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## Issues on the Membership, Powers and Autonomy of the National Judicial Council

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### *Abstract*

*Controversy over the independence of the Judiciary from interference and control by the executive arm of government has been of special concern to the legal profession in Nigeria. This paper examines the autonomous status of the National Judicial Council and the extent of the impact of its establishment to ensure the independence of the Judiciary under the Nigerian 1999 Constitution. It concludes that though the Constitution guaranteed enormous powers to the National Judicial Council in carrying out its duties, these powers are seriously undermined if not eroded by some other Constitutional as well as practical limitations. The paper goes on to proffer recommendations on the way forward.*

### 1. Introduction

The National Judicial Council (NJC) is a creation of the 1999 Constitution,<sup>1</sup> with powers of participation in the appointment and discipline of Judicial Officers in Nigeria among others.<sup>2</sup> These powers which are clearly stipulated by the Constitution have often been usurped by other bodies,<sup>3</sup> especially with regard to the

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<sup>1</sup> See s. 153 (1) (I) of the 1999 Constitution of the Federal Republic of Nigeria (herein after, 1999 Constitution), as amended.

<sup>2</sup> These are its major powers. Other powers exercised by the Council will also be discussed in this paper.

<sup>3</sup> Notably the House of Assembly of States of the Federation. The usurpation of such powers often arose from the interpretation of section 292(1) of the 1999 Constitution.

removal of judicial officers. The manner of exercise of its powers by the Council also raises some issues. There are also some issues relating to the membership of the Council, especially on the powers of appointment vested in the Chairman of the Council.<sup>4</sup>

Does the Council have full autonomy considering its powers, membership and other considerations? A thorough examination of these issues is the objective of this paper.

## **2. Composition of the National Judicial Council.**

The membership of the National Judicial Council is provided for under the Third Schedule to the 1999 Constitution.<sup>5</sup> The members are:

- (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;

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<sup>4</sup> The Chairman of the Council is the Chief Justice of Nigeria. See the 3rd Schedule, Paragraph 20, 1999 Constitution.

<sup>5</sup> Paragraph 20 part I *ibid.*

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- (i) five members of the Nigerian Bar Association who have been qualified to practice for a period of not less than fifteen years, at least one of whom shall be a Senior Advocate of Nigeria, appointed by the Chief Justice of Nigeria on the recommendation of the National Executive Committee of the Nigerian Bar Association to serve for two years and subject to re-appointment;  
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.<sup>6</sup>

It is clear enough that apart from the Chief Justice of Nigeria, who is the Chairman of the Council, the Deputy Chairman,<sup>7</sup> the Chief Judge of the Federal High Court and the President of the Court of Appeal, all other members of the Council are appointed by the Chairman of the Council. Such appointments are however made pursuant to the criteria laid down by the Constitution.

The appointment of the other members of the Council by the Chairman may, in our humble view, present a situation of misplaced loyalty on the part of the appointed members. It is possible for those appointed members to generally feel inclined to stick to the Chairman who appointed them, especially whenever there is need to put any issue to vote. Such allegiance would be more pronounced where the issue in question before the Council

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<sup>6</sup> See the 1999 Constitution, 3rd Schedule, paragraph 20.

<sup>7</sup> That is the next most senior Justice of the Supreme Court. It is submitted that time of appointment of the Justices should be the criteria for ascertaining seniority rather than year of call to Bar.

relates to the discipline of the Chairman himself or any other Judicial Officer perceived to be related or close to the Chairman.

Another feature of the membership of the Council is the biennial rotation of some of the members. The five Chief Judges of States, one Grand Kadi of a Sharia Court of Appeal and one President of a Customary Court of Appeal of a State who are appointed by the Chairman at any given time, should each serve in rotation for a period of two years.<sup>8</sup> The implication is that it will take a long period of years for all the Chief Judges of States, Grand Kadis of Sharia Courts and Presidents of Customary Courts of Appeal in the States of the Federation and the Federal Capital Territory, to participate in the Council as members.

Five members of the Nigerian Bar Association are also to be appointed as members of the Council, by the Chairman of the Council on the recommendation of the National Executive Committee of the Association.<sup>9</sup> One interesting provision of the Constitution relating to the members of the Nigerian Bar Association is that they are to sit as members of Council only when it is considering names of persons, for appointment as Judicial Officers. In other words, the members of the Association should not sit with the Council when it is performing any other function, including discipline of Judicial Officers.

It is hard to imagine the reason for this restriction by the Constitution. Why should the members of the Association be prevented from sitting in the Council when they are considering other issues including the discipline or removal of judicial officers? Members of the Nigerian Bar Association have been known to play very important roles as members of other statutory

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<sup>8</sup> See items (g) & (h) of 3<sup>rd</sup> Schedule part I, paragraph 20, 1999 Constitution.

<sup>9</sup> See item (i) *ibid*. One of such members should be the holder of the rank of Senior Advocate of Nigeria. However, none of them should be less than fifteen years standing at the Bar.

bodies.<sup>10</sup> Does it mean that the framers of the 1999 Constitution did not have enough confidence in legal practitioners in Nigeria, sufficient to allow them to participate in all the deliberations and decisions of the National Judicial Council? There seems to be no justification for the restriction placed on the members of the Nigerian Bar Association who are members of the Council, from participating in all the deliberations by the Council.

The membership of the Council also includes two persons who are not legal practitioners, but who are of unquestionable integrity in the estimation of the Chairman of the Council.<sup>11</sup> These persons are qualified to sit in the Council in all deliberations unlike the Council members from the Nigerian Bar Association. What would be the relevance of having a person who is not a lawyer as full member of the Council while restricting lawyers to only one function, as members of the Council? We humbly do not see the relevance of the membership of these two persons since they may not contribute meaningfully to the discussions of the Council on many issues before it, particularly issues pertaining to the appointment and discipline of Judicial Officers.<sup>12</sup> These issues may relate to law and may at times involve evaluation of judgments of a particular judge or many of them, including published papers on legal issues.

Some of the other provisions of the Constitution relating to the composition of the Council also deserve some comments. Section 154(1) of the 1999 Constitution provides that the

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<sup>10</sup> Such bodies include the Council of Legal Education, the General Council of the Bar, the Body of Benchers etc, see the Legal Education (Consolidation Etc.) Act, CAP L10 LFN 2004, s. 2 and ss.1 and 3 of the Legal Practitioners Act as amended.

<sup>11</sup> See item (j) *ibid.*

<sup>12</sup> If the intention of the framers of the Constitution was to have technical persons in the Council to assist it in those aspects of its duties where necessary, it would have sufficed if the Council was given power to seek consultations with such persons whenever the need arises.

Chairman and members of the bodies established by the section, which include the National Judicial Council, should be appointed by the President and such appointment should be confirmed by the Senate. Section 154(1) however excludes ex-officio members and also made the provision subject to any other contrary provision in the Constitution. Alubo,<sup>13</sup> was of the opinion that the members of the Council including the Chairman, should be appointed by the President and thereafter be confirmed by the Senate. However, section 154(1) has made its provision subject to any other provision of the Constitution to the contrary. The 3<sup>rd</sup> Schedule, Part I, paragraph 20 of the Constitution made provisions for the membership of the Council. The Chairman and Deputy Chairman of the Council occupy their positions by virtue of their holding or performing the functions of their offices in the public service of the Federation.<sup>14</sup> Same applies to the President of the Court of Appeal and the Chief Judge of the Federal High Court. Other members of the Council are to be appointed by the Chairman who is the Chief Justice of Nigeria. It is therefore clear that the two exceptions made in section 154(1) are met by the Chairman and other members of the Council. First, is the ex-officio membership and second is the provision of the 3<sup>rd</sup> Schedule to the Constitution

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<sup>13</sup> Alubo; “The National Judicial Council: A Desideratum for Judicial Independence and Public Confidence in the Judiciary,” p. 20, available at: [www.dspace.unijos.edu.ng/](http://www.dspace.unijos.edu.ng/), visited, Thursday, 20<sup>th</sup> October 2013.

<sup>14</sup> That makes them ex-officio members of the Council and they require no further appointment to assume their offices. See s. 161(a) of the 1999 Constitution. The Chief Judges of the High Courts of States, the Grand Kadis of Sharia Court of Appeal and the Presidents of the Customary Court of Appeal of States and FCT, who are to be appointed from time to time by the Chairman of the Council, may not in our view be regarded as ex-officio members of the Council by virtue of s.161(a) of the Constitution, as they are not automatic members of the Council by virtue of their offices. They require appointment by the Chairman before they become members of the Council.

which contains provisions which are contrary to the one in section 154(1). A schedule is an integral part of an enactment and is as much as an enactment as any other part.<sup>15</sup> There is therefore no necessity for the President to make any further appointment or seek the Senate's confirmation. Section 154(1) would have applied if neither of these exceptions was present.

The tenure of the members of the Council,<sup>16</sup> as provided in section 155(1) (b) of the Constitution also appears to be vague. The paragraph provides:<sup>17</sup>

In the case of a person who is a member by virtue of his having previously held an office, for the duration of his life.

Some members of the National Judicial Council may appear to be there by virtue of their having previously held an office. Such members include the five retired Justices of either the Supreme Court or the Court of Appeal, who are appointed by the Chairman of the Council. It follows therefore that by the authority of section 155(1)(b), it may appear that these five Justices, once appointed, should remain in office for life. It may be tempting to give this line of interpretation to the paragraph. It may however appear that the provisions of section 155(1)(b) may not have been intended by the makers of the Constitution to apply to the members

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<sup>15</sup> See *Egolum v Obasanjo* (1999) 7 NWLR (Pt. 611) 355 at 371. Although the main body of an enactment prevails over a schedule where there is inconsistency between the two, such position is in our view not tenable here as s. 154(1) subjected itself to any other contrary provision in the entire Constitution, which includes the provisions of the Schedules to the Constitution.

<sup>16</sup> The provisions of s. 155 on the tenure of the members of the National Judicial Council, also applies to members of other executive bodies established by section 153(1) of the Constitution.

<sup>17</sup> S. 155(b) *ibid.*

of the National Judicial Council, it may have been intended for an executive body like the Council of State.<sup>18</sup> It is hard to imagine why five retired Justices appointed by the Chairman should be members of the Council for life even when the Chairman himself has no such privilege.

We are of the humble view that such life membership, if interpreted to be applicable to those five Justices appointed by the Chairman of the Council, would be absurd. Such privilege should be restricted to members of the Council (if any) who are there by virtue of their having occupied offices in the public service of the Federation previously; and are not to be appointed by anybody. Once a person requires an appointment before becoming a member of the Council, he cannot be deemed to be such member by virtue of his having occupied an office in the public service of the Federation.

We are also of the humble view that the correct interpretation to this paragraph should be that it only applies to persons whose membership of the National Judicial Council is automatic by virtue of their having previously held an office. The provision should not be applicable to a situation where a person may still have to be appointed by somebody before he becomes a member of the Council, despite the fact that he was appointed from those who had previously held an office.

We therefore believe that the five retired Justices of the Supreme Court or the Court of Appeal who are to be appointed by the Chairman of the Council cannot be deemed to be covered by section 155(1)(b) of the Constitution. The reason is that the five Justices do not automatically become members of the Council only by virtue of their having previously held an office as Justices of

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<sup>18</sup> See s. 153 (1) (b), *ibid* See also Third Schedule, Part I, para. 5 (c) & (d), *ibid*. Some members of the Council of State who enjoy life membership are all former Presidents of the Federation and Heads of the Government of the Federation and former Chief Justices of Nigeria.

the Supreme Court or Court of Appeal. They are to be selected and appointed from the list of all the retired Justices of the two courts.

It is not every retired Justice of the Supreme Court or Court of Appeal that becomes a member of the Council by virtue of their former offices. Furthermore, sections 155(2) & 156(3) of the Constitution have cleared the slight ambiguity. The sections provide that the tenure of any member of the Council, who is not an ex-officio member nor attains his membership by virtue of his having held an office previously, should be five years, subject to re-appointment for another period of five years.<sup>19</sup> There is, in our humble view, no member of the National Judicial Council who attains his membership by virtue of his having previously held an office. There is therefore no life membership in the composition of the Council.

Section 156(2) of the Constitution also presents a problem. The proviso to that sub-section is to the effect that any person who is employed in the civil service of the Federation shall, upon his appointment as a member of the National Judicial Council, be deemed to have resigned his former office from the date of his appointment. What is the import of this provision? The provision on the tenure of members of the Council states that members who are neither ex-officio members nor by virtue of their having previously held an office, should hold office for a period of five years,<sup>20</sup> subject to re-appointment for another five year term only.<sup>21</sup> The implication of these provisions on the tenure of the members is that the highest period any person may serve in the

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<sup>19</sup> There is however an exception in the case of the five serving Chief Judges of States, one Grand Kadi of Sharia Court of Appeal and President of the Customary Court of Appeal to be appointed by the Chairman. Their membership lasts for only two years. See 3rd Schedule, part 1, paragraph 20, items (f), (g) & (h) *ibid.*

<sup>20</sup> See s. 155 (1) (c) *ibid.*

<sup>21</sup> See s. 156 (3) *ibid.*

Council is ten years,<sup>22</sup> except the person is an ex-officio member.<sup>23</sup> It is therefore contrary to common sense to expect a person who is in full - time employment in the public service of the Federation, to opt to resign his appointment in favour of another appointment, which is to serve as a member of the National Judicial Council for a limited period of ten years. If that is the correct interpretation of the proviso,<sup>24</sup> it therefore follows that a Director in the Federal Ministry of Justice for instance, should upon appointment as a member of the National Judicial Council, be deemed to have resigned his appointment with the Ministry of Justice.

It is however to be noted that this provision should not apply to persons who are members of the Council by virtue of their offices. The reason is that such persons are not “appointed” by anybody to be members of the Council. Their membership of the Council is automatic upon their appointment into such offices.<sup>25</sup> It is also to be noted that the proviso to section 156(2) does not apply to persons employed in the public service of a State. It stands to reason therefore that a person employed in the public service of a State, may not upon his appointment as a member of the Council, be deemed to have resigned his appointment from the date of such appointment.

A person may not be qualified for appointment as a member of the Council unless he attains the qualification for election into the House of Representatives.<sup>26</sup> Such persons must therefore have

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<sup>22</sup> Depending on whether or not he is considered for re-appointment after the initial term of five years.

<sup>23</sup> See s. 155 (1) (a), *ibid*. Such persons remain members for the duration of their stay in such offices by virtue of which they are members of the Council.

<sup>24</sup> We have no ground to contradict such interpretation.

<sup>25</sup> One good example is the Chief Judge of the Federal High Court. See paragraph 20(e) of 3rd Schedule, part 1, 1999 Constitution.

<sup>26</sup> See s. 156(1) (a), *ibid*. Such person must also have not been removed previously as a member of the Council or any other office on ground of misconduct. See s. 156(1)(b), *ibid*.

attained the age of thirty years and must have been educated up to at least school certificate level or its equivalent. The person must also be a citizen of Nigeria.<sup>27</sup> For the purpose of appointment as a member of the Council, a person may or may not belong to a political party.<sup>28</sup>

### **3. Powers of the National Judicial Council**

The National Judicial Council has powers to:

- (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;
  - (ii) to recommend to the President for appointment, from the list of persons submitted by the Judicial Service Committee of the Federal Capital Territory, Abuja, persons for appointment to the offices of the 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;

<sup>27</sup> See s. 65(1)(b)&(2), *ibid*, same qualifications apply to the members of the Senate except the age which is thirty-five years. See s. 65 (1) (a), *ibid*.

<sup>28</sup> See s. 156(1)(a), *ibid*. Such person should not be required to belong to a political party before he is eligible for appointment.

- (c) recommend to the Governors of States 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 on 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.<sup>29</sup>

Most of the items on which the Council may exercise their powers are not so controversial except for two: which are appointment and discipline of Judicial Officers. We shall therefore place more emphasis on these two.

#### **4. Appointment of Judicial Officers**

This is one of the important functions of the Council. The Council does not actually appoint judicial officers. Judicial Officers, both at the Federal and State levels, are recommended for appointment

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<sup>29</sup> See 3<sup>rd</sup> Schedule Part 1, item 21 to the 1999 Constitution.

by the National Judicial Council. The person, to whom such recommendation may be made by the Council, may be the President of Nigeria or the Governor of a State. The appointments of the Chief Justice of Nigeria, the President of the Court of Appeal, the Chief Judges of the Federal High Court, High Court of the Federal Capital territory and of the States, Grand Kadi and President of the Customary Court of Appeal of the Federal Capital Territory and of the States, are made on the recommendation of the National Judicial Council.

The National Judicial Council also recommends the appointments of the justices of the Supreme Court, Court of Appeal, Judges of the High Courts, Kadis of the Sharia Court of Appeal and Judges of the Customary Court of Appeal of the States and the Federal Capital Territory.

## 5. Guidelines for Appointment of Judicial Officers

The new Guidelines released by the National Judicial Council for the appointment of Judicial Officers took effect from 1<sup>st</sup> January 2004.<sup>30</sup> The NJC Guidelines empowers the Judicial Service Commission of the States, the Federation and the Federal Capital Territory to conduct the process of selection of candidates for appointment as Judicial Officers in their respective jurisdictions. Such candidates are to be selected from nominations made by serving Judicial Officers in each jurisdiction.<sup>31</sup> The National Judicial Council may, where it is satisfied that the Guidelines for

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<sup>30</sup> The guidelines are contained in the NJC Guidelines and Procedural Rules 2003.

<sup>31</sup> See Rule 4(3), *ibid*. The Judicial Officers while nominating candidates should take into consideration good character, reputation, maturity, honesty, integrity and sound knowledge of the law on the part of the candidates. The judicial officers shall also indicate where appropriate, that they previously sat on appeal over judgments delivered by the candidates. See Rule 3(b), *ibid*. This provision applies to magistrates and judges of inferior courts who are aspiring to be judicial officers.

the appointment of Judicial Officers have been complied with in the nomination and selection of the candidates, recommend such candidates for appointment to the Governor of the State or the President of Nigeria as the case may be.<sup>32</sup>

One important issue arising from the procedure for appointment of Judicial Officers as contained in the NJC Guidelines is the power to nominate persons for the screening and eventual appointment as Judicial Officers. This power is vested in serving Judicial Officers. No other person is allowed by the Guidelines to nominate a person for such appointment. Even the Nigerian Bar Association does not have any power to make any nomination for such appointment. The powers of the Association as stipulated in the Guidelines are restricted to making of comments on the short-listed candidates forwarded to it, on their suitability or otherwise for appointment as Judicial Officers.<sup>33</sup>

It is our humble view that this power of nomination should not have been restricted to serving Judicial Officers only. Other members of the legal profession, particularly practising lawyers, Nigerian Bar Association and other persons, should have been permitted to make such nominations. Also, members of the Bar who are genuinely interested in serving on the bench should also have been accommodated in the Guidelines and be allowed to apply to the Council or any other relevant body, for appointment as Judicial Officers. One major problem with the restriction of nominations only to the serving Judicial Officers, and the choice of using only such nominations for the selection and appointment, is that many qualified persons who are interested in the job may be permanently shut out. Such persons may not have any access to any influential serving Judicial Officer or even where such access

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<sup>32</sup> For full details of the NJC Guidelines, see A. Obi Okoye, *Law in Practice in Nigeria*, (Enugu: Snaap Press Ltd, 2011), pp. 283-288.

<sup>33</sup> See Rule 3 (4) of the Guidelines.

is available, the Judicial Officer still has the discretion of nominating the person he chooses.

This situation may not afford the National Judicial Council the opportunity of recommending highly competent persons for such appointment.

Another big problem of this nomination process is that serving Judicial Officers may be put under intense pressure by aspirants to the bench. Some of these aspirants may resort to all forms of enticement which may include monetary gifts and other amoral gestures in order to get such nomination. We are of the humble view that the present nomination process may be abused and may not produce the appointment of persons of honour and outstanding competence as Judicial Officers.

## 6. Discipline of Judicial Officers<sup>34</sup>

A Judicial Officer who has been found guilty of any misconduct in the discharge of his duties may be disciplined by the appropriate body. Such disciplinary action may include removal from office, suspension from office or any other type of sanction considered by the disciplinary body as appropriate for the misconduct committed. It all depends on the gravity of the misconduct committed by the Judicial Officer. Such disciplinary action may only be taken against a Judicial Officer upon breach of either the Code of Conduct for Public Officers<sup>35</sup> or the Code of Conduct for Judicial Officers issued by the National Judicial Council.

### 6.1 Removal of a Judicial Officer from Office

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<sup>34</sup> Note that the appointing bodies mentioned above also have powers to discipline such judicial officers when necessary.

<sup>35</sup> See the 5<sup>th</sup> Schedule to the Constitution, part 1.

Generally, a Judicial Officer shall not be removed from office before his date of retirement,<sup>36</sup> except as permitted by the Constitution. The Chief Justice of Nigeria, the President of the Court of Appeal, the Chief Judges of the Federal High Court and Federal Capital Territory, the Grand Kadi on the Sharia Court of Appeal of FCT and the President of the Customary Court of Appeal of FCT may be removed from office before their retirement by the President of Nigeria acting on a motion supported by two-thirds majority of the Senate. In the case of the Chief Judge of a State, the Grand Kadi of the Sharia Court of Appeal of a State and the President of the Customary Court of Appeal of a State, the Governor of the State may remove any of them based on a motion or address supported by two thirds majority of the members of the House of Assembly of the State.<sup>37</sup> In addition, these Judicial Officers may be removed from office by the President of Nigeria (for Federal courts) or the Governor of a State (for State courts) acting on the recommendation of the National Judicial Council.<sup>38</sup>

All other Judicial Officers both at the Federal and State Courts, other than the ones mentioned above may be removed by the President or the Governor, acting only on the recommendation of the National Judicial Council.<sup>39</sup> There is no requirement for the two-thirds majority of either the Senate or the House of Assembly of a State.<sup>40</sup>

## **6.2 Grounds for removal of judicial officers**

A Judicial Officer may be removed from office on any of the following grounds:<sup>41</sup>

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<sup>36</sup> S. 292(1) 1999 Constitution.

<sup>37</sup> See s. 292(1) (a) *ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> S. 292(1) (b) *ibid.*

<sup>40</sup> See, Obi Okoye, above note 32 at p. 287.

<sup>41</sup> See s. 292(1) (b) of the 1999 Constitution.

- (i) Misconduct;
- (ii) Breach of Code of Conduct;
- (iii) Inability to discharge the functions of his office

### **i. Misconduct**

The nature of misconduct which may justify the removal of a Judicial Officer from office must be one which may have an impact on his general perception by the public as a judicial officer. In other words, such misconduct includes one which relates to the discharge of his official duties and his standing as a Judicial Officer. Misconducts of this nature may include corruption, abuse of office, conviction for a criminal offence, drunkenness, recklessness in the use of judicial powers etc.<sup>42</sup> However, misconducts which may warrant such removal from office may not be limited to one concerning his office. They include the acts or omissions of a Judicial Officer in his private life which are such as to erode public confidence in him as a Judicial Officer.<sup>43</sup>

In *A.G. Cross River State v Esin*,<sup>44</sup> where the Respondent, a Judge of the Cross River State High Court was removed from office on allegations of misconduct which did not relate to his official duties as a judicial officer, Katsina-Alu JCA (as he then was) stated:

....Section 256 of the Constitution does not appear to restrict the misconduct to matters concerning the office. I think it envisages a much wider scope. Each case must however depend upon its peculiar facts, for there is no rule of law defining the degree of misconduct which will

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<sup>42</sup> Such acts of a judicial officer in his private life which may justify his removal from office must be grave in nature and entirely scandalous. The writer is yet to come across any case where such acts were relied on to remove a judicial officer in Nigeria.

<sup>43</sup> See I.O. Smith, *The Constitution of the Federal Republic of Nigeria Annotated*, (Lagos: Eco Watch Publications (Nig) Ltd, 1999), p. 305.

<sup>44</sup> (1991) 6 NWLR (Pt. 197) 365.

justify dismissal. The sufficiency of the justification for removal depends largely upon the degree of misconduct: See *Clouston & Co. Ltd. v Corry* (1906) AC. 122 at 129. I also think that misconduct in his private life by a Judge of a nature which tends to erode his authority and confidence in his relations with the public amounts to misconduct which will justify dismissal. A Judge must be above suspicion in the eyes of the public. He should be able to do his work in complete independence and free from fear. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. He should give no cause for scandal

After reviewing the facts of the case, the Court of Appeal came to the conclusion that the actions of the respondent contained in the letters he wrote to the principal of a school and a superior officer at his wife's place of work, did not constitute misconduct capable of justifying his removal from office as a Judicial Officer.

## **ii. Inability to Discharge Functions of His Office**

The ground of inability of the Judicial Officer to discharge the functions of his office is very wide. Such inability may arise from infirmity of his mind or body.<sup>45</sup> Under this head, a Judicial Officer may be removed from office if he becomes insane or of unsound mind or if he suffers from some mental delusions which may affect to a large extent, his capacity to discharge the functions of his office.<sup>46</sup> Also any form of bodily harm or physical infirmity suffered by a Judicial Officer which renders him incapable of discharging the functions of his office will suffice. Such disabilities may include paralysis, persistent sickness which

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<sup>45</sup> The 1963 Constitution added "or any other cause" See s. 113 (2) *ibid*.

<sup>46</sup> Such as one in which the judicial officer may constantly believe that a particular dead man's spirit has been trying to kill him or that his life is seriously threatened by another person. See *Ejinima v State*(1991) NSCC 348.

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results in constant and prolonged hospitalization of the Judicial Officer, loss of speech, inability to hear etc.<sup>47</sup>

It may not be that easy to remove a Judicial Officer on the ground of insanity. The reason is that there must be cogent medical evidence presented to the investigating panel which irresistibly point to the fact of insanity. Such evidence may not however be of such a standard as to establish proof beyond reasonable doubt as applicable in criminal trials. We are of the humble view that it may suffice if the panel is convinced that the judicial officer lacked the capacity to understand what he was doing or to control his actions.<sup>48</sup> These two capacities should, in our humble opinion, be established before the panel, on the balance of probabilities.

### **iii. Breach of Code of Conduct**

This is the third ground for the removal of a Judicial Officer from office. The Code of Conduct for Public Officers regulates the conducts of all public officers in the country including Judicial Officers. Such breach may include failure to declare his assets, false statement in the declaration, personal involvement in private business etc.<sup>49</sup> There is the Code of Conduct for Judicial Officers which regulates the official activities of all Judicial Officers in Nigeria. There is also the Code of Conduct for Judicial Officers specifically.<sup>50</sup> It is our humble view that contravention of the provisions of any of the two Codes of Conduct by a Judicial Officer could justify his removal from office.

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<sup>47</sup> Some of these disabilities may earn the judicial officer the rather compassionate measure of compulsory retirement.

<sup>48</sup> These are some of the tests applied in determining whether an accused person suffers from insanity at the time of committing an offence. See C.O. Okonkwo, *et al*; *Criminal Law in Nigeria* (Ibadan: Spectrum Books Ltd, 1980) 136-137.

<sup>49</sup> See the 5<sup>th</sup> Schedule to the Constitution part I, paragraph 2(b).

<sup>50</sup> This Code was issued by the National Judicial Council pursuant to s. 22(J) of the Third Schedule (part I) 1999 Constitution.

## **7. Procedure for Removal of Judicial Officers under the 1999 Constitution**

Section 292 of the 1999 Constitution provides:<sup>51</sup>

A judicial officer shall not be removed from his office or appointment before his age of retirement except in the following circumstances.

(a) In the case of

- (i) Chief Justice of Nigeria, President of Court of Appeal, Chief Judge of the Federal High Court, Chief Judge of the High Court of the Federal Capital Territory Abuja, Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory Abuja and President of the Customary Court of Appeal of the Federal Capital Territory Abuja, by the President acting on an address supported by two thirds majority of the Senate.
- (ii) Chief Judge of a State, Grand Kadi of a Sharia Court of Appeal or President of a Customary Court of Appeal of a State, by the Governor acting on an address supported by two-thirds majority of the House of Assembly of the State.

(b) In any case, other than those to which paragraph (a) of this subsection applies, by the President or as the case may be, the Governor acting on the recommendation of the National Judicial Council.....

A cursory look at the provisions of section 292(1) may lead to the hasty conclusion that only Judicial Officers stated in subsection (1)(b) of the section are entitled to the recommendation

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See. s. 292(1)(a)&(b) of the 1999 Constitution as amended by s. 9 of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010. The National Judicial Council was established by the 1999 Constitution in s. 153(1)(i).

of the National Judicial Council before they may be removed from office while those under subsection (1)(a) do not enjoy such privilege. The provisions of section 292(1)(a) (ii) has been employed by many State Governors in the removal of the Chief Judges of their States.<sup>52</sup> The interpretation often preferred by those Governors is that the power of investigation and recommendation for the removal of the Chief Judge of the State resides in the House of Assembly of the State and not the National Judicial Council. In those States therefore, complaints against the Chief Judge of the States were addressed to the House of Assembly of the respective States who investigated same and recommended the removal of the Chief Judge to the Governor. This erroneous interpretation of the provisions of section 292(1)(a) of the 1999 Constitution by the Governors, arose from the fact that there was no judicial authority from the Supreme Court on the point as most of the cases hinging on the wrongful removal of a Chief Judge from office were still pending at the lower courts.

Is there any ambiguity created by section 292(1) of the 1999 Constitution? We humbly answer that question in the affirmative. Section 292(1)(a), if interpreted alone without taking cognizance of other relevant provisions of the Constitution, may appear to have excluded the National Judicial Council from the removal process of various heads of courts while leaving the fate of such Judicial Officers mentioned therein in the hands of legislators.<sup>53</sup>

The third schedule, part I to the 1999 Constitution provides:

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The National Judicial Council shall have power to-

(a) .....

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<sup>52</sup> Some of those States include Kwara, Plateau, Oyo etc.

<sup>53</sup> The judicial officers in question are the heads of various courts at the Federal and State level.

<sup>54</sup> See paragraph 21 (a)-(d) of 3<sup>rd</sup> Schedule part I to the 1999 Constitution.

- (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 offices;
- (c) .....
- (d) Recommend to the Governors the removal from office of the Judicial Officers specified in sub-paragraph (c) of this paragraph, and to exercise disciplinary control over such officers.

Sub-paragraphs (a) and (c) contain the particulars of Judicial Officers who should not be removed except on the recommendation of the National Judicial Council. While sub-paragraph (a) expressly lists out all categories of Judicial Officers serving in federal courts including the Federal Capital Territory, sub-paragraph (c) names all categories of Judicial Officers serving in State owned courts. The lists include the Chief Judge of a State and other heads of courts at the Federal and State level. Neither sub-paragraph (a) nor (c) excluded any particular Judicial Officer from the prior recommendation of the National Judicial Council before his removal from office or appointment.

In interpretation of statutes including the Constitution, Schedules play a very important role of complimenting the body of the statute to which it is attached. In other words, schedule is a part and parcel of a statute and is interpreted together with the main body of the enactment except where it is manifestly inconsistent with the provisions of the main body of the statute.<sup>55</sup> Paragraph 21 of the Third Schedule, Part 1, is not inconsistent with section 292(1) of the 1999 Constitution. It merely recognizes the power of the National Judicial Council to investigate complaints and make recommendations before the legislature and the Governor or President may act to remove a Judicial Officer from office.

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<sup>55</sup> In which case the provisions of the main body of the statute should prevail. See *Egolum v Obasanjo* above note 15 at p. 368.

There is no express provision of the Constitution empowering the National Assembly or the House of Assembly of a State to receive or investigate complaints made against a Judicial Officer in the main body of the Constitution. It is therefore our humble view that if section 292(1) and Third schedule to the 1999 Constitution, Part 1, paragraph 21(a)-(d) are construed together, the inescapable conclusion would be that the National Judicial Council has the exclusive power to receive complaints against all Judicial Officers in Nigeria, investigate the complaint and make recommendations to the President of Nigeria or Governor of a State as the case may be, on whether or not to remove any such judicial officer from office.

The Senate or the House of Assembly as the case may be, may only sanction such removal after and in addition to the recommendation of the National Judicial Council. Any contrary interpretation of those provisions would produce an absurd result which would subject the position of some Judicial Officers to the absolute discretion of political office holders especially the President or Governor and legislators. That may not represent the intentions of the framers of the Constitution. In our respectable view, the preferable interpretation of the provisions of section 292 and Third Schedule to the 1999 Constitution should be that no Judicial Officer, including the Chief Judge of a State, may validly be removed from office except on the prior recommendation of the National Judicial Council. The Supreme Court has affirmed this position recently.

In *Elelu-Habeeb v National Judicial Council*,<sup>56</sup> 1<sup>st</sup> Appellant was the Chief Judge of Kwara State at all times material to this case. The Kwara State House of Assembly in purported exercise of its powers under the 1999 Constitution, sought to exercise disciplinary control over the 1<sup>st</sup> Appellant by way of removal from office. A letter was served by the House of

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<sup>56</sup> (2012) 13 NWLR (Pt. 1318) 423.

Assembly on the Chief Judge to appear before the House and defend charges of misconduct made against her. The 1<sup>st</sup> Appellant challenged the powers of the State House of Assembly to exercise disciplinary control over her. The Supreme Court ruled in her favour and held that the House of Assembly of Kwara State had no constitutional power to exercise any form of disciplinary control over the Chief Judge of the State, without the prior recommendation of the National Judicial Council. Mohammed JSC who read the lead judgement stated:<sup>57</sup>

....On the interpretation and application of the provisions of sections 153(1)(l); 292(1)(a)(ii) and paragraph 21 of Part 1 of the Third Schedule to the Constitution of the Federal Republic of Nigeria 1999, the Governor of Kwara State and the House of Assembly of Kwara State cannot remove the Chief Judge of Kwara State from office without recourse to or input or participation of the National Judicial Council. That is to say for the purpose of emphasis, the Constitution of the Federal Republic of Nigeria 1999, does not give the Governor of Kwara State acting in conjunction with the House of Assembly of Kwara State absolute power to remove the Chief Judge of the State from his/her office or appointment before the age of retirement without the recommendation of the National Judicial Council.

The National Judicial Council is therefore constitutionally empowered to receive petitions against Judicial Officers, investigate same and make recommendations to the appropriate authority before such Judicial Officer may be removed from office. Neither the Senate nor the House of Assembly of a State possesses any power to receive petitions against a Judicial Officer

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<sup>57</sup> *Ibid* at p. 495.

or to investigate such petition. They can only act on the recommendations of the Council.

Complaints against Judicial Officers are usually sent to the National Judicial Council which is headed by the Chief Justice of Nigeria. The National Judicial Council sets up a committee to investigate the allegation. The Judicial Officer against whom the allegation is made is notified in writing of the allegation and is afforded reasonable time to react to the allegation. Where the allegation is proved against the judicial officer, the National Judicial Council shall recommend to the President or Governor as the case may, such Judicial Officer for removal.<sup>58</sup> Where such Judicial Officer is the head of any court (e.g. Chief Justice of Nigeria or Chief Judge of a State), the President or the Governor as the case may be, may not remove him except on the address of the Senate or the House of Assembly with the two –thirds majority votes of members.<sup>59</sup>

## **8. Disciplinary Control other than Removal from Office**

The National Judicial Council may exercise a different disciplinary measure, other than removal from office, over Judicial Officers for any misconduct committed in the exercise of their judicial functions.<sup>60</sup> Such disciplinary control may include suspension from office pending the outcome of its investigation of a complaint made against such a Judicial Officer.<sup>61</sup>

## **9. Autonomy of National Judicial Council.**

We have to examine here whether the National Judicial Council is in all circumstances, a body that is capable of exercising its powers and making its decisions without being controlled in any manner

<sup>58</sup> See 3rd Schedule to the 1999 Constitution Part I item 21(b). See also *Umanah v Attah* (2006)17 NWLR (Pt. 1009) 503.

<sup>59</sup> See ss. 266(1) & 271(1) *ibid.*

<sup>60</sup> See 3rd schedule part I, paragraph 21(b) of the Constitution

<sup>61</sup> See Obi Okoye, above note 32 at p. 293.

by any other person; or without the interference of anybody. In other words, is the National Judicial Council really autonomous and independent? The answer to this question lies in the consideration of various indices, some of which are highlighted and discussed below.

### **9.1 Appointment of Members of the Council**

We have earlier in this paper, examined critically the mode of appointment of the members of the Council. None of the members of the Council is appointed by the President of the Federal Republic of Nigeria. The Chairman of the Council is the Chief Justice of Nigeria and so is the Deputy Chairman, who is the next most senior Justice of the Supreme Court. All other members are appointed by the Chairman either independently or in consultation with or on the recommendation of another body. We may therefore conclude that, looking at the mode of appointment of members of the Council, there is sufficient autonomy of the Council as none of the members may be obliged to owe any allegiance to the President or any other member of the executive arm of the government of the Federation in respect of his appointment. The only concern which we have expressed earlier in this paper touching on the mode of appointment of the members of the Council, is the possibility of undue allegiance of some members of the Council to the Chairman. The reason lies in the fact that he appoints majority of the members and such members may, in order to secure a re-appointment, or as a mark of gratitude, decline to discharge their duties with sufficient independence and diligence.

### **9.2 Exercise of Powers by the Council**

Section 158(1) of the 1999 Constitution provides:

In exercising its powers to make appointments or to exercise disciplinary control over persons,.....the National Judicial Council .....shall not be subject to

the direction or control of any other authority or person....

Literally, this provision guarantees the Council full autonomy in respect of the exercise of its duties and powers under the Constitution. The powers of the Council include matters relating to the appointment and discipline of Judicial Officers.<sup>62</sup> In our discussion above on the appointment and removal of Judicial Officers, we came to the conclusion that the Council does not actually appoint or remove any Judicial Officer. The Council's power of appointment and removal of Judicial Officers is limited to making recommendations to either the President of Nigeria or the Governor of a State, on whether a Judicial Officer should be appointed or removed from office. Such recommendation by the Council, may be accepted or otherwise rejected by the President or the Governor as the case may be. Such refusal by the President or Governor to act on the recommendations of the Council generally undermines the powers of the Council.

Autonomy and independence of the Council in this area may not therefore have been fully guaranteed by the Constitution. However, with regard to the discipline of Judicial Officers other than removal from office, the National Judicial Council enjoys a measure of autonomy. The Council may, while investigating a petition against a Judicial Officer, decide to suspend him pending the conclusion of such investigation.

The Council is also permitted to delegate some of its powers to any officer or authority. However, such delegation is not permissible unless the Council first obtains the approval of the President.<sup>63</sup> The implication of this provision is that the Council cannot ordinarily appoint anybody to exercise or carry out any of its powers or functions without first seeking and obtaining the

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<sup>62</sup> We have already examined these items critically in this paper.

<sup>63</sup> See s. 160 (1), *ibid*. Where such power is to be conferred on an officer of a State, the approval of the Governor of that State should first be obtained. See s. 160 (2), *ibid*.

approval of the President and in some cases, the Governor, for approval. This is far from the perceived autonomy granted by the Constitution to the Council in section 158(1). The same restriction of first seeking the approval of the President is also placed on the Council, in relation to the making of its rules of procedure for exercising its constitutional powers.

Why would the Constitution subject the power of the Council to delegate some of its powers and to make its own rules of procedure to the approval of the President? Does the Council also need approval of the President to amend such rules of procedure at any given time? We are of the humble view that the provisions of section 160 of the Constitution has, to a large extent, subjected the exercise of powers of the Council on those matters to the whims of the President despite the provisions of section 158(1) of the Constitution. The essence of seeking approval of the President by the Council in respect of those matters is to ascertain whether or not the President is disposed towards the action of the Council for which it is seeking the approval. What would be the position where the President refuses to approve an action or proposal of the Council but insists on some form of compromise before he can approve same. Can the Council ignore him and proceed on its proposed course of action? The answer is no. The refusal of the President marks the end of such proposed action.

## **10. Funding of the Council**

The National Judicial Council receives funding directly from the Consolidated Revenue Fund of the Federation. Such fund it receives from the Consolidated Revenue Fund includes monies for disbursement to the heads of superior courts of records in Nigeria.<sup>64</sup> The funding of the recurrent and capital projects of the Council is also from the Consolidated Revenue Fund in the manner approved by the National Assembly. Such funding is

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<sup>64</sup> See s. 81(3), *ibid.*

included in the Appropriation Act for each year.<sup>65</sup> Once the Council receives its appropriation for its expenditures for the year, it is responsible for the control and disbursement of such funds for its recurrent and capital services, without the approval of any body. Such independence in the control and disbursement of its funds means that the Council can embark on any capital project without necessarily begging any member of the executive to approve it.<sup>66</sup>

Another aspect of the funding of the National Judicial Council which guarantees a measure of independence and autonomy to the Council, is in respect of the salaries and allowances of the members. The salaries and allowances of members are charged to the Consolidated Revenue Fund of the Federation.<sup>67</sup> Also such salaries and allowances and conditions of service of the members, cannot be lawfully altered to their disadvantage after their appointment.<sup>68</sup> These provisions will protect the members of the Council from any form of pressure from anybody in the course of the discharge of their constitutional functions.

## **11. Removal of Members of the Council**

Although the Constitution removed the power of appointment of the members of the National Judicial Council from the President, such may not be the position in the case of removal of members of the Council from office. Any of the members of the Council,

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<sup>65</sup> See s. 81(2), *ibid.*

<sup>66</sup> Provided that the Council complies with the necessary statutory pre-conditions for the award of government contracts for the execution of the projects.

<sup>67</sup> See s. 84(2) *ibid.* Such salaries and allowances of the members of the Council should be determined by the Revenue Mobilization Allocation and Fiscal Commission and approved by the National Assembly. See S. 84(1) *ibid.*

<sup>68</sup> See s. 84 (3) & (4) *ibid.*

including the Chairman,<sup>69</sup> may be removed from office by the President, acting on an address supported by two - thirds majority of the members of the Senate. The ground for such removal should be either for inability of the member of the Council to discharge the functions of his office.<sup>70</sup> or for misconduct.<sup>71</sup> We are of the humble view that the procedure for removal of any member of the Council is stringent enough to ensure autonomy of the Council. It will be difficult for the President to sack any member of the Council summarily for the mere reason that he refused to do his bidding. Similar procedure for removal is applicable to Judicial Officers except that in the case of Judicial Officers, the allegations against them should be sent to the National Judicial Council, to be investigated by it before making recommendations to the President, where applicable.<sup>72</sup>

## 12. Conclusion

The establishment of the National Judicial Council by the 1999 Constitution has been a big blessing to the judiciary, especially the superior courts of record in Nigeria. Ever since its establishment, there is much sanity in the judiciary and judicial system in Nigeria when compared to what we had prior to the 1999 Constitution.

However, the composition, exercise of powers and the autonomy of the Council are not without some defects, as the Council does not have full independence in the appointment and

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<sup>69</sup> Reference to a member of the Council includes the Chairman of the Council. See s. 161, *ibid*.

<sup>70</sup> See s. 157(1), *ibid*. Such inability to discharge the functions of his office may arise from infirmity of the mind or body or any other cause.

<sup>71</sup> Misconduct means in s. 161(d) *ibid* a breach of the oath of allegiance or oath of office of a member or a breach of the provisions of this Constitution or bribery or corruption or false declaration of assets and liabilities or conviction for treason or treasonable felony.

<sup>72</sup> See s. 292(1) of the 1999 Constitution. See also *Erebu - Habeeb v National Judicial Council*, above note 56 at p. 495.

removal of Judicial Officers. Its exercise of power is still subjected to the whims of the President or Governor of a State as the case may be. It will probably be better for the Council to be fully independent in the exercise of its constitutional powers without the interference of the executive. It is also necessary to devote a percentage of the funds in the Consolidated Revenue Fund of the Federation for each year, for the funding of the Council's activities including funds for disbursement to the judiciary.