

Judicial Administration in Nigeria: Examining the Role and Independence of National Judicial Commission

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Abstract

The National Judicial Council has the sole power to recommend for appointment to the Governors and the President, every Judge, every Head of Superior Courts of records in the Federal Republic of Nigeria. The body also has the sole power to the exclusion of any other body or agency to discipline judicial officers for any infractions as echoed by judicial decisions. This paper seeks to examine the role of the National Judicial Council as it carries out its statutory duties as well as the independence of the body from any form of interference, The paper also seeks to stimulate thoughts on the roles of the body within a federal system of government which Nigeria practices.

1. Introduction

The National Judicial Council sits atop the pyramid of judicial administration in Nigeria. It is a body created by section 153 of the 1999 Constitution of the Federal Republic of Nigeria. The National Judicial Council, therefore, is one of the Federal Executive bodies established under section 153 of the 1999 Constitution with powers relating to appointments and exercise of disciplinary control over Judicial Officers specified in paragraph 21 of Part I of the Third Schedule of the Constitution. The same provision also grants the National Judicial Council the power to collect, control and disburses all monies, capital and recurrent, for the judiciary and to deal with all matters relating to policy and administration.

The importance of an independent judiciary to democracy was aptly captured by Alexander Hamilton, one of the framers of the U.S. Constitution when he offered justification for an independent judiciary in the following words: ‘the complete independence of the courts of justice is peculiarly essential in a limited constitution.’¹

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¹ A Hamilton, ‘78th paper of The Federalist,’ <<https://guides.loc.gov/federalist-papers/text-71-80>> 12 May 2023

Hamilton argued tenuously that it is only an independent judicial branch of government that can impartially check an excessive exercise of power by the other branches of government.² It has also been postulated that the court is the rudder upon which democracy must and should be kept afloat.³

Judicial autonomy or judicial independence by all modern standards, is the principle that the Judiciary should be independent from the other branches of government and other private interests. In other words, the other branches of government, powerful interests' groups and persons should not be allowed by the courts to influence their decisions. This principle is largely reinforced by the well acclaimed theory of separation of powers. The 1999 Nigerian Constitution (as amended) drove this point home in Section 6 by vesting judicial powers of the Federation in the courts mentioned in the said Section. In order to demonstrate severe intolerance to the idea of meddling with judicial affairs by lawmakers,

Section 4(8) of the said Constitution subjects the legislative powers of the Legislature to judicial scrutiny. What is more; the sub-section under reference specifically prohibits the enactment of any law that purports to oust the jurisdiction of the court. It will be near impossible to discuss the issue of independence without touching on financial independence as provided for by the 1999 Constitution. The impetus to strengthen the judiciary was further expressed through the establishment of the National Judicial Council (NJC) by Section 153 of the same constitution.

2. National Judicial Council and the 1999 Constitution of the Federal Republic of Nigeria

Section 153 (1) of the 1999 Constitution of the Federal Republic of Nigeria provides that:⁴

¹ A Hamilton, '78th paper of The Federalist,' <<https://guides.loc.gov/federalist-papers/text-71-80>> 12 May 2023

² *Ibid*

³ E West – Idahosa, 'Independence of the judiciary: A recipe for true democracy in Nigeria,' <<<https://thenationonlineng.net/independence-of-the-judiciary-a-recipe-for-true-democracy-in-nigeria-2/>> 12 May, 2023

⁴ Act No. 24 of 1999, enacted on 5th May 1999

- (1) There shall be established for the Federation the following bodies, namely:
 - (a) Code of Conduct Bureau;
 - (b) Council of State;
 - (c) Federal Character Commission;
 - (d) Federal Civil Service Commission;
 - (e) Federal Judicial Service Commission;
 - (f) Independent National Electoral Commission;
 - (g) National Defence Council;
 - (h) National Economic Council;
 - (i) National Judicial Council;
 - (j) National Population Commission;
 - (k) National Security Council;
 - (l) Nigeria Police Council;
 - (m) Police Service Commission; and
 - (n) Revenue Mobilisation Allocation and Fiscal Commission.
- (2) The composition and powers of each body established by subsection (1) of this section are as contained in Part 1 of the Third Schedule to this Constitution.

In the clamour for the autonomy or complete independence of the Judiciary, the fulcrum of the argument has always revolved around the liberation of the Judiciary as a single entity in the Federal Republic from the clutches of the Executive arm of Government at the Federal and State levels. Section 153 of the 1999 Constitution provides for the establishment of certain Federal Executive Bodies. The interpretation that can be distilled from the short title of this section is that the National Judicial Council is a Federal Executive Body that wields extensive powers.

An overview of all the other bodies provided for in Section 153 of the Constitution reveals that they are all indeed answerable to or connected to the Executive arm of Government in one way or the other. That begs the question: Is the National Judicial Council a body of the Executive arm of Government? This may appear to be an obtuse point but one worth giving a second glance. Should such an all-powerful organ of a whole arm of Government be lumped up with other bodies that are connected to or under the control of another arm of

Government? A thorough scrutiny of the fourteen bodies provided for by the provisions of Section 153 reveals that the National Judicial Council is the only body of its kind for any of the three arms of Government. As a matter of fact, it is the only body which wields the kind of near absolute powers over a complete arm of government.⁵ There is no such body for any of the two other arms of Government.

3. Membership of the National Judicial Council

The relevant portion of Part 1 of the Third Schedule⁶ provides:

I. National Judicial Council

20. The National Judicial Council shall comprise the following members –

- (a) the Chief Justice of Nigeria who shall be the Chairman
- (b) the next most senior Justice of the Supreme Court who shall be the Deputy Chairman;
- (c) the President of the Court of Appeal;
- (d) five retired Justices selected by the Chief Justice of Nigeria from the Supreme Court or Court of Appeal;
- (e) the Chief Judge of the Federal High Court;
- (f) five Chief Judges of States to be appointed by the Chief Justice of Nigeria from among the Chief Judges of the States and of the High Court of the Federal Capital Territory, Abuja in rotation to serve for two years;
- (g) one Grand Kadi to be appointed by the Chief Justice of Nigeria from among Grand Kadis of the Sharia Courts of Appeal to serve in rotation for two years;
- (h) one President of the Customary Court of Appeal to be appointed by the Chief Justice of Nigeria from among the Presidents of the Customary Courts of Appeal to serve in rotation for two years;
- (i) five members of the Nigerian Bar Association who have been qualified to practice for a period of not less than fifteen years, at least one of whom shall be a Senior Advocate of Nigeria, appointed by the Chief Justice of Nigeria on the

⁵ *Manuwa v National Judicial Council* (2013) 2 NWLR (Pt. 1337) 1 at 24

⁶ Constitution of the Federal republic of Nigeria (as amended), Act No. 24 of 1999, enacted on 5 May 1999, Third Schedule

recommendation of the National Executive Committee of the Nigerian Bar Association to serve for two years and subject to re-appointment.

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

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

It is evident from the foregoing that besides from the Chairman, the Deputy Chairman, the President of the Court of Appeal and the Chief Judge of the Federal High Court who are specifically appointed as members by the Constitution, every other member of the National Judicial Council is appointed by the Chief Justice of Nigeria. It is curious that the provisions of the Constitution cited above left out the Secretary to the council in the composition of members. The appointment of the Secretary to the council is contained in paragraph 22 of the same schedule as will be seen shortly. However, the Secretary is not exempted from the discretionary powers of appointment of the Chief Justice of Nigeria in that the Secretary is to be appointed by the Council upon the recommendation of the Federal Judicial Service Commission headed by the Chief Justice of Nigeria.

4. Powers of the National Judicial Council

The relevant portion of the Constitution provides that:

- 21. The National Judicial Council shall have power to⁷ -
 - (a) recommend to the President from among the list of persons submitted to it by -
 - (i) the Federal Judicial Service Commission, persons for appointment to the offices of the Chief Justice of Nigeria, the Justices of the Supreme Court, the President and Justices of the Court of Appeal, the Chief Judge and Judges of the Federal High Court, and
 - (ii) the Judicial Service Committee of the Federal Capital Territory, Abuja, persons for appointment to the offices of the

⁷ *Ibid*

- Chief Judge and Judges of the High Court of the Federal Capital Territory, Abuja, the Grand Kadi and Kadis of the Sharia Court of Appeal of the Federal Capital Territory, Abuja and the President and Judges of the Customary Court of Appeal of the Federal Capital Territory, Abuja;
- (b) recommend to the President the removal from office of the judicial officers specified in sub-paragraph (a) of this paragraph and to exercise disciplinary control over such officers;
 - (c) recommend to the Governors from among the list of persons submitted to it by the State Judicial Service Commissions persons for appointments to the offices of the Chief Judges of the States and Judges of the High Courts of the States, the Grand Kadis and Kadis of the Sharia Courts of Appeal of the States and the Presidents and Judges of the Customary Courts of Appeal of the States;
 - (d) recommend to the Governors the removal from the office of the judicial officers in sub-paragraph (c) of this paragraph, and to exercise disciplinary control over such officers.
 - (e) collect, control and disburse all moneys, capital and recurrent, for the judiciary;
 - (f) advise the President and Governors or any matter pertaining to the judiciary as may be referred to the Council by the President or the Governors;
 - (g) appoint, dismiss and exercise disciplinary control over members and staff of the Council;
 - (h) control and disburse all monies, capital and recurrent; for the services of the Council; and
 - (i) deal with all other matters relating to broad issues of policy and administration.
22. The Secretary of the Council shall be appointed by the National Judicial Council on the recommendation of the Federal Judicial Service Commission and shall be a legal practitioner.

The Constitution therefore endows the National Judicial Council with sweeping powers to recommend for appointment anyone who is to be appointed as a Judge in any superior Court of record in Nigeria and exercise disciplinary powers of same. The National Judicial Council has

over the years sanctioned judicial officers found to have erred.⁸ In *Hon. Justice Kayode Bamisile v National Judicial Council and Ors*⁹ the Court of Appeal held:

It is not in doubt that the 1st respondent has the constitutional responsibility to investigate complaints of acts of grave misconduct or contravention of the code of conduct against the judicial officers specified in paragraph (ii) of Section 292 (1) of the 1999 Constitution. It has the power to exercise disciplinary control over erring judicial officers and in appropriate circumstances to recommend the removal from office of such judicial officers to the Governor of the State. The power to remove the Chief Judge of a State is vested solely in the Governor acting on an address supported by two – thirds majority of the House of Assembly of the State. It is clear therefore that the investigative and disciplinary powers conferred on the 1st respondent by the said provisions do not include the power of dismissal.

This brings to the fore the fact a scenario can exist where the National Judicial Council will recommend the removal or dismissal of a judicial officer but the said judicial officer will continue in office where a Governor refuses to take any action on the recommendation of the National Judicial Council. Indeed, a scenario has existed where the National Judicial Council recommended a judicial officer for appointment as Chief Judge of a State but the Governor proceeded to ignore that recommendation to appoint another judicial officer.¹⁰ In *National Judicial Council & Ors v Hon. Justice Jubril Babajide Aladejana*,¹¹ the Court of Appeal held that:

⁸ B Olabimtan, ‘The National Judicial Council (NJC) says three judges will not be promoted for issuing conflicting ex parte orders,’ <<https://www.thecable.ng/njc-bars-3-judges-from-promotion-over-conflicting-orders-on-pdp-leadership-crisis>> accessed on 14 May 2023

⁹ (2012) LPELR – 8381 (CA) Pp. 22 – 23 *Per* Kekere – Ekun JCA, paras. F–B

¹⁰ Z Adangor, ‘Depoliticising the Appointment of the Chief Judge of A State in Nigeria: Lessons From the Crisis Over the Appointment of the Chief Judge of Rivers State of Nigeria,’ <<https://www.iiste.org/Journals/index.php/JLPG/article/view/27743>> accessed on 13 May 2023

¹¹ (2014) LPELR – 24134 (CA) Pp. 56 – 57 *Per* Mustapha JCA at paras. E–A

I am particularly in full agreement with my learned brother on his interpretation of Section 292 (1)(b) of the Constitution (1999 amended), to mean that the National Judicial Council can only recommend the removal of a judicial officer to the governor of the relevant state and having done that, nothing prevents a governor from rejecting the recommendation. As a matter of both fact and law, it is my considered view that, the governor does not have to put his rejection of the recommendation in writing, simply doing nothing about it is as good as openly saying no. See *Justice Okwuchukwu Opene v National Judicial Council and Ors* (2011) LPELR – 4795 CA.

The exclusive powers of the National Judicial Council to discipline judicial officers who breach the Code of Conduct have been restated in *Hon. Justice Hyeladzira Ajiya Nganjiwa v Federal Republic of Nigeria*¹² where the Court of Appeal held:

...All I have been saying is that a combined reading of Section 6, 153, 158, 292(1) and Paragraph 21 (b) of the Third Schedule of 1999 Constitution (as amended) is to the effect that no authority can interfere with or direct the exercise of the powers of the NJC without having shown that the NJC has concluded its investigation. NJC is the sole body empowered by the Constitution to determine allegations of misconduct against judicial officers even on criminal allegations of bribery and corruption made against its officers. The NJC is created by the Constitution to solely regulate the affairs of the appointed judicial officer without interference from any authority. It is only and only when, the NJC has given a verdict and handed over such judicial officer (removing his toga of judicial powers) to the prosecuting authority that he may then be investigated and prosecuted by the appropriate security agencies...

The significant powers conferred on NJC by item (i) paragraph 21(a) to (i) of the Third Schedule (part 1) to the Nigerian Constitution as reproduced above include the powers to recommend the appointment

¹² (2017) LPELR - 43391 (CA) Pp. 13 – 35, *Per* Obaseki – Adejumo JCA at paras. C–D

and removal of judges at all levels, complete control of funds for the judiciary, disciplinary control of judges and judicial staff, as well as control of broad issues of policy and administration.

However, the Courts have also held that such powers must be exercised within the ambit of the rules of natural justice.¹³ In *National Judicial Council v Honourable Justice Mohammed Ladan Tsamiya*,¹⁴ the Court of Appeal held that the failure of the National Judicial Council to serve a copy of the investigative report on the 1st Respondent was a breach of his fundamental right to fair hearing and the Court declared the compulsory retirement of the 1st Respondent as null and void. It is therefore evident that while the Courts uphold the exclusive powers of the National Judicial Council as provided for by the Constitution, the Courts have been consistent in insisting that same must be done within the ambit of the principles of natural justice.

5. National Judicial Council and State Judiciary: A Case for Autonomy?

The National Judicial Council is such a monolith that no Judge either of a State High Court, State Customary Court of Appeal, or Khadi of a Sharia Court can be appointed, remunerated, disciplined or removed without the involvement of the National Judicial Council.¹⁵

Thus, anything connected to the position of a Judge from all the thirty-six Federating States must pass through the single door of the National Judicial Council which as pointed out earlier is a 'Federal Executive Body.' Therefore, no single State Judiciary has complete control or is independent or autonomous of the National Judicial Council. This is clearly an entrapment of the Constitution because neither the Executive nor the Legislative arm of any State of the Federation is subjected to this kind of unitary structure.

¹³ (n9) 23, paras. C–F

¹⁴ (2020) LPELR – 51119 (CA) Pp. 12 – 23, *Per* Mustapha JCA at paras. F–E; *Tambu v NJC & Ors* (2018) LPELR – 46898 (CA) p 13–38, *per* Adah JCA at paras. D–E

¹⁵ *Elelu – Habeeb & Anor v The Attorney General of the Federation & Ors* (2012) 2 SC (Pt. 1) 145; *Nganjiwa v Federal Republic of Nigeria* (2018) 4 NWLR (Pt. 1609) 301; *National Judicial Council & Ors v Aladejana* (2014) LPELR – 24134 (CA) 50–53; *National Judicial Council v Yerima & Anor* (2014) LPELR – 24208 PP24 – 25; *National Judicial Council v Agumagu & Ors* (2015) 10 NWLR (Pt 1467) 365

The President of the Federal Republic lacks the powers to remove a Governor of a State or indeed any elected official yet the National Judicial Council which is headed by the head of the Federal Judiciary can recommend the removal of the Chief Judge of a State who is the head of the third arm of a State of the Federation. The question that seeks to be answered therefore is why is this structure which is non – existent for the Executive or Legislative arms of Government permissible for the third arm of Government? If the State Houses of Assemblies or the State Executive Committees are generally not subject to the powers of the National Assembly or the National Executive Council, why are the State Judicial Service Commissions subject to the National Judicial Council in the manner in which they are? Should autonomy or independence of the Judiciary not extend to the autonomy or independence of the State Judiciaries from the National Judicial Council?

6. The Rise and fall of Executive Order 10

It is impossible to discuss the independence of the National Judicial Council without discussing the provisions of the Constitution as it regards finance. Sections 81(3)(c) and Section 169 (2) of the 1999 Constitution provide for funds standing to the credit of the Judiciary for the Federation and the States to be remitted to the National Judicial Council for disbursement to the Heads of the Courts created by the Section 6 of the 1999 Constitution. The Federal Government enacted Executive Order 10 in a bid to give added impetus to the foregoing Constitutional provisions.

In the case of *AG Abia State & Ors v AG Federation & Ors*,¹⁶ the thirty-six State Governors through the respective Attorney Generals kicked against this. Collectively they elected to go to court, and hence asked the Court (a) to declare the Executive Order 10, unconstitutional and illegal; (b) compel the Federal Government to take up funding of capital projects for State High Courts, Sharia Court of Appeal and Customary Court of Appeal, and (c) refund to the 36 states a sum of N66 billion, being amount which they claimed to have spent on capital projects for the three courts in their respective states.

¹⁶ (2022) LCN/4988(SC)

To resolve the matter, the Supreme Court in addition to its panel of seven Justices invited five Senior Advocates of Nigeria (SANs) as *amici curiae* (friends of the Court). The Supreme Court ruled 6-1 that the Executive Order 10 is *ultra vires*, unconstitutional, illegal, and therefore null, void and of no effect whatsoever. Their Lordships also resolved, 4-3 that the 1999 Constitution already expressly spells out the responsibility of the states and the Federal Government concerning the funding of the State High Courts, Sharia Court of Appeal and the Customary Court of Appeal, even if it is silent on capital projects. In sum, the Supreme Court rejected the request of the Attorney General of Abia State and 35 others with regard to the aforementioned (b) and (c) parts of their prayers.

The Supreme Court has in the aforementioned case, interpreted the provisions of the 1999 Constitution *vis a vis* the powers of the President, the relationship between the states, and the limits of the Federal Government in the exercise of its powers as spelled out in the 1999 Constitution. Did the President of Nigeria actually act *ultra vires*? Justice Mohammed Dattijo, delivering the lead judgment held that ‘This country is still a Federation and the 1999 Constitution it operates is a federal one. The Constitution provides a clear delineation of powers between the state and the Federal Government. The President has overstepped the limit of his constitutional powers by issuing the Executive Order 10. The country is run on the basis of the rule of law.’

The powers of the various tiers of government are defined in Sections 4, 5, and 6 of the 1999 Constitution pursuant to the doctrine of the separation of powers. Executive powers are vested in the President in Sections 5, 130, 132, 148(1), 151. The strong effect of the ruling by the Supreme Court in *AG Abia and 35 ors v AG Federation* is that there are limits to these powers, nonetheless.

By seeking to enforce and extend Section 121(3) of the 1999 Constitution, the President, in other words, encroaches on the right of state governments to receive money from the Federation Account on behalf of the state judiciary and legislature and transmit their share to them. Thus, the Federal Executive overreaches itself when it assumes it has the powers to strengthen Section 121(3) through what amounts to additional legislation. It is the duty of the legislative arm of government to make or amend laws under Section 6. EO 10 further amounts to an

interpretation of the law by the Federal Government and that Executive arm of government acting as adjudicator. The powers in that regard belong to the judiciary under Section 6. So, while the EO 10 would have protected the judiciary against the rascality of state Governors riding roughshod over the judiciary and the legislature at the sub-national level, and the judiciary would have been a beneficiary of the order, their Lordships looked beyond benefit to the judiciary and took a strictly purist and technocratic view of the law.

It would be wrong to assume that the judiciary has ruled against itself. If the Federal Government is allowed to overreach itself and the President permitted to usurp the functions of the legislature and the judiciary, that would be a prescription for anarchy and an endorsement of dictatorship. However, this is relatable to the minority judgment by Justice Uwani Abba-Aji who maintained that the EO 10 was in order ‘because of the hanky-panky and subterfuge played by state Governors against the independence and financial autonomy of state judiciary...This is not unconstitutional.’ There has been a tendency to play down this minority view.

But Justice Abba-Aji enjoys the support of Sagay,¹⁷ who states that:

I just read the judgment... I just want to say broadly that I agree with Justice Abba-Aji, the minority judgment. The reason is that the constitution makes it clear that the legislative and judicial branches of state government are to get specific sums of money from what goes to the state. And if the state governors are not making them to have it, all that the executive order has done is to facilitate the implementation of the Constitution. And that is what executive orders are supposed to do. So, the Federal Government was right and I agree with the minority judgment entirely.

What are we dealing with here: *form vs substance, the law as it is vs the law as it ought to be*? What is the minority opinion based upon? Was Justice Abba-Aji offering an opinion rather than a strict construction of

¹⁷ O Ameh, ‘Debating Supreme Court judgement on Executive Order 10,’ <<https://guardian.ng/features/law/debating-supreme-court-judgement-on-executive-order-10/>> accessed on 14 May, 2023

the law as it is? But whatever it is, the Supreme Court is the apex Court of the land, and the majority decision carries the day, more so as it is focused on the very substance of EO 10.

The Nigerian President is empowered to give orders, and in this regard, there can be a recourse to Section 315(2) of the 1999 Constitution, but this particular section states clearly that the President can only act ‘in conformity with the provisions of this Constitution,’ certainly not in breach of it. The problem with EO 10 as appropriately pointed out by the Supreme Court is its breach of constitutional provisions. However, taking a cue from the dissenting judgment of My Lord, Hon. Justice Abba – Aji, can it not be argued that by his oath of office, the President of the Federal Republic is duty bound to give life to the spirit and letter of the 1999 Constitution and that this is what the President has sought to do via the Executive Order 10.

The lead judgment emphasizes the rule of law, separation of powers, the limits of powers and the federal principle. I would like to see the state legislatures begin to perform their oversight functions, to call over-bearing Governors to order. The judgment has also been described as victory for the Governors. It is most ironic that these same Governors are benefiting from a principle they themselves do not respect, an emphasis on the rule of law they have no regard for. It will be recalled that in one state, Cross Rivers State to be specific, magistrates not too long ago – January 2021- carried placards and organized protests because their salaries had not been paid for 24 months and nothing had been done to provide them good working conditions.

7. Conclusion

The Judgment of the Supreme Court thus throws up more questions than answers: how do we truly ensure the independence of the co-equal parts of government at all levels? How do we prevent cynical elements from violating the laws of the land because it is expedient to do so? There are many Nigerians who believe that the 1999 Constitution is the biggest problem of Nigeria and that the Constitution needs to be replaced with a people’s Constitution forged and agreed upon under a democratic dispensation. As it concerns the subject of this discuss: is it not possible to fashion out a functional system where even the State Judiciaries can

be truly independent and autonomous of the National Judicial Council? Can there exist a structure which establishes a federated Judiciary rather than the unitary Judiciary which the 1999 Constitution has bequeathed to the country? Should the country continue to operate this structure because this is how it has always been or because this is what the country has grown accustomed to?

Those who argue for the replacement of the Constitution also think that for as long as Nigeria is unable to find the political will and the right political leaders to promote unity and national loyalty, the lawmakers and the judex may continue to talk about the rule of law in vacuo. In that sense, the Supreme Court Judgment now stands as a strong reminder, of the inchoateness of the Nigerian essence. Our country now relies on the judiciary and judicial means for addressing core legal, moral, political controversies and public policy questions on equality of rights, criminal justice, education, labour and environmental protection. The world is moving and rapidly evolving yet the Nigerian Judiciary is still caught in the sticky web of extracting the paws of interlopers from its cookie jar. The National Judicial Council has lived up to its responsibilities are provided for by the Constitution of the Federal Republic of Nigeria. However, it would not hurt to take another look at the different issues that have been identified in the course of this chapter with a view to reconsidering the statutory framework that underpins the existence of the council.