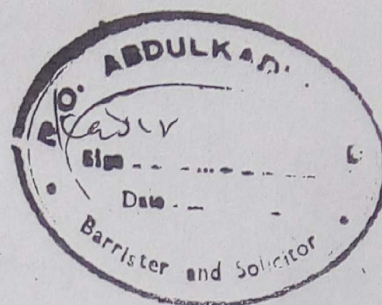


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THE CONSTITUTIONAL CRISIS ON THE REMOVAL OF CHIEF JUDGE OF A STATE OR CHIEF JUSTICE OF NIGERIA

I. INTRODUCTION

In the United States, like the President and Vice President, all Civil Officers of United States including Judges shall be removed from office on impeachment for grounds for impeachment are only that of commission of some criminal offence and not because a majority of the congress thinks the President or Judge involved is of obnoxious political beliefs or has in good faith mismanaged his office. Senility, inability to function for any reason or other difficulties, which do not constitute a criminal offence, is not grounds for impeachment. An offence charged in an impeachment must be a criminal act which implies moral turpitude (conduct contrary to justice, honesty or good morals), which is dangerous to the safety of the state which makes an incumbent unfit to remain in his office²

This article intends to bring to the fore light the power of President, Governor and the National Judicial Council (NJC) on the removal of the Chief Judge of a state, Chief justice of the Federation (C.J.N) and other justice to which the section applies. The provision of section 292 of the 1999 constitution is going to be the fulcrum of this discourse.

The judiciary is the third arm of the realm of the government which is the only branch not made up of elected representatives but of personally appointed persons to perform the very fundamental role of adjudication in society, which sometimes has a greater effect on the lives of people much more than the actions of the other two arms of government. Thus, there has been a few oppositions to the functions of the judiciary as the trial arbiter of what the law made by the people's elected representative is,³ even though the modern tendency, especially under the written constitutions is to acknowledge the necessity and inevitability of such role.

It goes without saying that judicial arm of government is the specialized differentiated structures, processes and personnel that are devoted to the task of performing on a continuous basis, one of the three inter-related and independent governmental functions in modern day performed by the judiciary. In these

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¹ See the provision of article 2, section 4 of the United States constitution.

² Angela Roddey Holder: *The Measuring of the Constitution*, (Bafra Educational Series Inc. Woodbury, New York) p. 39

³ See for example the views of Mercer supported by Mr. Dickson during the debates in the conventions that led to the ratification of the United States constitution; Mr. Farrand, *The records of the convention of 1787* (New Haven; rev ed. 1937 id, 299)

societies they are known as rule adjudication as distinct from the two governmental functions of rule making and rule application.⁴

II. INDEPENDENT OF JUDICIARY

It is not out of place to briefly discuss the history and independence of judiciary before dwelling on the removal of Chief Judge especially in the United Kingdom from where the modern legal system was imported in to Nigeria⁵. Although the executive in the United Kingdom has now come to play the role in public affairs formerly played by the sovereign, the Judges are free from control or influence. The truth is that the houses of parliament do not seek to interfere with litigation. The salaries of judges are charged on the consolidated fund. And it is parliamentary custom that questions should not be asked in the house about the decision of the courts in particular cases. The foregoing practice has been adopted in Nigeria. The salaries of judges in this country are constitutionally provided for to be charged on the consolidated fund⁶.

Consequently, payment of salaries regularly is just one of the many issues to determining the genuineness of the independent of judiciary. Others includes appointments, conditions for removal etc. The later being the fulcrum of this paper.

Appointment

The appointment of a person as a judge of superior court of record is made by the governor or president (as the case may be) on the recommendation of the National Judicial Council⁷. There are constitutional provisions for the appointment

⁴ See Professor Oloko in "Independence of the Judiciary with particular reference to Appointments Removal and Discipline" published in Law/ Development and Administration in Nigeria (1990) by Yemi Osibanjo and Awa U. Kalu page 533

⁵ Tracing the history, Professor O. Hood Phillips in his book, Constitutional and Administrative Law, page 28-29. 7th Edition said "The justice of the Royal courts, which grew up in Norman and Plantagenet times, were the king's servants down to the time of the Stuarts they usually held office during the king's pleasure and the like other crown servants could be dismissed by the king at will. This fact doubtless affected some of the judicial decisions given in the reigns of James I and Charles I. After the revolution of 1688, judges of superior courts were appointed during good behaviour, but there was doubt whether at common Law this referred merely to good behaviour in relation to the king. Eventually the Act of settlement 1700 provided that Judge's Commissioner be made *quandiu se ben gesserint*, and their salaries ascertained, but upon the address of both houses of parliament it may be lawful to remove. The first and third of those provision's have been substantially re-enacted by the judicature Acts and are now to be found in the Supreme Court Act 1981 s.11. The Appellate Jurisdiction Act 1876. Their effect is that judges of the Superior British courts may not be removed except for misbehaviours in their office or (probably) convicted of some serious offence. Removal is by the Crown. Removal may be on an address by both Houses of parliament, but it is not certain whether such an Address is necessary.

⁶ For example see section 81 (3) of the 1999 constitution of Federal Republic of Nigeria which provides that "Any amount standing to the credit of the judiciary in the Consolidated Revenue Fund of the Federation shall be paid directly to the National Judicial Council for disbursement to the head of the courts established for the Federation and the States under section 6 of this Constitution.

⁷ It is a constitutional requirement that a person appointed as justice of Supreme Court shall be subject to confirmation of the Senate s. 231 of the 1999, CFRN. Note the position with respect to the appointment of other justices or judges of other superior courts of record for example see section 238 (2) on the appointment of the justice of the Court of Appeal that is not subject to confirmation of the senate. Note also that the appointment of the President of Court of Appeal, Chief Judge of the Federal High Court and the Chief Judge of State High Court are subject to confirmation of the Senate and House of Assembly. See sections 238 (1), 250 (1) and 271 (1) of the 1999 constitution of the Federal Republic of Nigeria

of the different cadres from the lowest to the Chief Justice of Nigeria. The provisions are tolerable if the spirit of give and take is exhibited by the politicians especially the appointing authorities. Dr. Hari Chand⁸ Captured the mood as follows.

"It appears that in the appointment of Justice of the Supreme Court and the President of the Court of Appeal, the advice of weights as the recommendation in the appointment of the Justice of the Federal High Court. Advice is more or less a guiding factor which may be brushed aside whereas recommendation shows a degree of bindingness, though not binding absolutely. The lower we move from the Chief Judge of Nigeria, the more the Executive discretion goes down. In fact, the President cannot be said to have power here to ignore totally the advice or recommendation. In India, during the seventies Mrs. Gandhi ignored the advice of the retiring Chief Justice of India in the appointment of the Chief Justice of India. The constitution of India requires the consultation with the out going Chief Justice of India in appointing the new Chief Justice. It was explained by the then law minister that, provision of the constitution does not mean that the advice of the Chief Justice is binding. If the Chief Justice is consulted, the provision of the constitution is complied with, though the advice may not be acted upon⁹."

It is crystal clear that from our ground norm (constitution) that the appointment of Chief Judge and High Court Judges, were placed in the hands of the Governor of each State acting on the recommendation of the National Judicial Council¹⁰. It might be argued that these provisions of the constitution left too much power in the hands of the Governor in the appointment of Chief Judges of the High Court of a state¹¹. It is savor that the affairs relating to the appointment of judicial

⁸ Hari Chand "the Nigeria constitutional Law" pages 218-219.

⁹ India is one of the largest, if not the largest, democracy in the World when the advice was circumvented, heaven did not fall, many politicians would argue. Even in the event of a difference of opinion between the president and the judicial service commission if some other person acceptable to both the president and the commission is found, which may not be easy to come by, in order to check the indication by executive to appoint persons on party or political considerations this approach may not solve the problem here. It is the calibre of the appointee that matters. An inherently good character, though appointed on a party or political considerations may in future decides cases against his appointer depending on the facts before him what is respect of the president while appointing judges into rise above party, political creed and religious considerations in the interest of the stability of the nation may well depend on the confidence the people of this country have in the judiciary which in turns is determined by the independence the judiciary enjoys. For the judiciary to be able to make a start on this line of approach, it is necessary that there should be a uniform standard of appointment at least at the High Court level. This opinion was also expressed by professor P.A.O. Oluyede in his book titled "Constitutional Law in Nigeria" Evans Brothers (Nigeria publishers) Limited, page 288.

¹⁰ See section 271 of the 1999 constitution of the Federal Republic of Nigeria.

¹¹ It is not a good idea that Governor should participate in the process of the appointment of Chief Judge or judge of the High Court of a state, ditto to the appointment of Chief Judge of other cadres which requires

officers should be, the sacred responsibility of the National Judicial Council, a non-political body and unbiased empire. The responsibility of the executive arm of government should be to execute laws made by the legislature and the judiciaries in turns interpret the laws in accordance with the doctrine of separation of powers in the constitution¹²

Removal of Chief Justice of Nigeria or Chief Judge of State

The Constitution provides for the removal of a CJN or Chief judge by the President or Governor respectively for inability or misbehaviour on an address supported by two-third majority of the Senate or House of Assembly of the state, praying that the holder of the office be 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 conduct¹³. With respect to the removal of judges of those courts mentioned, the President or Governor can only remove a judge on the recommendation of the National judicial council¹⁴

The term "inability or mishbehaviour" has not been defined by the constitution. The question that readily comes to mind is can the Senate or House of Assembly (as the case may be) be trusted with deciding the issue devoid of impartiality? There is likelihood of bias on the part of the legislature since they are likely to dance to the tune of the executive¹⁵ and an alleged misbehaviour may be no more than political prejudice in disguise. In the United Kingdom where this practice of removal of parliament was imported, the security of tenure enjoyed by judges rests more on the force and the deep rooted tradition of respect for an independent of judiciary. It would be more optimistic to expect Nigerian Politicians to be as restrained and impartial as their British counter parts, particularly in face of judicial decisions invalidating the election of some legislators¹⁶

the judicial officers to be appointed by the president with the limited experience of our politicians in democratic government, it is undesirable that the appointment of Judges should be made by politicians.

¹² In the case of Governor of Kaduna State V House of Assembly (1981) 2 NCLR 444, the court held that in the 1979 Constitution, the doctrine of separation of powers is enshrined. It is therefore the responsibility of the legislative arm of Government to make law and it is the responsibility of the Executive to execute the Laws made by the legislature. See also sections 4, 5 and 6 of the 1999 constitution which shared the powers of the Federal Republic of Nigeria on the three (3) arms of the Government – namely legislative, executive and judicial powers.

¹³ See: section 292 (1), (a), (i), of the 1999 constitution. This provision is specific in relation to the office of Chief Justice of Nigeria, President, court of Appeal, Chief Judge of Federal High Court, Chief Judge of FCT, Abuja, Chief Judges of States, Grand Khadis of Sharia Court of Appeal, FCT Abuja and states, President, Customary Court of Appeal of the FCT and State.

¹⁴ In the case of removal of other Judges other than Chief Judge or Chief Justice or President, the address of the Senate or House of Assembly is not a requirement as it is the case in the case of Chief Judge/Justice or President of the Court.

¹⁵ Most of the legislators will succumb to the request of the executive for material gains. Other may support the executive to guarantee their return ticket

¹⁶ It has been canvassed that nothing had done greater to the independence of the judiciary since 1975, the year of the mass retirement of public officers, the premature removal of many judges especially under the military. Although many of those compulsorily retired might have deserved it, in the interest of the image of judiciary, the methods laid down in the constitution should have been followed. See also P.A.O. Oluyede (no 5) supra @ page 298.

Executive Power to Remove Chief Judge or C.J.N

The Executive power for the removal of a Chief Judge or Chief Justice of the Federation is subject to the ratification of the State House of Assembly or the Senate as the case may be. In effect, the address of the Governor or President for removal of the Chief Judge or CJN must be supported by 2/3 majority of the House of Assembly or Senate.

For the sake of emphasis, section 292 of the 1999 constitution of the federal Republic of Nigeria provides:

1. A judicial officer¹⁷ shall not be removed from his office or appointment before his age of retirement except in the following circumstance-

(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 of the federal Capital Territory Abuja, Grandkhadi of the Sharia Court of Appeal and president of the Customary Court of Appeal of the Federal Capital Territory, Abuja, by the president acting on an address supported by the two-thirds majority of the senate
- (ii) Chief judge of a State, Grandkadi of a Sharia Court of Appeal or president of a Customary Court of Appeal of a state, by the Governor acting on an address supported by two-thirds majority of the House of Assembly primary that the be so removal 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 (underlined mine for emphasis).

The above provision is clear from any ambiguity hence, the grounds upon which the Governor or President may address the state House of Assembly or the Senate for the removal of the Chief Judge of a state or Chief Justice of Nigeria are here under listed:-

1- Inability to discharge the functions of his office or appointment.

This may arise where the Chief Judge or CJN is suffering from ailment which makes him incapable to perform the functions for which he is appointed. A disease which renders the holder

¹⁷ It appears from this provision of the constitution that the removal is specifically in respect of a Judge of an High Court and this does not include the Chief Judge. The decision of the Court in the case of GOVERNOR EBONYI STATE V ISUAMA (2004) 6 NWLR (PT 870) 511 AT 537 that the national judicial council is a proper parties to an application for judicial review of the removal of an High Court Judge from office. In the instant case the joinder of the National Judicial Council as a party to the Respondent's suit is proper could be well grounded in this case if the Judge sought to be removed is not a Chief Judge as was the case in this case. Therefore, to my mind, the intendment of the drafter of Section 292 (1) does not envisage the participation of the NJC in the removal of the Chief Judge or CJN.

of the office unable to sit in the court to hear and determine cases brought before him is a good instance in this regard.

2- **Misconduct**¹⁸

This is an act or failure to act when there is a duty to do so. Misconduct in office includes misbehavior in office, malconduct in office, misdemeanor in office, corruption in office etc¹⁹.

3- **Contravention of the Code of Conduct.**

A judicial officer shall not contravene the provisions of the Code of Conduct. The Chief Judge or CJN would breach this provision if he is guilty of Abuse of powers. Abuse of powers may arise where he does or direct to be done, any arbitrary act prejudicial to the rights of any other person knowing that such act is unlawful²⁰.

The National Judicial Council's Powers of Removal

The National Judicial Council's power to remove the Chief Judge or chief justice of the federation, as the case may be is contained in the constitution of the federal Republic of Nigeria²¹. It goes thus:

"In any case, other than those to which paragraph @ 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".

A cursory look at the aforequoted Paragraph A (b) of the constitution shows that the provision is an alternative to paragraph (a). In any event, the Chief Judge or CJN and other judicial officer to which the provision applies could be removed either by the process in (a) or (b) of section 292 of the 1999 constitution.

¹⁸ The phrase "misconduct" is not defined in relation to the provisions of the section, or the interpretation section and it was held in relation to similar provisions in the 1979 constitution that only the courts can determine what misconduct is for example see *Anya v A.G Benue* (1984) 5 NCLR 225. This perhaps is an intentional act on the part of the drafters of the various constitutions so as not to subject the judiciary to the whims of the other arms in this respect. This however is a grave oversight. This is more so because the phrases "gross misconduct" and "misconduct" are defined in relation to the impeachment of the president and governor and members of the Federal and State executive bodies respectively. Under the 1989 and 1995 draft constitutions, a procedure followed once an allegation supported by an appropriated address of the legislature is made. This is similar to the procedure under article 1 section 3 of the United State constitution which subject judicial officers to same impeachment procedure as the president. In addition, it better safeguards the office of judicial officers in recognition of the crucial role that perform in society see also Angela Roddey Holder, *The measuring of the constitution*, (Belframs Educational Series inc. Woodbury, New York) p.39

¹⁹ See the Black Law Dictionary, (Bryan A. Garner. ed) Eight Edition, page 1019

²⁰ See fifth schedule to the 1999 constitution, paragraph 9

²¹ See S. 292 (1) (b) of the 1999 constitution

The removal of Chief Judge, CJN or others could also be done by the National Judicial Council. However, the NJC can only recommend to the president or Governor as the case may be. This leg of process of removal in our humble view does not accord the NJC the deserved power of removal. The reason is that the NJC could not unilaterally remove the holder of the office without recourse to the Governor or the President (as the case may be). In another words, the National Judicial Council can only recommend the removal.

Form the foregoing, it could be deduced that the NJC is at the mercy of the Governor or president. Invariably, where the holder of the office of CJN or Chief Judge of a state is enjoying good rapport with the Governor or president, the removal may be some what difficult²²

III. CONCLUSION

It has been generally acknowledged that the judiciary is the guardian of our constitution, the protector of our cherished governance under the Rules of Law, the guardian of our fundamental rights, the enforcer of all the laws without which the stability of society can be threatened, the maintainer of public order and public security, the guarantee against arbitrariness and generally the only insurance for a just and happy society.²³

From the foregoing, the Chief Judge of a state or C.J.N and other mentioned in section 292 (1) (a) & (b) of the 1999 can be removed from holding the office through two modalities. The first being by the address of the Governor or president to the state House of Assembly or Senate (as the case may be) if the address is supported by 2/3 majority, the holder of the office ceases to be the Chief Judge or C.J.N.

The second mode is by recommendation by National Judicial Council to the Governor or presidency for the removal of the holder of the office.

IV. RECOMMENDATIONS

1. Judiciary should be totally independent from the executive or legislative interference.
2. The power to appoint, suspend, discipline or remove a judge should only be vested with the National Judicial Council to avoid too much room for prejudice to creep in.
3. The power of the Governor to recommend for appointment or removal of a judge should be abrogated from our constitution.
4. Judges should not be dismissed prematurely before the expiration of their term of office except by virtue of judicial decision and only upon the grounds provided under the constitution e.g. infirmity of mind, misconduct etc.
5. Politicians should not be allowed to deciding issue of inability or misbehaviour of judges because an alleged inability or misbehaviour may be no more than political prejudice in disguise.

²² Although the NJC may have other means of dealing with such an erring judicial officer like non-payment of his/her salary and other entitlements.

²³ See Nnamani, JSC, retired in "Judiciary in the 1990s: Expectation and Challenges," in Justice: a journal of contemporary Legal problems Vol 1 no. 3 (1990) p.27