially the appointment, removal and remuneration of judges.
2. **Appointment of Judges should be on the Basis of Meritocracy:** The Judiciary can be said to be the most important office as it oversees the legislature and executive as well as the citizenry. Cases that are entertained by the courts require a person who has the requisite skill, character and capacity to handle them. Therefore, judges should not be appointed on the basis of political connections, but they should be appointed through the merits as was the case in 1963, where the competence of a judge is what earned him his appointment to the bench.⁵⁰
3. **Financial Independence Would Guarantee Impartiality and Neutrality:** The budget of the judiciary and the remuneration of judges should not be subject to the approval of the executive and it should. This custom hamstrings judges from making decisions that will be detrimental to the executive in matters that concern them or that are connected to them. Therefore, to assure a judicial system that respects the rule of law and upholds democracy,

⁵⁰ A. A. Babalola Appointment, promotion and remuneration of judges in Nigeria: The need for a change

the judiciary should be free of any form of restrictions resulting from it needing the approval of the judiciary in its budgeting.

4. The Nigerian Judicial Council Should Equally Not Have its Officers Appointed by the Executive: The judiciary needs an impartial body to recommend to the legislature on the appointment and removal of judges, but this body needs to be independent itself. The Nigerian Judicial Council (NJC) has its members appointed by the President and this affects their effectiveness as one cannot bite the hands that feeds it. It is therefore necessary that the NJC not have its members appointed by the Presidency so as to ensure an impartial nomination of persons that should constitute the bench.

5.2 Conclusion

The Nigerian Judiciary is one of the three arms of government and Nigeria which is a democratic state operates the principle of separation of powers and checks and balances, however for a long time now the judiciary has been turned into a toothless bulldog who cannot operate impartially and independently since the appointment, removal and remuneration of its officers are subject to the prerogative of the executive.

In order to have a judicial system that works, that upholds justice, fairness, equity and the rule of law, the judiciary needs to be independent and that means, its officers, specifically the judges need to be appointed by an independent body and not by the executive. This way, our justice system will be once more be seen as “the last hope of the common man”.

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