JUDICIAL INDEPENDENCE AS BULWARK OF RULE OF LAW

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1. Introduction

In any society, even more so in a democratic one, the judiciary is indispensable for the impartial administration of justice. The judicial system of Nigeria is founded upon a number of interrelated principles, the foremost of which is the rule of law, which is needed to restrict arbitrary government power. Judicial immunity is indispensable for an independent and virile judiciary. It is against this backdrop that this paper explores the nexus between the doctrine of judicial immunity, judicial independence and the maintenance of the rule of law. It seeks to answer the question whether judicial immunity is absolute or qualified. In view of the fact that judicial misconduct has increasingly become the subject of public and legal scrutiny, the paper further interrogates the issue whether, under the doctrine of judicial immunity, today, judicial officers are in any way accountable and under what circumstances? In discussing judicial immunity and seeking to provide an answer to the question whether judicial officers are sacred cows, cognisance is taken of judicial responsibility as the jural opposite of judicial immunity in Hohfedian sense of fundamental legal conception[1].

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1 See Cook, W.W. (ed), Hohfeld, W.N. *Fundamental Legal Conception*s *Applied in Judicial Reasoning* (1919: Yale University Press, New Haven, Connecticut), p. 5. "In the first of the two essays upon Fundamental Legal Conceptions Hohfeld sets forth the eight fundamental conceptions in terms of which he believed all legal problems could be stated. He arranges them in the following scheme:

2. The Need for Rule of Law and Separation of Powers

Rule of law and separation of powers are intertwined necessities in any democracy.

(a) Rule of Law

The rule of law is put into effect through a constitutional system by which power is separated and balanced among three branches of government. Under the separation of powers, the judiciary functions as an independent branch of government so that it may enforce the rule of law. Judicial independence, though, must be tempered with a certain degree of judicial responsibility. An independent judiciary can properly enforce the rule of law only if it is learned in the law and is characterised by impartiality and integrity.

The rule of law is an ancient philosophy as old as creation[2]. Plato and Aristotle in circa 350 BC discussed the rule of law against its disrespect by the society. In the view of Plato:

> Where the law is subject to some other authority and has none of its own, the collapse of the state, in

Jural Opposites	right	privilege	power	immunity
	no right	duty	disability	liability
Jural Correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability, p. 5.

…When so completed, these legal concepts become the "lowest common denominators" in terms of which all legal problems can be stated, and stated so as to bring out with greater distinctness than would otherwise be possible the real questions involved…" p. 6.

[2] See Oyewo, A.T., "*The Survival of the Rule of Law in Nigeria. A Function of Good Governance and Democratic Consolidation",* in Onyekagbu, A.I. (ed.) Readings in Contemporary Law and Policy Issues. Essays in Honour of Dr. The Hon. Justice Iche N. Ndu, (2013: Pearl Publishers, Port-Harcourt), p. 13. In *Omatseye v FRN* (2017) LPER – 42719 (CA) p. 65, the court gave the origin of the rule of law as being over twenty five centuries.

> my view, is not far off, but if law is the master of the government and the government is its slave, then the situation is full of promise/and men enjoy all the blessings that the gods shower on the state[3].

For Aristotle[4] the famous Greek Philosopher who coined the term, the rule of law is preferable to the rule of men. The concept of the rule of law featured in the philosophy of Aristotle where he stated as follows:

> The rule of law is preferable to that of an individual, whilst according to Bracton who wrote in the 13th century adopted the view common in the middle ages that entire world was governed by human or divine law and that there was no divine right for kings that even "the king ought not to be under no man but under God and the law because it was the law that made him king.

Thereafter, the Magna Carta was signed into law by King John in 1215 following the revolt of the English barons who challenged the assumed divine right of the English Kings over the English people[5]. The Charter provides, in part, that "no free man shall be taken, imprisoned or dispossessed or outlawed or banished or in any way destroyed, nor will we go upon him or send upon him except by the legal judgment of his peers or by the law of the land"[6]. Prior to the

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3 Quoted in Cooper J., etal, *Complete Works by Plato*, 1997, p. 1402, cited in Wikipedia, the free Encyclopedia.

4 Aristotle (BC 384-322) in Politics 111, 16 Translated by Jowett ed. Davis cited in Wokocha R. A., "The Rule of Law and Individual Political Rights in Nigeria: A Critical Reflection" (2009) 1 *ANSULJ* p. 150.

5 The Magna Carta was signed into law in 1215.

6 See Article 20 of the Magna Carta.

Magna Carta, the law was used erratically, at the King's whims and caprices, and for his personal benefit rather than for the public good. Thus, the Magna Carta was the first step towards establishing the rule of law, according to which law is applied in a fair and equal manner to all persons rather than capriciously or arbitrarily. Under the rule of law, it is recognised that no one is above the law. King, counsel, and commoner alike, are all subject to the law.

In the words of Bracton, a great philosopher of the 13th century: "The king himself ought not to be subject to man, but subject to God and to law because the law makes him king".

The principle of the rule of law was further expounded by such Western thinkers as Montesquieu[7], John Locke[8] and Sam Rutherford[9], and was also one of the remote factors responsible for the French Revolution[10], the American Declaration of Independence[11] and the Bolshevik Revolution[12].

The modern concept of rule of law was based on the constitutional theory of Albert Venn Dicey, Professor of English Law at Oxford to which he devoted a large part of his book, *Law of the Constitution 1885* wherein he identified three characteristics of the rule of law namely:

> First it means, the absolute supremacy of predominance of regular law as opposed to the

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7 *The Spirit of Laws*, 1748,

8 Second Treatise of Government, 1690.

9 Lex Rex, 1644.

10 1798.

11 1776.

12 1917.

> influence of arbitrary power and excludes the existence of arbitrariness or even of void discretionary authority on the part of the government.
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> Secondly every man whatever be his rank or condition is subject to the ordinary laws of the realm and amenable to the jurisdiction of ordinary tribunal (i.e. courts).
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> Thirdly whereas in many countries private rights such as freedom from arrest are sought to be guaranteed by a statement in a written constitution of the general principles relating thereto in England, these rights are the result of court decision in particular cases which have actually arisen.

According to A.V. Dicey, in his *Introduction to the study of Man and Constitution*:

> …in the first place, the absolute supremacy or predominance of regular laws, as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government, Englishmen are ruled by the law, and by the law alone, a man may with us be punished for nothing else. It means again equality before the law or the subsection of all classes to the ordinary law of the land administered by the ordinary law courts. The rule of law in this sense excludes idea of any exception of officials or others from the duty which govern other citizens or from the jurisdiction of the ordinary tribunals.

The rule of law is the very antithesis of arbitrary and unbridled government power. It brings reason, fairness, and equality to the law. In virtually all nations today, the rule of law finds its quintessential expression in the Constitutional provisions which state that no person shall be deprived of life, liberty, or property without due process of law, nor denied the equal protection of the laws. These provisions, which are the direct descendants of the Magna Carta, establish the rule of law as the constitutional right of all persons.

Historically, the framers of the American Constitution also recognised the need to create a national government that has sufficient power to effectively govern the nation, yet it is restrained by a system of checks and balances specifically designed to limit the abuse of power. Before gaining its independence, the United States was a British colony, and the American colonists had experienced inequities at the hand of the English monarchy. In order to guide against tyranny that can result from unbridled government power, the framers of the Constitution sought to create a government characterised by separation of powers among the three branches of government – the executive, the legislature, and the judiciary.

The 1950s saw the understanding of the concept beyond Professor Dicey's conception. The International Commission of Jurists made efforts to give the rule of law effective meaning which was actualised in the Declaration of New Delhi 1959 which was reaffirmed in a similar conference held in Lagos in 1961 with special reference to Africa as follows:

> The rule of law is a dynamic concept which should be employed to safeguard and advance the will of the people and the political rights of the individual and to establish social, economic educational and cultural conditions under which the individual achieve his dignity and realise his legitimate aspirations in all countries whether dependent or independent", and finally declared in Lagos conference:
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> (i) That in order to maintain adequately the rule of Law all governments should adhere to the principle of democratic representation in their legislatures.
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> (ii) That fundamental human rights especially the right to personal liberty should be written and entrenched in the constitution of all countries and such personal liberty should not in peace time be restricted without trial in a court of law.

Dennis Lloyd[13] conceives the rule of law somehow in a narrower sense as imposing procedural guarantees that have been found necessary to ensure what, in American constitutional practice, is referred to as the due process of law. This involves such matters as the independence of the judiciary, speedy and fair trial of accused persons, the principle that responsibility is personal and individual, and provision of adequate legal aid for those whose financial resources are insufficient to secure suitable legal services.

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[13] Lloyd, D., *The Idea of Law*, (1964: penguin Books, London), pp. 101-104.

Olanipekun asserted: "Our profession is the only one cut out to espouse the beauty of the rule of law"[14]. Mahajan, C.J. of the Indian Supreme Court reiterated the need for a strong bar in order to guarantee rule of law. In his words:

> …a strong Bar and a strong Judiciary are a sine qua non for the maintenance of the rule of law. It is the Bar that makes both the Ministry and the Judiciary go straight. If the Bar becomes a mere money-making machine, then it will be failing in its duty toward the nation....[15]

Rule of law connotes that every individual and organisation is bound by the law except as stipulated by the law itself[16].

(b) Separation of Powers

The doctrine of separation of powers lies at the heart of the Constitution of Nigeria like in that of the United States and also at the heart of the individual constitutions of each of the 50 states of the union. Like the federal Constitution, each of the state constitutions establishes a tripartite government composed of three branches, which are allocated distinct spheres of authority. The

[14] Olanipekun, W., "The Future of the Legal Profession in Nigeria: Challenges and Prospects", in *Akinseye-George*, Y. and Gbadamosi, G. (eds.) *The Pursuit of Justice and Development Essays in Honour of Hon. Justice M. Omotayo Onolaja* (2004: Diamond Publications Ltd., Lagos and Abuja), p. 385.

[15] Mahajan, *Autobiography* (1978: New Delhi) pp. 72-73 quoted Olanipekun, W., ibid, p. 388.

[16] See recent works on rule of law in Edu, O. K. "Reflections on the Rule of Law in Contemporary Nigeria", Vol. 5, *DLR (Delsu Law Review*), 2019, pp. 1-22; Olagbegi-Oloba, V. B., "Rule of Law and Realities in Nigeria: Rethinking the 21st CenturyRoadmap for Liberty and Justice in Africa", Vol. 15, *DLR (Delsu Law Review*), 2019, pp. 200-223.

doctrine of separation of powers is based upon the principle that each branch of government has its own sphere of authority and no branch should interfere with another's fundamental role under the Constitution. In reality, absolute separation of powers between the three branches of government is impossible, and some overlap of authority is bound to occur. Nonetheless, the Constitution requires a government of separated powers, and to the extent possible, the Constitution restrains the ability of one branch to overreach its bounds and interfere with another.

In addition, by protecting each branch of government from encroachment by the others, the doctrine of separation of powers protects the individual rights possessed by each citizen of a nation. By separating and hence limiting governmental authority, the doctrine of separation of powers restrains the capacity of any branch of government to impinge upon individual rights. Thus, the doctrine of separation of powers serves a dual function; it structures and thereby limits government power, and it protects the rights of individuals.

The doctrine of separation of powers entrenched in the Nigerian constitution recognises that the judiciary is a separate branch of government that is independent, equal and coordinate to the legislative and executive branches of government. It is the doctrine of separation of powers that underlies the need for an independent judiciary that acts as a counterweight to the legislature and executive. Accordingly, there is a delicate balance between the three branches of government. To maintain this balance, the judiciary has been granted the power of judicial review. This means that the courts have the authority to review the acts of the other branches of government to determine if they meet constitutional

standards. If, in the opinion of the courts, an act of the legislature or executive is contrary to the Constitution of Nigeria, the courts have the authority to nullify that act[17]. Thus, the judiciary stands as the final arbiter of the Constitution, and has the responsibility to review legislative and executive action to determine its constitutionality, and hence its validity. Judicial review is the most significant function performed by the judiciary and operates as an integral cog in the system of checks and balances created by the Constitution.

As one of the constituents of the basic structure or framework of the Constitution, separation of powers between legislature, executive and judiciary requires that no arm is controlled by another, although, each acts as a check on the other. In view of the structure of government, notwithstanding the difficulties in practical application of the concept of separation of powers, it is necessary to clearly state and demarcate the powers and functions of government so as to avoid conflict and chaos. The "environment to exercise the powers without fettering, thwarting and short-circuiting the working of any arm is the spirit of the Constitution"[18]. In *Amaechi v. Omehia*[19], the court took this bold position in the interest of rule of law when it re-integrated the supremacy of the Constitution into the Nigerian legal corpus[20].

The legal profession is concerned about defending the rule of law. For the lawyer to perform this role effectively, however, the bar

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17 *A-G of Bendel v A-G of Federation* (1981) 10 S.C. 132; (1981) ALL NLR 85; *Attorney-General of Lagos State v Attorney-General of Federation and others* (2003) 12 NWLR (pt. 833) 1; (2004) 11-12 S.C. 85; (2005) 2 WRN 1.

18 Badaiki, A .D. *Interpretation of Statutes and Constitution* (2018: University Law Publishing Co. Ltd, Lagos, Abuja and Washington D. C.) p. 191.

19 (2008) 1 MJSC 1; (2007) 9 NWLR (Pt. 1040) 504.

20 Badaiki, ibid.

must be independent. The International Commission of Jurists in the Declaration of Delhi 1959 recognises that it is essential to the maintenance of the rule of law that there should be an organised legal profession free to manage its own affairs[21]. And it is for the independent bar to provide the necessary support to sustain an independent and fearless bench.

3. Concept of Judicial Independence

(a) Independence of the Judiciary

The oldest and popular meaning attributed to judicial independence is freedom from interference, pressure or inducement from the other branches of government, executive, legislature, as well as from relations, friends and peers[22] and indeed from political, economic, social or other influences. It means that judicial officer should be free from influence by the people. Undoubtedly, judicial officers are bound to follow the law, which the people may revise or amend through their representatives in the legislature. Naturally, judicial officers should make their decisions according to the law, but should not be influenced by what the executive, the legislature and, even the people might think. This view contends that the ideal judicial officer is a person who is learned in the law and who is independent, so that he or she will be guided in decision-making, solely by legal knowledge and judicial experience. It requires that a judicial officer should not only have a good understanding and interpretation of the law, but also have good conscience, and without fear or favour, decide a case on merit. This notion of the independence of the judiciary was reflected in the United Nations

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21 The Rule of Law in a Free Society p. 13.

22 Osipitan, T. "Safeguarding Judicial Independence under the 1999 Constitution, in Akinseye-George, Y. and Gbadamosi, G. (eds.) *The Pursuit of Justice and Development Essays in Honour of Hon. Justice M. Omotayo Onolaja,* (2004: Diamond Publications Ltd. Lagos), p. 12.

Declarations on Basic Principles on the Independence of the Judiciary[23] as follows:

> The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law without any restrictions, improper influences, inducements, interferences, direct or indirect from any quarter for any reason.

Some of those principles are contained in the United Nations Basic Principles on Independence of the Judiciary, the highlights of which can be stated as follows[24]:

(i) Each state is required to enthrone or affirm, by the Constitution or statute, the concept of the independence of its judiciary;

(ii) By the above token, decisions of the judiciary should be the product of judicial consideration of the underlying facts of the case as presented to the court and the application of the applicable law to such facts. Judicial decisions should not be fettered or impaired in anyway by "improper influence, inducements, pressure or threat" from any quarters;

(iii) It is the duty or function of the judiciary in any given nation to hear and reach decision on any matter or dispute that is brought before the court. It is also deemed to be within the province of the exercise of powers of the

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[23] This instrument was first adopted in 1985 during the 7th U.N. Congress Assembly of the U.N. by its Resolution 40/32 and 40/146 of 1985. See http://apps.americanbar.org/rols/docs/judicialreformunprinciplesindependence judiciaryenglish.pdf (accessed on30thJuly, 2020).

[24] The United Nations: Basic Principles on the Independence of the Judiciary", ibid.

courts to assume or decline jurisdiction in any such legal dispute without any interference;

(iv) Judicial decision should be free and there should be the absence of any form of undue meddlesomeness with the judicial process. Judicial decisions should not be subject to unnecessary revision, although necessary allowance for appropriate judicial review by way of appeal is recognised;[25]

(v) It is the responsibility of each state to adequately provide the wherewithal and infrastructure to enable the carrying out of judicial duties; and

(vi) Appointment of judicial officers should be on the basis of legal training, personal competence, integrity and character of the candidates devoid of any ulterior or extraneous considerations. Such procedure for appointment should not be tainted by discrimination along the lines of creed, race, religion etc.

From the global perspective, independence of the judiciary extends to "self-administer matters pertaining to the adjudicative process, unfettered and without any interference from any quarters"[26]. Furthermore, it will necessarily impart the notion that the individual judicial officer should not be found or placed in a situation that will occasion the display of any form of bias in any case that is before him, on grounds of gender, religion, creed,

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[25] This principle does not exclude the prerogative of mercy, or mitigation or commutation under the laid down law.

[26] Orimogunje, O.O., "Expanding the Frontiers of Independence of the Judiciary: A Critical Appraisal of the Extant Constitutional and Institutional Framework" in Onadeko, O. etal (eds.) *Fifty Years of Legal Education in Nigeria: Challenges and Next Steps,* (2014: CSS Sterlong Printers Ltd), Lagos, pp. 431-432.

political, affiliation or any other extraneous considerations[27]. Independence is of both the judicial officer and the judiciary as an arm of government.

Section 6 of the Nigerian Constitution vests judicial powers in the judiciary which is granted authority to hear all cases under the Constitution and Laws of the Federal Republic of Nigeria. This grant of authority was intended by the framers of the Constitution as a mandate to an independent judiciary to check and abuse abuses of authority by the other branches of government. The essence of judicial independence, therefore, is the preservation of a separate jurisdiction of government that can adjudicate cases or controversies with impartiality[28].

(b) Guarantees of Judicial Independence

There are international standards and principles as well as standards in constitutions of nations as guarantees for judicial independence.

(a) Standards and Principles

(i) International Standards

A country in the process of democratic transition or constitution-building may wish, both for intrinsic reasons of good governance and for reasons of internal and external legitimacy, to ensure that its provisions regarding judicial removal, immunity and accountability conform to international standards. These include article 14 of the International Covenant on Civil and Political Rights, which provides that 'everyone shall be entitled to a fair and public

[27] Ibid.

[28] Kaufmau, "The Essence of Judicial Independence", 80 *Columbia Law Review*, 671, 688 (1980).

hearing by a competent, independent and impartial tribunal established by law'; the UN Basic Principles on the Independence of the Judiciary[29]; the Minimum Standards of the International Bar Association[30]; and the Latimer House Guidance on Parliamentary Supremacy and Judicial Independence[31].

The UN Basic Principles state, *inter alia*:

> The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. Judges...shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.

The International Bar Association's Minimum Standards state, *inter alia*:

> Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at

[29] United Nations, Basic Principles on the Independence of the Judiciary, 1985, available at www.ohchr. org/EN/.../Pages/IndependenceJudiciary.aspx (accessed 30thJuly, 2020).

[30] Minimum Standards' of the International Bar Association, 1982, available at http://www.ibanet.org/Document/Default.aspx (accessed 30th July, 2020).

[31] Latimer House Guidance on Parliamentary Supremacy and Judicial Independence, 1998, available at www.cpahq.org/cpahq/cpadocs/Latimer%20 House%20Principles.pdf> (accessed 30th July, 2020).

> the date of appointment. The grounds for removal of judges shall be fixed by law and shall be clearly defined. A judge shall not be subject to removal unless by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he/she has shown himself/herself manifestly unfit to hold the position of judge.

The Latimer House guidelines, which apply only to members of the Commonwealth, state that 'Judges should be subject to suspension or removal only for reasons of incapacity or misbehavior that clearly renders them unfit to discharge their duties' and that 'arrangements for appropriate security of tenure and protection of levels of remuneration must be in place'.

(ii) National Constitutions

In addition to international standards and principles, national constitutions incorporate principles for guarantee of judicial independence. The protection of judges from arbitrary removal, together with other guarantees of judicial independence, has long been recognised as an essential element of a constitutional system of government in many parts of the world. For example, Article 100 of the Belgian Constitution of 1831 prescribed thus: "Judges are appointed for life. No judge may be deprived of his office nor suspended except by a judgment. The transfer of a judge shall not take place except by a new appointment and with his consent". Article 102 stated: "The salaries of members of the judiciary are fixed by law", and Article 103 forbade judges

from holding other paid offices. Removal from office 'by a judgment' meant that the judiciary was responsible for preserving the professional integrity and good conduct of its own members through the enforcement of criminal and disciplinary laws. As constitutionalism spread to Latin America, Eastern Europe, the Middle East and East Asia, similar provisions were included in many other constitutions. Today, provisions against the arbitrary removal of judges are incorporated in the constitutions of almost all newly democratising (or re-democratising) states. The absence or neglect of such provisions would be a serious anomaly, and would put the legitimacy and efficacy of the judiciary at grave risk.

The Constitution of the Federal Republic of Nigeria 1999 (as amended) contains provisions that can protect judicial independence. Section 17 of the Constitution which provides for the social objectives of government provides that in furtherance of the social order, "the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained". These constitutional principles are in the form of constitutional scheme for appointment of judicial officers, terms and conditions of their office, their tenure of office, their removal, their promotion, demotion and transfer, their prohibition from holding other offices, adequate funding and financial autonomy.

(b) Appointment of Judicial Officers

The President on the recommendation of the National Judicial Council (NJC) after an advice from the Federal Judicial Service

Commission, to the NJC, appoints certain judicial officers subject to confirmation by the Senate[32]. They include the Chief Justice of Nigeria and Justices of the Supreme Court, President and Justices of the Court of Appeal, Chief Judge of the Federal High Court and the Chief Judge of the Federal Capital Territory[33]. The president, subject to recommendation by the National Judicial Council, after advice from the Federal Judicial Service Commission to the NJC, makes appointment of other federal judicial officers[34], namely, the Grand Kadi of the Sharia Court of Appeal of the Federal Capital territory, Abuja, President of the Customary Court of Appeal of the Federal Capital Territory, Abuja and the President of the National Industrial Court of Nigeria. At the state level, in consonance with the principle of federalism, the Governor appoints the Chief Judge of the State High Court[35] and State High Court judges, Grand Kadi of the State Shariah Court of Appeal[36], where established pursuant to section 276 (1) of the Constitution; the President of Customary Court of Appeal[37] where established pursuant to section 281 (1) of the Constitution on the recommendation of the National Judicial Council after advice to the NJC by the State Judicial Service Commission subject to confirmation by the State House of Assembly.

While appointments of heads of all the courts aforementioned are subject to confirmation by the Senate or the State House of

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32 See, Third Schedule, Part 1, section 21, of the Constitution.

33 Section 231 (1) and (2), 238 (1) and (2), 250 (1) and (2), 256 (1) and (2), and 250(1) (i) of the Constitution.

34 Sections 261 (1) and (2) and 266) and section 254B Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 respectively.

35 Section 270(2) of the Constitution.

36 Section 276(1) of the Constitution.

37 Section 281(2) of the Constitution.

Assembly, as the case may be, appointments of judges and kadis of the courts are not. The president or the governor, as the case may be, appoints on the recommendation of the National Judicial Council after advice by the relevant Judicial Service Council without resort to the legislatures[38]. The implication of this is that while the appointments of certain judicial officers in the land undergo legislative screening or oversight, the appointment of others needs only the recommendation of the National Judicial Council for the President or the Governor of a state to make such appointment. The essence of the legislative oversight in such appointments is to ensure that both the National Judicial Council and the President comply with the provisions of the constitution for making such appointments. One finds it difficult to understand the need for the different requirements since all the judges are members of the same judiciary established by the constitution.

(c) Terms and Conditions of Office

Judicial officers have terms and conditions of office. These include salaries, allowances, housing, transportation and police security facilities. Their remuneration, salaries and all allowances are as may be prescribed by the National Assembly but not exceeding the amount as shall have been determined by the Revenue Mobilisation Allocation and Fiscal Commission[39]. There have been advocacy that terms and conditions, especially salaries of office of a judge should be sufficient to make a judge resistant to the temptations of corruption. A judge's remuneration and salaries and conditions of service, other than allowances shall not be altered to his disadvantage after his appointment, that is, cannot be reduced

[38] They are the judges of the Court of Appeal, Federal High Court, High Court of the Federal Capital Territory, Abuja, Sharia and Customary Courts of Appeal, Abuja and National Industrial Court of Nigeria.

[39] Section 84(1) of the Constitution.

during his term in office[40]. Pension rights conferred on judicial officers also contribute to guarantee independence of the judiciary. Section 291(3) of the Constitution provides, to this effect, as follows:

> S. 291(3) Any person who has held office as a judicial officer -
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> (a) for a period of not less than fifteen years shall, if he retires at or after the age of sixty-five years in the case of the Chief Justice of Nigeria, a Justice of the Supreme Court, the President of the Court of Appeal or a Justice of the Court of Appeal or at or after the age of sixty years in any other case, be entitled to pension for life at a rate equivalent to his last annual salary and all his allowances in addition to any other retirement benefits to which he may be entitled;
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> (b) for a period of less than fifteen years shall, if he retires at or after the age of sixty-five years or sixty years, as the case may be, be entitled to pension for life at a rate as in paragraph (a) of this subsection pro rata the number of years he served as a judicial officer in relation to the period of fifteen years, and all his allowances in addition to other retirement benefits to which he may be entitled under his terms and conditions of service; and
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> (c) in any case, shall be entitled to such pension and other retirement benefits as may be

[40] Section 84 (3) of the Constitution.

> regulated by an Act of the National Assembly or by a Law of a House of Assembly of a State.
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> (4) Nothing in this section or elsewhere in this Constitution shall preclude the application of the provisions of any other law that provides for pensions, gratuities and other retirement benefits for persons in the public service of the Federation or of a State.

In some jurisdictions, Judges may be appointed for life (or until retirement) or for fixed terms of office. Life tenure or long terms of office will tend to promote judicial independence, albeit at the cost —unless other means are in place for removing an unsuitable judge —of weakening judicial accountability. Short terms of service will have the opposite effect. Judges seeking reappointment will need to satisfy and defer to the appointing body in order to keep their jobs, while those who are not eligible for reappointment will need to seek positions elsewhere. Either way, this potentially compromises their independence.

(d) Tenure 'During Good Behaviour' and Retirement Ages

It was once the rule in some jurisdictions that a judge should serve for life so long as he did not commit misconduct warranting his removal from office.[41] An appointment 'during good behaviour' implies that a judge, once appointed, should continue in office for life unless removed for misbehaviour (usually defined in terms of corruption or other breach of trust or dereliction of duty). This

[41] This is reminiscent of the suggestion that was recently made by Afe Babalola concerning tenure of office of Supreme Court judges in Nigeria.

arrangement has been described as 'the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws'[42].

Life tenure subject to removal only on the grounds of misbehaviour may, however, mean that very elderly people continue in office as judges despite declining health. Moreover, turnover can be slow, and vacancies irregular, which potentially raises the stakes—and uncertainty—of each appointment. For example, Oliver Wendell Holmes was 90 years old when he retired from the US Supreme Court. To avoid such situations, almost every country—including, for example, Canada, Germany, India, Kenya, the Netherlands and South Africa—now has a compulsory retirement age for judges.

Judicial retirement ages vary: for example, it is 62 years in India and 70 in the Netherlands. The optimum retirement age is difficult to specify. If it is too high, elderly judges may become too far removed from the mindset of the general population, and may remain on the bench after their intellectual peak has passed. If it is too low, judges will only serve a relatively short term on the bench and will retire when they are still fit, able and seeking further employment, making them vulnerable to corruption by those who can offer such rewards. If constitution-makers cannot decide on a suitable retirement age or do not wish to specify a fixed retirement age in the text of the constitution, phrases such as 'subject to retirement at an age to be prescribed by law' may be used. To prevent the manipulation of such provisions, it might also be stipulated in the constitution that any future reduction of the

[42] Hamilton, A., 'The Judiciary Department', in James Madison, Alexander Hamilton and John Jay(eds.), *The Federalist Papers* (1788: New York), available at http://thomas.loc.gov/home/histdox/fed_78.html (accessed 30th July, 2020).

retirement age would not apply to existing judges without their consent.

A higher retirement age is often applied to Supreme Court judges in recognition of the fact that judges will typically be appointed to these courts at the end of their careers. In Japan, for example, Supreme Court judges retire at 70, while members of the lower courts retire at 65[43].

(e) Tenure of office of judicial officers in Nigeria

Under the 1999 Constitution, the security of tenure of office for judicial officers[44] is protected. By section 291 thereof, the Chief Justice of Nigeria, Justices of the Supreme Court and the Court of Appeal may retire when they attain the age of sixty-five years and shall compulsorily vacate office on the attainment of seventy years of age. Other than these, other judicial officers like the Chief Judges, Judges, Grand Kadi and President and Judges of the Customary Court of Appeal, may retire when they attain sixty years and shall automatically cease to hold office upon the attainment of sixty-five years.

However, by section 292 of the 1999 Constitution, a judicial officer may be removed from his office before his age of retirement upon the happening of the circumstances prescribed by the Constitution. Accordingly, both the Federal and State Judicial Service Commissions are empowered to recommend to the National

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[43] Bridge, John, 'Constitutional Guarantees of the Independence of the Judiciary', *Electronic Journal of Comparative Law*, 11/3 (December 2007)

[44] See generally, Akpambang, E. M., "Nigerian Judiciary under the 1999 Constitution", *Journal of Law and* Diplomacy, Vol. 6, No. 2, 2009, pp. 19-20.

Judicial Council (NJC) the removal from office of judicial officers[45]. It is on the strength of the recommendation that NJC may recommend to the President or the State Governor, whichever is applicable, for the removal from office of the affected judicial officers[46] on the ground of his "inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct[47] or in contravention of the Code of Conduct[48].

Alternatively, in relation to removal of judicial officers before the retirement age at the Federal level, the President is required to act on an address supported by two-thirds majority of the Senate praying for the removal of the judicial officer based on the above stated ground. Within this category are the Chief Justice of Nigeria and the various heads of the Federal courts listed under section 6 (5) of the 1999 Constitution and the National Industrial Court[49]. Other judicial officers of the Federal courts are removable by the President acting purely on the recommendations of the NJC. At the State level, the Governor of the State is required to remove the heads of the judiciary listed as State courts under Section 6 (5) of the Constitution acting on an address supported by two-thirds majority of the House of Assembly praying for the removal of the

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45 Section 13(b), Part 1 of the Third Schedule to the 1999 Constitution; section 6(b), Part II of the Third Schedule to the 1999 Constitution.

46 *Ibid*, section 21(b)(d), Part I of the Third Schedule to the 1999 Constitution.

47 Recently, a High Court Judge was sacked for street fighting and assault contrary to Code of Conduct of Judicial officers as well as the Oath of Office he had subscribed to – See the *Punch*, Tuesday, March 16, 2010, p. 9, and *The Punch*, Thursday, May 13, 2010, p.8.

48 See Section 292(1) of the 1999 Constitution.

49 See generally the Constitution of the Federal Republic of Nigeria (Third Alteration) Act No. 3 of 2010, sections 2 and 9.

affected judicial officer. Other State judicial officers are removable by the Governor acting on the recommendation of the NJC[50].

In the case of *Eri v. Kogi State House of Assembly*[51], the substantive issue was whether a State House of Assembly was clothed with power to investigate allegations of crime alleged against the State Chief Judge or remove him from office. The court pointed out that the body constitutionally empowered to exercise disciplinary control over judicial officers in Nigeria was the National judicial Council (NJC). It went further to assert that it is only the NJC that is constitutionally charged with the responsibility to investigate any complaint or act of grave misconduct against any judicial officer and thereafter make necessary recommendations to the Governor. The purported removal of the judicial officer by the House of Assembly was rightly declared unconstitutional, null and void[52].

(f) Fixed Terms of Office and Reappointment

It is quite usual, especially in civil law countries, for Constitutional Court judges to serve for fixed terms. In Germany, for example, members of the Federal Constitutional Court serve for a term of 12 years; in France, members of the Constitutional Council serve terms of nine years. Usually, fixed terms are staggered so that the composition of the court is renewed by halves, thirds, or quarters. Depending on the length of terms adopted, this can enable some of the advantages of life tenure – security, irremovability, and thus

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[50] The discriminatory approach in the removal of judicial officers under the 1999 Constitution has been condemned by writers on ground that such could directly or indirectly affect their tenure and independence – See Oluyede, P.A. & Aihe, D.A., *Cases and Materials on Constitutional Law in Nigeria*, (2003: University Press Ltd, Ibadan) pp. 425-426.

[51] (2009) All FWLR (Pt. 468) 343.

[52] *Ibid*, pp. 399-341; see *Governor of Ebonyi State v Isuama* (2004) 6 NWLR (Pt. 870) 511.

independence – to be combined with a system of rotation in office that prevents any one set of judges from maintaining their hold on the court for an extended period.

Judges serving fixed terms may either be eligible or ineligible for reappointment. If judges are eligible for reappointment, they are likely to remain dependent on the appointing authorities. The extent of this dependence will depend, in large measure, on the length of the term and therefore the frequency with which judges become candidates for reappointment. If judges are not eligible for reappointment, they will be independent of the appointing authority, but, depending on the lengths of their terms, their pensions and future career prospects, they may be eager to seek employment elsewhere. As a general rule, it is believed that longer terms of office combined with prohibition on reappointment will produce a more independent bench (as in Germany, where judges of the Federal Constitutional Court are ineligible for reappointment after a single 12-year term), while short terms and eligibility for reappointment may render the judiciary subservient (as in Guatemala, where Supreme Court justices serve five-year terms, after which they must be reelected by the legislature). There is the need for term of office of a judge in Nigeria to be certain.

(g) Discipline and Removal of Judges

Constitutional provisions on removal of judicial officers from office are stated in section 292(1) of the Constitution. The section reads:

> 292(1) 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 the 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, President, Customary Court of Appeal of the Federal Capital Territory, Abuja, and President, National Industrial Court of Nigeria 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 ofa State, by the Governor acting on an address supported by two-thirds majority of the House of Assembly of the State,

Praying that he be so removed for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct;

(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 that the judicial officer be so removed for his

> inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct.

In finding a workable balance between, on the one hand, protecting judges from arbitrary dismissal, transfer or demotion and, on the other hand, ensuring that criminal, corrupt or incompetent judges can be censured and removed from office, it is necessary to consider: (i) The method of removal, that is, how a judge can be removed, and by whom; (ii) The grounds for removal, that is, the circumstances under which removal is permissible. Three main methods of judicial removal can be found in existing democratic constitutions: (i) removal by a court judgment or internal judicial disciplinary process; (ii) removal by political actors – usually in the form of an address from the legislature requesting the removal of a judge for reasons that the legislature deems sufficient; and (iii) impeachment, which combines political and legal decisions. Removal by a court judgment is more usual in civil-law jurisdictions, while common-law jurisdictions have traditionally relied more on removal by parliamentary address or impeachment. The first and second methods are constitutionally recognised in Nigeria while impeachment (the third method) is a part of the second method in the country. Such impeachment originates from the President or Governor of a State.

(h) Removal by Court Judgment or Disciplinary Process

A widespread formulation, especially in civil-law countries, is for judges to hold office for life (or until retirement), subject to removal by the judgment of a competent court for disciplinary

offences or misconduct. The 2008 Constitution of the Netherlands, which may be taken as a representative example of this formulation, states that in Article 117 as follows "Members of the judiciary shall be appointed for life. Such persons shall cease to hold office on resignation or on attaining an age to be determined by [an] Act of Parliament. In cases laid down by [an] Act of Parliament such persons may be suspended or dismissed by a court that is part of the judiciary and designated by [said] Act of Parliament". According to the Constitution of France, in contrast, the disciplinary function is performed not by a court, but by the Supreme Council of the Judiciary (article 65), although the membership of that Council is primarily judicial, so the principle of disciplinary self-regulation by the judicial corps is largely maintained.

Constitutions are sometimes silent about how such a judgment might take place, leaving this to be determined by ordinary legislation or judicial practice. Executive officials may have a role – although not the decisive role – in the process. In Denmark, for example, the chief public prosecutor, upon a motion by the minister of justice, accuses judges before a special court consisting of judges from the Supreme Court and other courts[53]. Proceedings concerning judicial discipline in France 'are initiated by the Minister for Justice, who is also responsible for the enforcement, if necessary, of the decisions reached'[54]. In Nigeria, removal by disciplinary process. Removal by court judgment is also

[53] Bridge, J., 'Constitutional Guarantees of the Independence of the Judiciary', *Electronic Journal of Comparative Law*, 11/3 (December 2007)

[54] McKillop, B., 'The Judiciary in France: Reconstructing Lost Independence' in Helen Cunningham (ed.), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997: Judicial Commission of New South Wales, Sydney)

constitutionally possible after following due process, including as a condition precedent, allowing intervention by the NJC, if the act of the judicial officer complained of is a judicial act.

(i) Removal by Parliament

In some jurisdictions, judges are removable by a legislative resolution or address. This was the traditional English practice, following the Act of Settlement of 1701, and has been adopted by the constitutions of many former British colonies. For example, Article 72 of the Constitution of Australia states that "Justices of the High Court and of the other courts created by the Parliament… shall not be removed except…on an address from both Houses of the Parliament in the same session, [requesting] such removal on the ground of proved misbehaviour or incapacity". This constitutional rule is usually framed only as a prohibition against arbitrary dismissal: parliament does not have the authority to unilaterally remove a judge, only to ask for – and thereby to authorise – the removal of a judge by the executive branch. Although parliament cannot request the removal of ajudge, say, for partisan reasons, or because of disagreement with a particular decision, parliament's decision as to what constitutes 'proved misbehaviour or incapacity' is final and is not subject to judicial review.

A variation on this system (found in Malta and India, among others) requires two-thirds majority vote to pass an address requesting the removal of a judge[55]. This means that, in most conceivable political circumstances, the removal of a judge will require a joint decision of the government and the opposition parties, although, this depends on the electoral system and political

[55] Constitution of Malta, (article 97); Constitution of India, (article 124).

conditions. As pointed out earlier, in Nigeria removal of the constitutionally categorised heads of courts in section 292(1)(a) of the Constitution by parliament requires two-thirds majority and at the instance of the President or Governor praying the respective legislature that such head of court be so removed.

(j) Removal by Impeachment

Impeachment originated as a medieval English process, according to which parliament could remove the king's officers or advisors for 'high crimes and misdemeanors'. Impeachable high crimes and misdemeanors are not limited to indictable criminal offences: the definition includes attempting to subvert the laws and liberties of the realm, corruption and a variety of other forms of misconduct in office. Impeachment gradually fell out of practical use in the United Kingdom, but it continues to have relevance in the constitutions of other countries, including the United States (for all civil officers, including federal judges) and Paraguay (for members of the Supreme Court).

An impeachment process consists of two stages. The first is the adoption of articles of impeachment by the legislature. In countries with a bicameral legislature, this is normally undertaken by the lower house. These articles recite the various high crimes and misdemeanors that the accused must answer for. The second stage is the trial of the accused. In countries with a bicameral legislature, this function is normally performed by the upper house, which may, for this purpose, be presided over by a judge rather than its usual president; otherwise, a special court may be convened for this purpose. As mentioned earlier, in Nigeria, section 292 (1) (a) of the Constitution is the closest provision to removal by impeachment and by the Senate as the Upper House of the National Assembly,

but at the instance of the President. In the case of the State, by the House of Assembly at the instance of the Governor.

(k) Showing Grounds for Removal

The grounds for removal may be specified with greater or lesser precision in the constitution. They typically include gross misconduct, incapacity, neglect of duty, corruption or other high crimes and misdemeanors. The Constitution of India, for example, allows the removal of a Supreme Court judge only on grounds of "proved misbehaviour or incapacity" (article 124.4), while the 2010 Constitution of Kenya specifies that judges of the superior courts may be removed only for "inability to perform the functions of his office, a breach of a code of conduct, bankruptcy, incompetence, or gross misconduct or misbehaviour" (article 168). In Nigeria, under section 292(1) (a) and (b) of the Constitution, a judicial officer shall be removed from his office or appointment before his age of retirement for "his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct.

Involving the judiciary at an early stage of the removal process, in establishing the grounds for removal, provides a further means of protecting judicial independence: a judicial council, judicial service commission or disciplinary tribunal can act as a gatekeeper blocking politically motivated dismissals. There is an important difference, for example, between a system that enables a legislative majority to remove a judge for any unstated reasons that seem sufficient to that majority, and one in which a legislative majority may only remove a judge on the basis of a specific complaint that has been investigated by an independent judicial disciplinary tribunal. In India, for instance, the Judges (Inquiry) Act of 1968

requires the appointment of a committee, consisting of serving judges and distinguished jurists, to conduct an investigation into judicial misconduct before the two houses of the legislature vote on removal. This provision is commendable.

(l) Promotion, Demotion and Transfer of Judges

Apart from the head of the judiciary of the Supreme Court and justices of the Supreme Court, the Court of Appeal and other federal courts, and head of judiciary of state courts, other judges are susceptible to transfer from one division of the relevant court to another at the instance of the head of the court concerned. Part-heard cases are often heard by judges after their transfer. Transfer of judges checks their entrenchment in a particular division and has the propensity to insulate them from influences. Promotion of judges within a particular court or judiciary is based on seniority, subject of course, to good conduct. Promotion to Court of Appeal and Supreme Court is on the recommendation of the NJC to the President. Federal character principle is an applicable formula. Promotion may amount to new appointments. While promotion on the basis of seniority obviates acrimonious succession, it puts to question such factors as merit, hardwork and knowledge.

Demotion is a disciplinary measure and, like removal, there must be a ground and a process for demoting a judge. It is rare for a judge to be demoted, since incapacity or misconduct of sufficient severity to justify the demotion of a judge is likely to be a ground for removal. Arbitrary power should not be exercised to transfer, promote and demote judges because it can be almost as damaging to judicial independence as the arbitrary power to appoint and remove them.

Principles applicable to the appointment and removal of judges can also be applied to the promotion, demotion and transfer of judges. Arbitrary power to promote, demote and transfer judges could be almost as damaging to judicial independence as the arbitrary power to appoint and dismiss them.

As a general rule, demotion is treated similarly to removal: there must be grounds and a process for demoting a judge against his or her will. It is rare in most established constitutional democracies for a judge to be demoted, since misbehaviour or incapacity of sufficient severity to justify the demotion of a judge is likely also to be grounds for dismissal.

Promotions and transfers are often considered as new appointments, and several constitutions make explicit provisions to this effect. However, there are exceptions: in Ireland, for example, the advice of the Judicial Appointments Advisory Board is sought only for new appointees to the bench, and subsequent promotion takes place at the unaided discretion of the government.

(m) Prohibition from Holding other Offices or Engaging in some other Activities

This prohibition arises mainly by virtue of a judicial officer being a public officer and as a judicial officer is subject to the Code of Conduct for Judicial Officers. Paragraph 5 of Part II, Fifth Schedule to the Constitution makes a judicial officer a public officer for the purpose of the Code of Conduct. By paragraph 2 part I, Fifth Schedule to the Constitution, he cannot receive or be paid the emoluments of any other public office, or engage or participate in the management or running of any private business, profession or trade, except in farming. While a judicial officer may own investments and real property, in the management of its

investments, is prohibited by the Code of Conduct for Judicial Officers from serving as an officer, director, manager, general partner, adviser or employee of any business entity. Otherwise permissible investment or business activities are prohibited if they:

(a) Tend to reflect adversely on judicial impartiality,
(b) Interfere with the proper performance of judicial duties.
(c) Exploit the judicial position, or
(d) Involve the Judicial Officer in frequent transactions with legal practitioners or with people likely to come before the Judicial officers court[56].

He cannot also be a member of a political party because by Rule 3 (ii), while he has freedom of association and assembly, "in exercising such right he shall always conduct himself in such a manner as to preserve the dignity and the impartiality and independence of the judiciary".

In many jurisdictions, judges are forbidden by constitutional provisions from holding elective office, from membership of political parties and from undertaking other political activities. A balancing corollary is that judges may be protected—by the constitution, law or conventional norms—from public criticism. The law on contempt of court is a popular law in this respect. Such rules are intended to protect the independence and neutrality of the judiciary by separating the law from politics. On the other hand, immunity clauses, if improperly applied, can promote corruption and prevent judicial accountability. In the 2014 Constitution of

[56] Rule 3 E2.

Egypt, for example, criticism of a judge was made a criminal offence—a provision that limits freedom of expression and limits the ability of the wider public to hold judges to account for their actions.

(n) Protection from Public Criticisms

Judges may be protected – by the constitution, law or conventional norms – from public criticisms. The oft-recognised and utilised protections of judicial officers from public criticism are restrictions on right to freedom of expression and the press in section 39 of the Constitution. The restrictions include contempt of court and defamation laws.

(o) Provision of Adequate Funding and Financial Autonomy

An independent and properly functioning judiciary may also necessitate practical considerations such as adequate funding and financial autonomy not just for the sake of individual judges, but also for the maintenance of the court system as a whole. In the constitutions of many Commonwealth countries, including Malta and Jamaica, the salaries of judges are a standing charge on the budget meaning that the government is obliged to pay them from its main bank account, without being dependent on annual Appropriation Acts enacted by parliament.

As a further protection from the external content interference, the salaries and allowances payable to judicial officers mentioned in subsection (4) of this section) shall be a charge upon the Consolidated Revenue Fund of the Federation[57]. The constitution provides that the remuneration, salaries and conditions of service of such judicial officers shall not be altered to their disadvantage after

[57] See section 84(2) 1999 Constitution.

appointment[58]. Section 84(4) of the constitution lists, among others, the holders of such judicial offices.

Under section 162 (9) of the Constitution, the judiciary in Nigeria is to be paid directly from the Federation Account. The section provides:

> S. 162(9) Any amount standing to the credit of the judiciary in the Federation Account shall be paid directly to the National Judicial Council for disbursement to the heads of courts established for the Federation and the States under section 6 of this Constitution.

By the Fourth Alteration to the Constitution, effective from 7th May, 2018, section 121(3) now reads:

> S. 121(3) Any amount standing to the credit of the
> (a) House of Assembly of the State;
> (b) judiciary
> in the Consolidated Revenue Fund of the State shall be paid directly to the said bodies respectively; in the case of the judiciary, such amount shall be paid directly to the heads of courts concerned.

The lack of compliance with the above provisions by State Governors led to the President making Executive Order No. 10 so as to ensure enforcement of direct payment by deduction of amount standing to the credit of the House of Assembly of the State, and judiciary.

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[58] Section 84(3) 1999 Constitution.

Despite that there are now constitutional provisions on direct payment of an amount standing to the credit of the judiciary, (as also to the House of Assembly of the State) in the Consolidated Revenue to heads of courts concerned[59], the State Governors, with recalcitrant askance, have blatantly refused to honour both the letter and spirit of the constitution and do not thereby allow financial autonomy to State judiciary. The incessant strikes by the Judiciary Staff Union of Nigeria (JUSUN) finds justification in these unconstitutional acts of state governors.

(c) Assessment of Judicial Independence

There is the question of independence of the judiciary from whom? The constitution, thus, provides for independence of the judiciary from the government, but it appears that the selection and appointment procedure of the heads of respective branches of judiciary suggests otherwise[60]. This also brings to the fore the question as to whom those judges whose appointments are not subject to legislature's oversight are responsible to; is it the people or the president? The judges are responsible to the people themselves[61] if their appointments and removal are subject to legislative oversight and only to the executive if their appointments and removal begins and ends with the executive. In addition, there is possibility of different level of loyalty and independence. Those

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[59] Fourth Alteration to the Constitution enacted on 7th May, 2018. See also Sections 81(3), 84(2) and (4), 121(3) of the Constitution on financial autonomy and independence.

[60] Shehu, A.T. and Imam-Tamin, M.K., "Suspension of Hon. Justice Isa Ayo Salami, Implications for Rule of Law, Judicial Independence and Constitutionalism, in Abikan, A. I. and Ishola, A.A. (eds.), Nigeria Judiciary: Contemporary Issues in Administration of Justice, Essays in Honour of Hon. Justice Isa Ayo Salami, (2013: Nigerian Bar Association, Ilorin), p. 42.

[61] This is because the legislatures consist of representatives of the people.

whose appointments are made subject to confirmation by the Senate are more prone to see their actions or inactions and those of whose officials are most likely and more frequently to be subject of decision-making by the courts, thus deserving loyalty to the nation. On the other hand, those whose appointments are not subject to legislative oversight are likely to regard their appointments as commanding loyalty to the chief executive in which case judicial independence suffers[62].

Generally, judicial officers enjoy security of tenure as they may only retire upon the attainment of certain specified age[63]. As noted earlier, a federal judicial officer cannot be removed from office before his age of retirement except upon an address supported by two-third majority of the senate; or two-third majority of the State House of Assembly in the case of a state judicial officer praying "…that he be so removed for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct"[64], and in any case, other than those to which the foregoing applies, by the President or, as the case may be, the Governor acting on the recommendation of the National Judicial Council that the judicial officer be so removed for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct[65]. Strangely, the judicial officers are subject to different requirements for their

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62 Shehu, A.T., and Imam-Tamin, M.R., ibid, p. 44.

63 Section 291 of the Constitution, ibid.

64 Section 292 (1) of the Constitution, ibid.

65 Ibid.

appointments, so also for their removal before age of retirement. One wonders if this division within the judiciary is necessary.

As stated earlier, the "recurrent expenditure of judicial offices in the federation (in addition to salaries and allowances of the judicial officers mentioned in subsection (4) of this section) shall be charged upon the Consolidated Revenue Fund of the Federation"[66]. Furthermore, the remuneration and salaries payable to the holders of the said judicial offices (such as Chief Justice of Nigeria and Justices of the Supreme Court, President and Justices of the Court of Appeal and Heads of Courts and Judges of High Courts, Customary Courts of Appeal and Kadis of Shariah Courts of Appeal both of the FCT and the States)[67] and their conditions of service, other than allowances, shall not be altered to their disadvantage after their appointment[68]. Unfortunately however, with these provisions on funding the judiciary, head of courts still go to the chief executives to beg for the release of their budget. While there are copious constitutional provisions on financial autonomy for the judiciary, the greatest challenge, however, is the protracted delay by the State governors to pay directly to the judiciary amount standing to its credit. This is the *bête noire* of the implementation of the law on financial autonomy of the judiciary.

Undoubtedly, all the schemes for judicial independence are to shield both the judges and the judiciary from executive interference. The mechanisms do not appear to protect judges from likely interference from within the judiciary itself, particularly from an overbearing headship of the judiciary. The National Judicial

66 See section 84(2) of the Constitution.

67 Section 84(4) of the Constitution.

68 See section 84(3) of the Constitution.

Council is charged with the responsibilities of overseeing the activities of the judiciary[69], including as stated earlier, recommending to the President or the Governor the removal from office of the judicial officers and exercise of disciplinary control over such officers. There is no guarantee that the body is not capable of interfering with the independence of individual judges, besides, the enormity of the powers of the NJC coupled with its composition makes the council potentially an internal threat to judicial independence.

Out of the 23 members of the NJC, 19 members are the nominees of the Chief Justice of Nigeria (CJN) who is the chairman. All the state judiciaries and the Judiciary of the Federal Capital Territory are represented by 7 States for the duration of two years. The Chief Judges, the Grand Khadis, the Presidents, Customary Courts of Appeal and President, National Industrial Court of Nigeria are left out of the Council. Recommendations for all appointments to and removal from the judiciary aforesaid are made by the National Judicial Council based on the advice or recommendation of the Judicial Service Commission. Such recommendations are to the President in the case of appointments to Federal courts and to the Governors in the case of appointments to States courts. The provisions erode the powers of the states to appoint and remove judges in their states, but confer the powers on a federal organ. The constitution thus provides for independence of the judiciary from the government; but it appears the selection and appointment procedure of the heads of respective branches of judiciary suggests otherwise[70]. Thus, while independence of the judiciary is, to some

[69] S. 21 (b) (c), Part 1 of the Third Schedule) to the Constitution, ibid.

[70] Shehu, A.T. and Imam-Tamin, M.K., ibid, p. 42.

extent, guaranteed in the country, there are tenets that diminish effectiveness of that independence.

4. Judicial Independence as Bulwark of Rule of Law

(a) Relationship between Judicial Independence and Rule of Law

Judicial powers are vested in the judiciary as an arm of government[71]. In exercise of these powers, the courts interpret laws, and such interpretative function is to determine the meaning of statutes, that is, the intention of the legislature[72]. In essence, by interpreting the law, the courts, more or less, declare laws. The judiciary is the final arbiter of the constitution and in dispute resolution according to law. When there is violation of law, resort is had to the court for redress. In discharging its judicial duties, the court applies the principle of equality before the law, subject to any exception, for instance, on ground of immunity, that may have been provided by a rule of positive law. The court upholds and protects the rights of individuals and organisations in the country. It is empowered to determine whether a person's fundamental human rights have been breached or is being breached or will be breached within the intendment of Chapter Four of the Constitution.

Moreover, the court is vested with the power of judicial review by which, the court exercises its powers when called upon to make a declaration either invalidating or validating the constitutionality or otherwise of a legislative or executive act. The court in Nigeria has, influenced by the legacy of *Malbury v. Madison*[73], undertaken

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71 Section 6 of the Nigeria Constitution.

72 Badaiki, A.D. *Interpretation of Statutes and Constitution*, (2013: University Law Publishing Co. Ltd., Lagos, Abuja and Washington D.C.) p. 2.

73 (1803) 1 CRAUNH 137.

judicial review of legislative and executive acts. In the case of the former, there is judicial review, for instance, where legislation is in excess of legislative boundary[74], where there is legislative interference with judicial powers[75], where a legislature usurps executive functions[76], where legislation infringes fundamental rights[77] and where there is unathorised delegation of legislative power and failure to follow constitutionally laid down procedure[78].

The common grounds on which court has reviewed executive acts and administrative actions may be broadly divided into two, unconstitutionality of executive and administrative act. The first broad ground is where executive action contravenes the fundamentals of the constitution or in any other way inconsistent with the provisions of the constitution[79]. Under the second broad ground for judicial review of executive acts and decisions, the court

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[74] *Doherty v Sir Abubakar Tafawa Balewa* (1961) All NLR 604.

[75] *Lakanmi and Another v. A-G. (Western Region)* (1971) 1 UILR 201; *Chief Sule Balogun v A.G, Lagos State* (1981) 2 NCLR 589; *Paul Unongo v Aper Aku* (1983) 5 NCLR 242.

[76] *Usman Mohammed v A-G, Kaduna State* (1980) 1 NCLR 117; *Governor of Kaduna State v House of Assembly of Kaduna State & Others* (1981) 2 NCLR 444; *Governor of Kaduna State v House of Assembly, Kaduna State* (1982) 3 NCLR 635.

[77] *Doherty v Balewa*, ibid, *Lakanmi's* case, ibid; *Paul Unongo's v. Aper Aku,* ibid; *Peter Uzodima v C.O.P* (1982) 3 NCLR 325; *Abdulkareem v. Lagos State* (2016) NWLR (Pt. 1535) 177; *Mogagi v Board of Customs and Excise* (1982) 3 NCLR 552.

[78] *A-G of Bendel v A-G of Federation* (1981) 10 S.C. 132; (1981) ALL NLR 85.

[79] *Jideonwo v Governor of Bendel State* (1981) NCLR 1; *Obatuwana v Governor of Bendel State* (1983) 3 NCLR 12; *Igbe v Governor of Bendel State* (1983) 3 NWLR 1; *Attorney-General of Lagos State v Attorney-General of Federation and others* (2003) 12 NWLR (pt. 833) 1; (2004) 11-12 S.C. 85; (2005) 2 WRN 1.

undertakes a review where an executive act or decision is challenged on ground that such act or decision is *ultra vires* the powers conferred on an official or executive authority by statute[80].

In many other areas, the courts have acted as an effective check on both the legislature and executive. This is particularly so in interpretation of statutes and constitution by the courts[81].

By the nature of judicial functions and powers of the courts and how the courts have exercised the powers to discharge the functions vested in them, it is evident that the courts generally uphold the law and check the executive and legislative arms of government as well as act as a protection to the individual against arbitrariness whether from the executive or legislature. It is for these reasons that the judiciary is independent of the other two arms of government and other entities and individuals no matter how powerful they may be. The relevant guarantees are meant to galvanise the judiciary to serve as a true bulwark of rule of law.

(b) Liability Question

There are constitutional, statutory and judicial stipulations on when judicial officers can be liable.

Constitutionality, Statutory and Judicial Authorities

The Constitution does not expressly provide for the immunity of judicial officers from law suits for acts done or ordered to be done by them in the discharge of their judicial duties. Some statutes,

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80 *Hart v Military Governor of Rivers State* (1976) 11 A.C. 211; *Attorney-General of Lagos State v. Attorney-General of Federation & Others*, ibid; *Bello v. Lagos Executive Development Board* (1973) 3 ECSLR 330.

81 See Badaiki, ibid, pp. 149-279 where the author discussed selected examples of interpreted statutes and constitution by the courts.

which under section 315 of the Constitution are, however, regarded as existing laws guaranteeing judicial protection[82].

The 1999 Constitution, like its predecessors, does not even make reference to such concepts as judicial and legislative immunities. With respect to judicial immunity, Karibi-Whyte, J.S.C.(as he then was) made a desperate attempt to explain this omission in *Egbe v. Adefarasin*[83] when he stated that "it will seem that the provisions of the various High Court Laws by section 274 of the (1979) Constitution were deemed sufficient for the purpose of the protection of judges of superior courts."[84]If the view expressed by his Lordship were correct, then it means thereof, that the principle of judicial immunity or legislative immunity which are products of "existing laws"[85] must not be found to be inconsistent with the Constitution, failing which, they would be declared unconstitutional, null and void to the extent of their inconsistencies.

The constitutionality of judicial immunity was raised in *Ogor v. Kolawole*[86]. In that case, the Counsel to the applicant challenged the constitutionality of section 57(1) of the Magistrates' Courts Law which guaranteed judicial immunity for the 1st respondent, on the ground that it was inconsistent with some provisions of the

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82 See for example, Federal High Court Act, Cap. F12, *Laws of the Federation of Nigeria*,2004, section 63(1); National Industrial Court Act No. 1 of 2006, section 52(1); High Court Law Cap. H3, Laws of Lagos State 2003, section 88(1); *High Court Law,* Cap H57, Laws of Ogun State, section 71(1); High Court Law, Cap 62A, *Laws of Ondo State of Nigeria* 2006, Vol. 2, section 72 (1); High Court Law of Cross River State, section 56(a).

83 (1985) 1 NWLR (Pt. 3) 549; ((185) 16 NSCC (Pt. 1) 643.

84 *Ibid*, at p. 559.

85 Section 315 of the Constitution.

86 (1983) 1 NCR 342

erstwhile 1979 Constitution. The trial Judge, Ayorinde, J. held that the relevant section of the Magistrate Court Law was not unconstitutional[87]. It is therefore, necessary to incorporate the concepts of judicial and legislative immunities into the Constitution as is constitutionally done with regard to the executive office holders.

The general rule at common law is that persons exercising judicial functions in a court or tribunal are exonerated from all civil liability whatsoever for anything done or ordered to be done in their judicial capacity[88]. The words which he speaks are protected by an absolute privilege. Both the orders made and the sentences imposed by him cannot be made the subject of civil litigation against him, notwithstanding that the judicial officer was under some gross error or ignorance, or motivated by envy, or hatred and malice; he cannot be liable to any civil action instituted by an aggrieved litigant.

The earliest reported decision on judicial immunity by a court in Nigeria was in the case of *Onitiri v. Ojomo*,[89] where the plaintiff had been accused before the defendant, a Chief Magistrate, of a criminal offence and had applied to transfer the case from the defendant's court. Upon reading a paragraph of his application for transfer at the request of the defendant, the plaintiff was informed by the defendant that he had committed a contempt of court. The defendant formulated a charge against him and remanded him in

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87 This judgment has been criticised by a learned writer – see Abimbola A. Olowofoyeku, *op.cit*, pp. 1888, 189.

88 *Sirros v. Moore* (1974) 3 All E.R. 77 at pp. 781-782, where Lord Denning M.R. traced the origin of the concept of judicial immunity even beyond the year 1613.

89 (1954) 21 NLR 19. See also Abimbola A. O. Olowofoyekun, A.O.O., *Law of Judicial Immunities in Nigeria*, (1992: Spectrum Co. Ltd., Ibadan), p. 33.

custody pending his trial before another Magistrate. Subsequently, the plaintiff instituted an action against the defendant claiming £600 damages for unlawful imprisonment. It was held by the Court that the defendant was entitled to immunity under the then Section 6(1) of the Magistrates' Courts Ordinance, which provided as follows:

> No Magistrate, Justice of the Peace or other person acting judicially, shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction. Provided that he at the time, in good faith, believe himself to have jurisdiction to do or order the act complained of[90].

The rationale for judicial immunity is established on public policy because of the need to protect judicial officers whether of superior court of record or not from wanton attack of infuriated litigants whose main grouse and grievance against the judicial officer is that they have lost a suit[91].The object of this judicial privilege is not therefore, to protect malicious or corrupt judicial officers, but to protect the public from the danger to which the administration of justice would be exposed if the judicial officer is made subject to inquiry as to malice or to litigation with those whom his decision might offend[92].

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[90] See also Magistrates' Courts Law, Cap 90, *Laws of Ondo State of Nigeria*, 2006, section 57(1).

[91] *Egbe v Adefarasin* (1985) 1 NWLR (Pt. 3) 549 at p. 567

[92] *Halsbury Laws of England*, 3rd ed., Vol. 3, para. 1352

Generally speaking, both under the common law and under statute, there is no criminal liability for judicial officers in Nigeria for acts performed or carried out in their judicial capacity[93]. In *Awosanya v. Board of Custom*[94], the appellant was found guilty of criminal contempt of court by Belgore, J (as he then was) for disobedience to an order of the then Federal Revenue Court (now Federal High Court) to stay proceedings in a case which the appellant was trying. On a further appeal to the Supreme Court, the appellant was held not guilty of criminal contempt and was accordingly discharged and acquitted. The principle according to Elias, CJN, was stated thus:

> An error of judgment on the Magistrate's part whether as to jurisdiction or as to the precise order to make in the circumstances with which he was confronted can hardly be characterised as criminal and no amount of argument as to a suspected improper motive would make it a criminal offence in itself[95].

The statutory provisions for immunity from criminal liability of judicial officers for acts done in their judicial capacity can also be found in section 31 of the Criminal Code Law[96]. It provides:

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[93] Conversely, there is no immunity for a judicial officer for a crime committed by personal action which is not connected with the discharge of his functions as a judicial officer: *Ikomi v. The State* (2002) 7 WRN 121.

[94] (1975) 1 All NLR 106.

[95] *Ibid* at p. 116.

[96] Criminal Code Laws of Bendel State Cap. 48 Laws of Bendel State 1976 Vol. II applicable to Edo State. See also Cap 37, *Laws of Ondo State of Nigeria* 2006, Vol. 1; Criminal Law of Lagos State enacted in 2011 (now in Cap. 17 Vol. 13 Laws of Lagos State 2015).

> S. 31 Except as expressly provided by this Code or the enactment constituting the offence, a judicial officer[97] is not criminally responsible for anything done or omitted to be done by him in the exercise of his judicial functions, although the act done is in excess of his judicial authority or although he is bound to do the act omitted to be done.

Similarly, section 88 (1) of the Lagos High Court Law[98] provides as follows:

> No Judge shall be liable for any act done by him or ordered by him to be done in the discharge of his judicial duty, whether or not within the limits of his jurisdiction; provided that he at the time in good faith believed himself to do or order to be done the act in question.

Under the Penal Code[99] section 46 provides to the same effect:

> S. 46 Nothing is an offence which is done by a person when acting judicially as a court of justice or as a member of a court of justice in the exercise of any power which is or which in good faith he believes to be given to him by law.

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[97] A judicial officer includes the Chief Judge or a Judge of a High Court, the President or Judge of the Customary Court of Appeal, a Magistrate, the Chief Justice of Nigeria and 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 when engaged in any judicial act or proceeding or inquiry, an Administrative Officer – *ibid*, section 1.

[98] See Cap. H3 Laws of Lagos State, 2015.

[99] See Penal Code (Northern States) Federal Provisions Act, Cap. P3 Laws of the Federation of Nigeria, 2004.

These clauses are wide and completely protective of a judge. The Supreme Court interpreted the then section 88(1) Lagos High Court Law in *Egbe v. Justice Adefarasin and Anor*[100]. In that case, the first defendant, then the Chief Judge of Lagos state, as part of his judicial duties, gave consent under section 304(2) of the Criminal Procedure Act for the prosecution of the Plaintiff. Bad faith, improper or malicious motivation and collusion were issues raised against the judge by the plaintiff in the giving of the consent to prosecute. The Supreme Court held that a judge of a superior court would lose the immunity offered by the above clause if he acts without jurisdiction and in bad faith.

A judicial officer is also statutorily exculpated from liability in respect of criminal defamation if the publication takes place in any proceedings held before or under the authority of any court or in any inquiry held under the authority of any Act, Law, Statute or Order-in-Council[101]. This absolute privilege applies to judicial officers in all courts and quasi-judicial bodies. Apart from this general principle of law, a judicial officer, who, however, accepts bribe or is in the least degree corrupt or has perverted the course of justice cannot escape criminal liability[102]. Sections 98, 98A, 98B and 98C of the Criminal Code prohibit public official, judicial corruption and abuse of office. The sections make it criminal for any judicial officer to corruptly asks, receives or obtains or agree or attempts to receive or obtain any property or benefit of any kind for

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[100] SC. 177/1984 reported in *Nigerian Current Law Review* (ed.) Dr. T. Akinola Aguda (Nigeria Institute of Advanced Legal Studies, Lagos) 1988 at pp. 11-13.

[101] Section 378 (3) of the *Criminal Code*.

[102] *Sirros v. Moore*, ibid, p. 782. See also *S.B.M. Services (Nig.) Ltd v Okon,* ibid, p. 1134.

himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in his judicial capacity.

The relevant sections of the Criminal Code prescribe seven years term of imprisonment for any judicial officer found guilty of this offence. Before any criminal proceedings could be commenced against any judicial officer who violates any of the provisions of these sections, however, a complaint or information signed by or on behalf of the Attorney General of the Federation or Attorney General of the State, as the case may be, is required[103]. Thus, the scope of judicial immunity is absolute and unqualified as long as the judicial officer is acting or performing his judicial duty[104].

5. Judicial Responsibility, Integrity and Discipline

The opposite of judicial immunity is judicial responsibility. It is the idea of making a judicial officer accountable or answerable for acts done or omissions made while carrying out his duty. According to Osipitan[105], judicial integrity "connotes the respect which citizens have for judicial officers and judicial decisions". To him, and one would agree, that, "the strength of the judiciary lies in the command it has over the hearts and minds of men and women"[106].

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[103] Section 98C(2) Criminal Code Act, Cap C38, *Laws of the Federation of Nigeria*, 2004.

[104] *S.B.M. Services (Nig) Ltd v. Okon* (2004) All FWLR (Pt. 230) 15 at p. 1134. In *M.P. Ogele v Hon. Justice Omoleye* (2006) All FWLR (Pt. 296) 809 at p. 85, it was held that a judicial officer who acted under section 188(5) of the 1999 Constitution (regarding the setting up of a panel by the Chief Judge of a State at the request of the Speaker of a State's House of Assembly for the investigation of a Governor or Deputy Governor of a State for impeachment purposes) was not covered under judicial immunity, as she was not acting judicially but constitutionally.

[105] Ibid.

[106] Ibid.

Judicial integrity begets respect for the judiciary and galvanises independence of the judiciary because it rests on the perception of judicial officers by the public. Lord Denning, in his book, *The Road to Justice*[107]admonished that "judges should be beyond reproach and scorn. They should not be persons who can be questioned by the people with scorn that 'who made thee a ruler and a judge over us'". While various measures are enshrined in the laws for purposes of enhancing judicial independence, the legal system is also replete with laws and legal institutions to effect erring judicial officers.

(a) Methods of Ensuring Judicial Accountability

(i) Code of Conduct for Public Officers

Judicial officers are public officers; so paragraph 5 of part II of the Fifth Schedule to the Constitution applies to them. If there is an allegation of breach of the Code by any of them, proper forum to raise the issue is the Code of Conduct Bureau and tried by the Code of Conduct Tribunal[108]. The relevant provisions of the Constitution are as follows:

> (a) Without prejudice to the generality of the foregoing paragraph, a public officer shall not –
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> (a) receive or be paid the emoluments of any public office at the same time as he receives or is paid the emoluments of any other public office; or

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[107] Denning, A. *The Road to Justice,* (1995:Sevens and Sons Ltd., London) pp. 30-32.

[108] *Ahmed v. Ahmed*(2013) LPEIR 21143 SC; (2013) 15 NWLR (part 1377) 274.

(b) except where he is not employed on full time basis, engage or participate in the management or running of any private business, profession or trade but nothing in this sub-paragraph shall prevent a public officer from engaging in farming[109].

Although judicial officers cannot engage in private business activities for gain or reward, there is an exception with regard to farming.

The Constitution requires that the sources of wealth of judicial officers should be known, hence, it is mandatory to him to declare his assets. He is not legally permitted to begin to perform judicial functions before the declaration of assets and liabilities. The declaration gives the Code of Conduct Bureau the chance to carefully check the value of the assets with the income of judicial officers.

(ii) Code of Conduct for Judicial Officers

This code regulates the conduct of judicial officers by prescribing rules to be followed by court, in the court and off the bench. The provisions of the code are mandatory rules aimed at instilling decorum and high moral standards in judicial officers. These ethical rules include discharging adjudicative duties, as well as administrative duties, prompt sitting time of courts, avoidance of impropriety or appearance of impropriety, avoidance of improper social relationships, avoidance of membership of any society or organisation that

[109] Paragraph 2 of Part 1 of the Fifth Schedule to the Constitution.

practices invidious discrimination, disqualification from a proceeding, need to regulate extra-judicial activities in order to minimise the risk of conflict with his judicial duties; not to take or accept any chieftaincy title while in office, not to be an officer, a director, manager, general partner, adviser or employee of any business entity in which he has investment, but may own investments and real property; not to ask for nor accept any gift, bequest, favour or loan an account of anything done or omitted to be done by him in the discharge of his duties, etc. compliance with these rules actuate sound moral behaviour which can instill confidence in litigants and even the Bar and the general public. The National Judicial Council is exclusively empowered to exercise disciplinary authority over the judicial officers' conduct as professional adjudication.

There is the question of whether the NJC is independent and democratically constituted. It is said that the Council is made up of twenty three (23) members, inclusive of the Chief Justice, who is the Chairman, Fourteen (14), out of the twenty three members are singularly appointed by the Chief Justice as the Chairman and such appointment is not subject to any control or consultation with any person or body. The five members from the Bar are also appointed by the Chief Justice upon the recommendation of the Nigerian Bar Association. In effect, the Chief Justice, as the Chairman, appoints nineteen out of the twenty three members of the council[110].

[110] Mohammed, A.O., "Constitutional Powers of the National Judicial Council" in Abikan, A.I. and Ishola, A, (eds). *Nigeria Judiciary: Contemporary Issues in Administration of Justice*, Essays in *Honour of Hon. Justice Isa Ayo Salami*, (2013: Unilorin Press, Illorin), p. 416.

(iii) Judicial Training and Education

This gives more skills and knowledge to judicial officers to adequately perform their functions.

(iv) Appellate System

Through a system of appeals, the legal system is designated to correct itself and instill responsibility in the Bench.

(b) Relationship between Judicial Accountability, Transparency and Judicial Corruption

The apposite questions here are whether there exist a relationship between judicial accountability/transparency and judicial corruption and whether the allegation of judicial corruption in Nigeria is real or imagined? There is a mutual relationship between judicial transparency and accountability on the one hand, and judicial corruption on the other. This implies that where there is accountability and transparency in the running of the activities of the judiciary, the propensity for corruption is reduced to the barest minimum because the judiciary will be made accountable through the two doctrines. The contrary will, however, be the case where judicial transparency and accountability is lacking. This means that absence of disciplinary measures in the name of judicial independence is capable of entrenching judicial corruption. According to Buscaglia[111]:

> Corruption thrives in the Nigerian Judiciary because of the structure of the courts coupled with a rather high degree of legal discretion and procedural complexities which allow judges and other judicial officers to extort illicit fees for services rendered.

[111] Buscaglia, E., 'Corruption and Judicial Reform in Latin America', *17 Policy Studies Journal*, 273-95, 1997.

While complaining against the abuse of judicial discretion, Arewa[112] also agreed with Buscaglia when he observed thus:

> Where the judiciary is characterised by systemic official corruption and the arbitrary use of judicial discretion and/or captured by political and economic forces to further purely group interests, the justice sector will suffer serious malfeasance, inefficiency, and above all considerations, it will atrophy.

Corruption breeds faster and easily where there is no judicial accountability and transparency, and where the discretionary powers conferred on judges are not used judicially and judiciously. As regards the evidence of judicial corruption, in spite of the existence of some level of judicial accountability through such mechanisms as the Code of Conduct Tribunal and the NJC, the Nigerian judiciary still suffers from endemic corruption. According to Transparency International Bribe Payers Index 2008[113], Business Executives gave the judiciary a score of 3.2 on a scale of 5, where 1 means 'not at all corrupt' and 5 means 'extremely corrupt'. A score of 3.2 out of obviously indicates high level of corruption within the judiciary. In another study[114], the judiciary is perceived to be among the most corrupt institutions in Nigeria. For instance, the

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[112] Arewa, J.A., 'Judicial Integrity in Nigeria: Challenges and Agenda for Action' at p. 230.

[113] Nigerian Country Profile from Business Anti-Corruption Portal available online at www.business-anti-corruption.com/count... (accessed on 30th July, 2020).

[114] Transparency International's Global Corruption Barometer 2010/2011 available at Dr. Sam Oloruntoba, OON www.transparency.org/research/... (accessed on 30th July, 2020).

report recorded that citizens gave the judiciary a score of 3.7 on a 5-point scale (1 'not at all corrupt' and 5 'extremely corrupt'). In the same 2011, the US Department of State conducted a study on judicial corruption in Nigeria owing to lack of accountability and found out that citizens faced long delay and frequent requests for bribes from judicial officials to obtain favourable rulings or expedite cases[115]. In a locally conducted study for the Lagos State Judiciary, it was found as follows: 99% of the lawyers interviewed agreed there is corruption in the Lagos State Judiciary. It also showed that 66% of the lawyers with 6-10 years experience at the Bar and 80% of those with 11-15 years believed that the prevalence of corruption in the Judiciary is very high[116].

In its 2010/2011 report, Transparency International observed that the judiciary is the least corrupt behind the Police, Power Holding Company of Nigeria, and the Nigerian Custom Services. It is disheartening that the judiciary as the citadel of justice should be among the corrupt institutions in the country.

Judges and scholars have alluded to the existence of official corruption in the judiciary. For example, at a swearing-in ceremony of High Court Judges in Abuja, the erstwhile Chief Justice of Nigeria, Hon. Justice Katsina-Alu helplessly admitted that the nation's judiciary cup is half-empty with respect to integrity[117]. Badejogbin and Onoriode also gave incredible but true report of judicial corruption. In their words:

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[115] Cited in 'Note on Corruption and Judicial Administration in Nigeria' ibid, p. 2.

[116] US Department of State 2011, available online at usembassy.gov/ Nigeria_us_dept_reports.html (accessed on 30th July, 2020).

[117] Cited in 'Note on Corruption and Judicial Administration in Nigeria' ibid, p. 2.

> The members of Akwa Ibom State Election Tribunal were all indicated and dismissed by the National Judicial Council for accepting bribes to influence their decision. Chief Magistrate James Isede also a member of the Tribunal was dismissed by the Edo State Governor. We also recall the infamous Justice Egbo-Egbo of the Federal High Court Abuja, Federal Capital Territory, who was dismissed from judicial office for his role in Dr. Chris Ngige/Chief Chris Uba's case. Furthermore, the National Judicial Council also suspended the Chief Judges of Anambra. Ekiti and Plateau States for the partisan roles they played in the impeachment of the governors of their respective states. In addition to this is the Justice Kayode Eso's report that saw to the removal of a number of judges including the former Chief Judge of the Federal Capital Territory who was alleged to have taken exhibit money from his court while he served is Sokoto prior to his resumption at the Federal Capital Territory[118].

Most reported or alleged cases of judicial corruption in Nigeria appear to relate to election petition matters. In this respect, the very respected Chief Afe Babalola, SAN expressedthe gory situation succinctly thus:

> Time was when a lawyer could predict the likely outcome of a case because of the facts, the law and the brilliance of the lawyers that handled the case.

[118] Badejogbin, R.E and Onoriode, M.E., 'Judicial Accountability and Discipline in Nigeria: Imperatives for the New Democratic Order', ibid, p. 5.

> Today, things have changed and nobody can be sure. Nowadays, politicians would test the outcome of the judgment to their party men before the judgment is delivered and prepare their supporters ahead of time for celebration[119].

6. Conclusion

Judicial independence is critical to and indeed is the bulwark of the rule of law. An independent judiciary provides a balance and check upon the authority of the other branches of government and thereby prevents arbitrary government action. Whether elected or appointed, judges need to possess a certain degree of independence in order to foster the rule of law. Judicial independence may be achieved by granting judges immunity from civil and criminal liabilities and by protecting their terms in office by providing that they may not be removed from office or otherwise penalised on account of the decisions that they make. By this toga, they can be independent, courageous, just, fair and proactive in discharging their functions.

There is, however, a corollary to judicial independence, namely judicial responsibility. If judges are to be granted independence, it is critical that they exercise their authority with competence, impartiality, and integrity. Judicial independence can operate properly only when judges are learned in the law and comport themselves with integrity and impartiality. The law must be administered professionally and impartially, with equality for all persons. Judges must avoid even the appearance of impropriety as

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[119] 'Nigerian Judiciary as Temple of Corruption' published in the *Nigerian Voice* available at http://www.thenigerianvoice.com/nvnews/31100/1/nigerian-judiciary-as-temple-of-corruption.html (accessed on 30th July, 2020).

well as actual impropriety. Judges are important public officials who exercise a great deal of authority over individuals. As such, they are guardians of the public trust. They must be granted independence to fulfill their responsibility of enforcing the law, but that independence must be tempered with the highest degree of impartiality and integrity. Public support of the judiciary is essential, and that support is only possible when members of the judiciary maintain an exacting standard of impartiality and integrity.

Judicial immunity is a *sine qua non* for an independent and strong judiciary. Although the doctrine of judicial immunity is broad and its parameters extensive, absolute immunity does not apply if there is no judicial act performed because the judicial act requirement of judicial immunity protection is a basic tenet of the doctrine. Thus, executive, legislative, administrative or ministerial acts, although, may be official functions of a judicial officer, yet they are not judicial acts. Judicial officers are, however, held accountable under limited circumstances through such accountability measures as State Judicial Service Commissions and National Judicial Council, and enforcement of the standards mandated in the Code of Conduct for Judicial Officers. As a further way of upholding judicial impartiality and integrity without compromising judicial independence, egregious judicial behaviour such as corruption may be dealt with through the criminal process or through impeachment by the legislature. The Bar, the Bench including the judicial officer himself, the public and the society are the prism with which judicial officers are viewed, seen and held accountable. Therefore, while the doctrine of judicial immunity greatly protects judges from civil and criminal liabilities, limited measures of judicial accountability help to preserve the integrity and workability of the Nigerian legal

system. By the tenets of the rule of law, judicial officers, certainly are not sacred cows, but are respectable and accordingly are highly respected and indeed venerated and honoured. The goal or expectation is to foster an independent judiciary that will protect the rule of law, but a judiciary that is learned in the law, impartial and honourable.

7. Recommendations

1. Judges should not be subject to arbitrary removal.
2. The tenure of a judge should be more clearly defined to prevent legislative or executive interference in the impartial administration of justice.
3. Judges should not be dependent on the appointing authorities (whether because they are personally indebted to these authorities for their initial appointment, or because they hope for future promotion).
4. They should not be subject to political interference or any undue influence that undermines independence or neutrality.
5. The judiciary should be made an equal partner with the Legislature and Executive as a department of the Constitution, relevant clause should be included in the Constitution. A system which subjects the judiciary to Executive for the provisions of funds for its services, or to the Legislature subordinates the judiciary to other department of the constitution.
6. Judges also need to be held accountable, however, with mechanisms in place to discipline and possibly remove judges who neglect their duties or abuse their position of trust.

7. There is wisdom in the suggestion that the judiciary should be left to discipline judges without control by the President or Governor except in the case of the Chief Justice of Nigerian and Chief Judge[120] or any other head of judiciary at federal or state levels.
8. There is the need to uphold the ethical integrity of the profession, defend the independence of the judiciary. Both the Bar and the Bench must work in synergy in order to achieve this objective. While respecting the Bench, both the Bar and Bench should carry out constructive criticisms of each other in good faith. As Ministers in the Temple of Justice, both should maintain a respectable relationship. It is an irreducible minimum for members of the Bar and Bench to improve on their education, quality of advocacy, judgments, standards of diligence, competence and ethical compliance.
9. Both the Bar and Bench should be united in making the judiciary truly independent so as to ensure that court decisions are insulated from improper influence. The ways this can be done include a credible and transparent process of appointing, evaluating, and disciplining judges and other members of the Bench.
10. There should be professionalisation of the Bench and Bar through in-service training for judges, lawyers and other legal professionals by setting up programmes to establish codes of ethics and disciplinary procedures. Judicial institutions should have adequate resources, Law Faculties and the Nigerian Law School should have curricula that reflect the demands of a market economy.

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[120] See this suggestion in Adeloye, S.F. *Appointment and Discipline of Judicial officers*, All Nigeria Judges Conference, 1988, p. 10.

11. There is a need for the legal profession to ensure that measures are put in place to reform and strengthen institutions and encourage appropriate political structures.
12. Mandatory continuing legal and judicial education should be introduced and enforced.