

**INVESTIGATION AND PROSECUTION OF JUDICIAL OFFICERS IN NIGERIA:
EFFECTS ON THE INDEPENDENCE OF THE JUDICIARY AND JUDICIAL IMMUNITY***

Abstract

In the light of the fundamental role of the judiciary in the society, it is important to ensure its independence and impartiality in carrying out its functions. The essence of the common law/statutory concept of judicial immunity as well as the constitutional provisions on independence of the judiciary is to guard the judges in the performance of their onerous tasks of acting as the guardian of the constitution and the fundamental rights, among others; to ensure that they are permitted to administer these tasks independently and freely, without fear or favour. However when judgments are obtained fraudulently, the society and the nation are endangered. It is therefore a very worrisome development that the judiciary in Nigeria is being accused of corruption and the spate of investigations and prosecutions of judges for corruption in Nigeria is on the increase. Though a welcome idea; for by the nature of the judicial function, the worst form of corruption is judicial corruption, caution has to be exercised to ensure that the necessary procedures are followed and that this is done for the right reasons. The paper discusses the investigation and prosecution of the judicial officers in the light of the corrupt antics of the political class and the necessity to ensure that this is done rightly to avoid exposing the judicial officers to the whims and caprices of the executive and the legislature. This is necessary, to ensure that the judiciary is not striped of their independence and become slaves of the executive, as that will have very harrowing effects on our fledging constitutional democracy. The paper after appraising concludes that the rising tide of corruption is wide spread in Nigeria with the Judiciary not left out. However there is need in curbing the corruption particularly in the judiciary to observe all the constitutional and other statutory safeguards that are necessary to insulate them from the antics of other arms of government in order not to create undue fear in the judicial officers and thus erode their independence.

Keywords: Independence, Immunity, Judicial Officers, Judiciary, Prosecution, Criminal, Corruption

1. Introduction

It has been generally acknowledged that the judiciary among other things is the guardian of our constitution, the protector of our governance under the rule of law the guardian of our fundamental rights, the enforcer of all laws, the maintainer of public order and security, the guarantee against arbitrariness etc. In the light of the fundamental role that the judiciary performs in the society it is important to ensure its independence and impartiality in carrying out its functions. The issue of immunity of judges in the discharge of their functions is also important with regards to the question of independence of the judiciary. Thus the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without fear or favour. These provisions of the law are not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public whose interest it is that judges should be at liberty to exercise their functions with independence and without fear or consequences. Since the judges are charged with the ultimate decisions over life, freedoms, rights, duties and property of citizens it follows that without independence, they have little chance of discharging these onerous responsibilities.

Independence of the judiciary is indeed the life-blood of constitutionalism in all democratic societies and one of the pillars upon which our constitutional democracy exists.¹ The freedom of the judiciary from the influence of the other branches of government is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law.² The role of the judiciary is very essential as they complement and complete the political system.³ It checks the government through judicial review, settles disputes between individuals and groups, and interprets the law, beginning with the constitution as the *grundnorm*. Judicial independence is therefore the key for effective performance of these and other judicial functions.⁴

In order to perform these functions effectively judges must be above board, in this vein the judiciary is the only arm of government made up only of appointed personnel, as they perform the fundamental role of adjudication which sometimes has a greater effect on the lives of the people than the actions of the other two arms of government. Part of judicial accountability is that judges who fail to live up to the expectations of their call must

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¹Submissions of the Senior Presiding Justice of the Peace to the 2010 Judicial Compensation Commission P.1

²Ibid.

³Basic Principles on the Independence of the Judiciary, Preamble, UN Human Rights Commission Resolutions 40/32 (Nov. 29 1985) and 40/146 (Dec. 13 1985).

⁴PC Aka, 'Judicial Independence under Nigeria's Fourth Republic: Problem and Prospects,' (2014) *Western International Law Journal* Vol. 45 Fall. No. 1

be subject to discipline. Thus judges are subject to the constitutional provisions on discipline of judges as well as other provisions of the law with regard to forms of punishment for various offences. However, the process of discipline and punishment of judges must be done with utmost caution because of the nature of their function. Thus it has been asserted that the constitutional apparatus for achieving discipline of judges should be transparent and effective and must not lose sight of the primary aim of enforcing accountability without impairing judicial independence or covering the lapses of judges out of a feeling of loyalty or friendship.⁵ Essentially under Nigerian law, a reference to a judicial officer is a reference to the holder of any of the following offices: the Chief Justice of Nigeria or a Justice of the Supreme Court, the President of the Court of Appeal, the office of the Chief Judge or a Judge of the Federal High Court, the office of the Chief Judge or Judge of the High Court of the Federal Capital Territory, Abuja, the office of the Chief Judge of a state and Judge of the High Court of a state, a Grand Kadi or Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja, a President or a Judge of the Customary Court of Appeal of a state.

2. The Concept of and Evolution of the Independence of the Judiciary and Judicial Immunity

The independence of the judiciary is central to the administration of fair and equal justice in any democratic society. It is a truth, universally acknowledged, that judicial independence is one of the principal building blocks of the rule of law. It is also commonly agreed that there are three characteristics of a truly independent judiciary:

First, it is impartial - judicial decisions are not influenced by a judge's personal interest in the outcome of a case... Second, judicial decisions, once rendered are respected...

Third, the judiciary is free from interference. Parties to a case, or others with an interest in its outcome, cannot influence the judge's decision.⁶

The idea of the independence of the judiciary as we have it is a modern one. Historically, although the notion that justice should be fairly administered may well be accepted, those who adjudicated or settled cases were not expected to be in any real sense independent. Thus in medieval England, from whose common law most African Commonwealth countries have derived their own national legal systems, justice was a royal prerogative, which the ruler carried out through his appointed officials or justices. As such, not only was there no separation of powers, but those who judged were agents of those who ruled; while in theocratic societies, such as those where Islam was the state religion, judges had to conform to the dictates of the sacred law as expressed in the Sharia and the *Sunna*. The same observations apply to societies with customary legal systems. Judicial immunity is a form of legal immunity which protects judges and others employed by the judiciary from law suits brought against them for judicial actions, no matter how incompetent, negligent or malicious such conduct might be, even if this conduct is a violation of statutes. It is thus a judge's complete protection from personal liability for exercising judicial functions. Judicial immunity protects judges from liability for monetary damages in civil courts for acts they perform pursuant to their judicial functions. A judge thus has immunity for acts relating to cases before the court, but not for acts relating to cases beyond the court's reach. Judicial immunity is a common law concept derived from the judicial decisions, and originated in the courts of medieval Europe to discourage persons from attacking a court decision by suing the judge. Losing parties were required instead to take their complaints to an appellate court. The idea of protecting judges from civil damages is where this basic tenet was derived from and served to solidify the independence of the judiciary. 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 of ignorance, or motivated by envy or hatred and malice he cannot be liable to any civil action instituted by an aggrieved litigant.⁷ It became widely accepted in the English courts and the courts of the United States. In the case of *Miller v Sears*⁸ the position at common law was stated thus: 'In all cases where protection is given to the judge giving erroneous judgment, he must be acting as judge. The protection in regard to the superior court is absolute and universal, with respect to the inferior court it is only when they act within their jurisdiction'. In *Thafee v Downes*⁹ in an action against the Lord Chief Justice of the Queen's Bench of Ireland, he declined to plead any form of justification for his actions and relied on his position as a judge to have the action dismissed. The court delivering the judgment stated that the principle of law of exemption from being sued for matters done by judges done in their judicial capacity is of great

⁵Sokombaa Alolade, 'The Discipline of Judicial Officers' <https://www.thelawyerschronicle.com/the-discipline-of-judicial-officers/> accessed 26 June 2020.

⁶The World Bank Group – Legal Institutions of the Market Economy, Judicial Independence: What it is how it can be Measured, Why it occurs, cited in J. Bridge, Constitutional Guarantees of the Independence of the Judiciary, vol.11.3 Electronic Journal of Comparative Law (December 2007), <http://www.ejcl.org/113/article113-24.pdf> accessed on 10 August 2011

⁷EM Akpambang 'Immunities and Tenures of office of the three Arms of Government in Nigeria: Legal Perspective (2016) *Global Journal of Politics and Law Research*, Vol. 4 No. 4, July 2016, p 49.

⁸ 636 P. 2d 1183(1981)

⁹ 3 E.F. Moore, 36

importance. It is necessary to the free and impartial administration of justice, that the persons administering it should be uninfluenced by fear and unbiased by hope. The rule was stated more forcefully in *Fray v Blackburn*,¹⁰ thus, 'it is a principle of our law that no action will be against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly.' Originally for a judge to be entitled to such immunity he must be a judge of a superior court of record; acting within jurisdiction in respect of the matter complained of; or if acting in excess of or outside jurisdiction must believe himself to have jurisdiction to do the act complained of. The protection was not generally applied to inferior courts when they acted without jurisdiction. Thus for example in *Holden v Smith*,¹¹ where a revising barrister wrongly expelled a plaintiff from his court, and *Marshalsea's case*,¹² where a judge who had jurisdiction over the King's household imprisoned someone who was not a member of such household; they and the officers executing their judgments were held personally liable in damages even when acting in good faith. The dichotomy was however abolished in the case of *Sirros v Moore*¹³ where the Court of Appeal, per Lord Denning stated 'Every judge of the courts of this land – from the highest to the lowest – should be protected to the same degree... so long as he honestly believes it to be within his jurisdiction, he should not be liable'

3. Independence of the Judiciary and Judicial Immunity in Nigeria

The concept of judicial independence means that the judicial officer can never be put to pressure directly or indirectly in the performance of his or her duty. They cannot receive orders from anybody or authority no matter how highly placed. Judicial officers should be free to give orders or judgments that must be respected by the executive, legislature and entire society.¹⁴ The rationale for the independence of the judiciary is that it will sustain the public confidence in the courts. The interpretation of judicial independence may vary and the measure taken to ensure such independence may possess different degree of efficacy. Bryde enumerates four possible attitudes to judicial independence in Africa:

- (1) a complete rejection of the doctrine of separation of powers as Western import not fit for developing countries.
- (2) an official commitment to judicial independence not supported by adequate legal safeguards,
- (3) a comprehensive set of legal safeguards occasionally violated by interferences from the executive in respect of politically sensitive issues and
- (4) effective institutionalised judicial independence¹⁵

From the present events in the contemporary Nigeria one may reason that Nigeria falls within the third category above. The 1999 Constitution of the Federal Republic of Nigeria (as amended),¹⁶ by allocating the judicial function to the courts secured the independence of the judiciary from the other branches. In furtherance to this, section 36 (1),¹⁷ by imposing an obligation to determine legal issues before an independent and impartial tribunal, reinforces the independence of the judiciary. There are also other constitutional safeguards for the independence of the judiciary especially as it relates to some of the landscape of judicial independence such as the appointment,¹⁸ removal,¹⁹ security of tenure and salaries of judicial officers.²⁰ On the basis of the constitutional provisions on the independence of the judiciary there is an obligation on government and other institutions to respect and observe this independence. However the constitutional provisions may not by themselves ensure the independence of the judiciary – the chief officers of the judiciary such as the Chief Justices, Presidents of courts, etc. must ensure the independence of the judiciary. This role however requires someone who is eminently independent and who can put his mark on the image of the judiciary and the legal system. This is ensured through the appointment processes. Appointment should be on merit and not because of political and other affiliations. This will in turn ensure a well-balanced content of that independence in terms that include the impartiality of judgment and the absence of improper influence of any kind, the exclusive authority of the judiciary over its competence and the absence of any inappropriate or unwarranted interference in judicial process.

¹⁰ 3 b & S 576

¹¹ (1850)14 QB 841

¹² (1615)10 Co Rep 686

¹³ (1974)3 All ER 776

¹⁴ MI Anushiem et al, 'Criminal Trial of Judges and Imperatives for Judicial Independence', Institutional Paper presented by Faculty of Law, Nnamdi Azikiwe University, Awka at the 51st Conference of the Nigerian Association of Law Teachers Held on July 1-6, 2018.

¹⁵ RC Chanchangi and IN Aduba, 'Judiciary its Constitution and Functions, including Independence of the Judiciary' Paper presented at Law Teachers Conferences, ABU Zaria 25 – 28 March, 1987.

¹⁶ Hereinafter referred to as the 1999 Constitution, Section 6 (1) and (2) 1999 Constitution

¹⁷ *Ibid*

¹⁸ *Ibid*, sections 231,238, 250, 254B, 256, 261, 266, 271, 276 and 281

¹⁹ *Ibid*, section 292

²⁰ *Ibid*, section 291

In Nigeria by the Supreme Court Ordinance No 4 of 1876,²¹ the common law doctrine of equity and statutes of general application which were in force in England on the 24th May 1874 were made applicable in Nigeria. Thus the common law rules in England with all its vagaries and ramifications became law in Nigeria. The Supreme Court Ordinance of 1948 was the first most comprehensive statute provision on judicial immunity. Its provision covered the justices of the Supreme Court, thus, 'No judge or other person acting judicially shall be liable to be sued in any court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within his jurisdiction.'

The question of immunity of judges in Nigeria is not a direct constitutional matter but embedded in the common law and statutes. The 1999 Constitution does not provide for immunity of judges, but some statutes which under section 315 of the 1999 Constitution are regarded as existing laws guarantees judicial immunity. The Federal High Court Act²² provides that; 'No Judge or other person acting judicially shall be liable to be sued in any 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.' Also the High Court Law ²³provides that: 'No judge shall be liable for any act done 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 have jurisdiction to do or order to be done the act in question.'²⁴ The statutory provisions for immunity from criminal liability of judicial officers for act done in their judicial capacity can be found in section 31 of the Criminal Code Act ²⁵as follows:

Except as expressly provided by this code or the enactment constituting the offence, a judicial officer 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.

The earliest reported judicial decision on judicial immunity by a court in Nigeria was the case of *Onitiri v Ojomo*.²⁶ In that case the plaintiff had been accused before the defendant, a chief magistrate, of a criminal offence and had applied to transfer the case from 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 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' Court Ordinance which provided that:

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.

The principle was also upheld in the case of *Egbe v Adefarasin*²⁷ where the court stated that:

The rationale for judicial immunity is established on public policy because of the need to protect judicial officers whether from 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.²⁸

In *Hon Justice Sotonye Denton West v Hon. Nimi Walson Jack & Ors.*,²⁹ the appellant, then a judge of the Rivers State High Court of Justice was presiding over a case involving *Mrs. Baby B. Amadi Woko v Mrs. Catherine Akor and Others*. In the course of hearing, he ordered for the issuance of and service of civil subpoena on the 1st respondent at his own instance without the application of any of the parties to the case. When the 1st respondent failed to appear he ordered a bench warrant to be issued for the arrest of the 1st respondent who was not a party to the case. As a result the 1st respondent filed an application for the enforcement of his fundamental human right via a motion ex-parte at the River State High Court of Justice presided by Mary Odili, (as he then was) where he

²¹ Section 14

²² Cap F12, Laws of the Federation of Nigeria 2004, section 63(1)

²³ Cap. H3 Laws of Lagos State, 2003, Section 88(1)

²⁴See also 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)

²⁵ Cap. C38 LFN, 2004

²⁶ (1954) 21 NLR 19

²⁷ 1(1985)1 NWLR (Pt. 3)549

²⁸ *Egbe v Adefarasin* (*supra*) at p. 561

²⁹ (2013) 15 NWLR (Pt 1377) 201

sought inter alia: That the issue and service of civil subpoena on the application by the Hon Justice (Ms) Sotonye Denton-West in the civil suit No. PHC/891/95 between Ms. Baby B – Amadi Woko and Mrs. Catherine and others in which the applicant is not a party and not required to give evidence by either the plaintiff or the defendants is a denial of right to fair hearing, a threat to the liberty of the applicant and threat to his freedom of movement. The trial judge granted the ex-parte application and adjourned the motion on notice for hearing. Before the hearing of the motion on notice the appellant filed a preliminary objection in which it was contended that the trial court has no jurisdiction to entertain the action. The trial court dismissed the preliminary objection. The appellant dissatisfied with the ruling, appealed to the Court of Appeal Port-Harcourt Division. The Court of Appeal dismissed the appeal. The appellant contended inter alia that he was covered with immunity as 1st respondent's cause of action at the trial court relates to an act done by the appellant on the performance of his judicial function. He contended that a judge is fully immune from any act done or ordered to be done by him in the discharged of his judicial duty when he acts within his jurisdiction referring to section 55(1) of the High Court Laws of Eastern Nigeria Vol. 4(Cap 67 1963 in *pari materia* with section 88 (1) of the High Court Law of Lagos State. The court held that the Appellant failed to meet the requirements of judicial immunity as provided in section 55(1) of the High Court Laws of Eastern Nigeria.³⁰

4. Judicial Officers and Criminals Prosecution

On the basis of judicial immunity judges cannot be subject to civil or criminal proceedings on account of negligence, or errors made in the course of discharging their functions. Therefore generally speaking both under common law and statute, there is no criminal liability for judicial officers in Nigeria for acts performed or carried out in their judicial capacity.³¹ In *Awosanya v Board of Custom*³² the appellant was found guilty of criminal contempt of court, 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 further appeal to the Supreme Court the court held that the appellant was not guilty of criminal contempt; and accordingly discharged and acquitted him. The Supreme Court stated per Elias CJN that:

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 characterized as criminal and no amount of argument as to a suspected improper motive would make it a criminal offence in itself.

Further, statutory provision for immunity of judicial officers from criminal liability for acts done in their judicial capacity is provided for in Section 31 of the Criminal Code Law. Furthermore, a judicial officer is also exculpated from liability in respect of criminal defamation for a publication that takes place in any proceeding 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.³³ However by the existing constitutional arrangement and even under the common law judicial officers are not immune from criminal prosecution except while on official duties. Thus a judicial officer who accepts bribes, or manifest corrupt tendencies or has perverted the course of justice should be made to face criminal liability.³⁴ Sections 98, 98A, 98B and 98C of the Criminal Code prohibit official corruption and abuse of office. The sections principally sanction any public officer (including judicial officer), who corruptly asks for, receives or obtains or agrees or attempts to receive or obtain any property or benefit of any kind for 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 above stated sections of the Criminal Code prescribe a seven years term of imprisonment for any judicial officer found guilty of the felonious acts stated therein. However, before any criminal proceeding can be commenced against any judicial officer who violates any of the provisions of these sections, a complaint or information signed by or on behalf of the Attorney- General of the Federation or of the State as the case may be, is required.³⁵ In the same vein also the Revised Code of Conduct for Judicial Officers of February, 2016 prohibits the Judicial Officer from engaging in conducts amounting to judicial misconduct. Rule 3.1 provides that: 'A judicial officer should be true and faithful to the Constitution and the Law, uphold the course of justice by abiding with the provisions of the Constitution and the Law and should acquire and maintain professional competence.' More specifically Rule 10 (1) (iii) provides that: 'A judge shall not give or take and shall not encourage or condone the giving or taking of any benefit, advantage, bribe however disguised for anything done or to be done in the

³⁰ See also *Adeyemi Candide-John v Mrs. Esther Edigin* (1990)1 NWLR (Pt. 129).

³¹ Abimbola AO Olowofoyekun, *Law of Judicial Immunities in Nigeria* (Ibadan Spectrum Law Series, 1992) P. 33.

³² (1975)1 All NLR 106

³³ Criminal Code, Section 378(3)

³⁴ *Sirros v. Moore* – P 782 *S B M Services Nig. Ltd v. Okon* (2004) NWLR (Pt 879) 529 at p. 553

³⁵ Criminal Code Act, Cap C 38, Laws of the Federation of Nigeria, 2004, Section 98C(2)

discharge of a judicial duty.’ However as held in *Nganjiwa v FRN*³⁶ whenever a breach of judicial oath occurs, it is a misconduct itself then the National Judicial Council (NJC) is the appropriate body to investigate such breaches by the judicial officer and if found to be so, such judicial officer shall face disciplinary action and the NJC may recommend the removal of such a judicial officer to the appropriate authority. When this is done and accepted by the appropriate authority in compliance with the provisions of the Constitution, then the relevant law enforcement agent or agency is at liberty to make the said judicial officer face the wrath of the law. If however a judicial officer commits a crime outside the scope of performance of his official functions, such as theft, fraud, murder or manslaughter, arson etc. which are crimes committed outside the scope of the performance of his official function, he may be arrested, interrogated and prosecuted accordingly by the state directly without recourse to the NJC. Therefore when a judicial officer is acting or performing in judicial capacity he has absolute immunity.

However, outside the exercise of judicial function, a judicial officer is criminally liable like any other citizen for his criminal actions. Thus the general laws on criminal prosecution will be applicable to a judicial officer who commits a crime outside the performance of his judicial functions in judicial capacity. Thus with regard to the criminal liability of a judicial officer there are three key points. First, a judicial officer cannot be liable for issues that arise with respect to anything said or done by him in the exercise of a jurisdiction which belongs to him.³⁷ Second, where a crime is alleged against a judicial officer, and such is committed within the scope of the performance of his official function, and amounts to a misconduct as envisaged in the Code of Conduct for judicial officers the NJC has the power to investigate such allegations of misconduct and if found to be true make recommendations for their removal.³⁸ It is only when the NJC has given a verdict and handed over such judicial officer to the prosecuting authority (removing his toga of judicial power) that he may then be investigated and prosecuted by the appropriate security agencies.³⁹ Third is where a judicial officer commits a crime outside the scope of the performance of his official functions. In such situations he may without recourse to the NJC be interrogated and prosecuted by the state directly.⁴⁰

5. Implications of the Recent Investigations and Prosecutions of Judicial Officers on Independence of the Judiciary and Immunity of Judicial Officers

It is beyond dispute that to sustain a democracy in the modern world an independent, impartial and upright judiciary is a necessity.⁴¹ In view of the vital role the judiciary plays in the society and the impact it has on governance, the independence of the judiciary becomes a *sine qua non* to effective governance, rule of law and the liberty of the citizens. The Court of Appeal in *Denton-West v Muoma*⁴² also stated that the importance of the competent, independent and impartial judiciary in preserving and upholding the rule of law cannot be over-emphasized.⁴³ In the same vein the immunity granted to judicial officers is very essential to ensure effective adjudication; otherwise the judicial officers may be inhibited in their adjudication by fear of the consequences of their decisions. Thus the reason for judicial immunity as stated in *SBM Services (Nig) Ltd v Okon*⁴⁴ is found on public policy because of the need to protect Judges and indeed all judicial officers whether of superior court of record or not from wanton attack in their capacity as judges. It is necessary for the free and impartial administration of justice, that the person administering it should be uninfluenced by fear and unbiased by hope. Thus, the judicial officer cannot be questioned or made to suffer for issues arising from his actions in the performance of his judicial functions, and the law in protection of the citizen from wrong decisions arising from these actions provide adequately for appeal to higher courts.⁴⁵ Like judicial immunity, judicial independence is the ability of a judge to decide a matter free from pressures or inducements.⁴⁶ It is also the total freedom of the judiciary from the other arms of government, the executives and the legislature. It may also mean the ability of the judiciary to be independent by being separate from government and other concentrations of power.⁴⁷

In line with the independence of the judiciary, the United Nations Declarations on the Basic Principles on the Independence of the Judiciary 1985, also noted that: ‘The judiciary, shall decide matters before them impartially,

³⁶ (2018)4 NWLR (Pt. 1609)301

³⁷ *Egbe v Adefarasin* (1985)3 NWLR (pt. 3) 549, *Ndefo v Obiesie* 2000 15 NWLR (Pt. 692) 820 at 836.

³⁸ *Opene v NJC* (2011) LPELR 4795, *Elelu-Habeeb v A-G Federation*(2012) 13 NWLR(Pt 1318)403

³⁹ *Ngajiwa v. FRN (supra)* at p 349.

⁴⁰ *Ngajiwa v. FRN (supra)* at p 342

⁴¹ TA Aguda, *The Judiciary in the Government of Nigeria*, (Ibadan: New Horn Press, 1983) p. 34.

⁴² (2008)6 NWLR (Pt. 1083) 418 at 451-452

⁴³ See also *In re: Diamond Bank Ltd* (2002)17 NLWR (Pt. 795) 120 at 134

⁴⁴ (2004)9 NWLR (Pt. 879)529 at 552

⁴⁵ *Secretary, Iwo Central L.G. v Adio* (2000) 8 NWLR (Pt. 667) 115

⁴⁶ FA Umar, ‘The Role of the Bar and Bench in the Sustenance of Democracy in Contemporary Issue in Nigeria Law’ Legal Essay in Hon Justice Umaru Faruke Abdullahi CON 2006pp 85 & 89.

⁴⁷ JB Dauda, ‘The Independence of the Nigerian Judiciary in the light of Emerging Socio-Political and Security Challenges, A key Note Speech available at <http://www.nba.org.ns/web> the independence of the Nigerian judiciary accessed 11 March, 2020.

on the basis of facts and in accordance with the law without any restrictions, improper influences, inducements and interferences, direct or indirect from any quarter for any reason.⁴⁸ The immunity of judicial officers and judicial independence are concepts clearly recognized and respected in Nigeria. The common law provisions on immunity are adopted in Nigeria and have been codified in the various Rules of Court in Nigeria.⁴⁹ Nigerian Courts have also in various judicial decisions upheld this concept.⁵⁰ There are numerous constitutional safeguards for the independence of the judiciary under the 1999 Constitution especially as it relates to some of the landscape of judicial independence such as the appointment, removal, security of tenure and salaries of judicial officers. However in relatively recent times from 2016 – 2019 there has been an unprecedented ‘crackdown’ on judicial officers who are alleged to have been involved in corrupt practices. As expected this has resulted in comments both positive and negative, on its implication on the independence of the judiciary as well as the immunity of judicial officers.

The major issue in contention in most of the cases is not really whether it is right or wrong to bring criminal prosecution against serving judges, for as earlier stated in this work, the doctrine of judicial immunity does not protect a serving judicial officer against criminal proceedings when he is reasonably suspected to have committed a criminal offence. However, the procedure to be adopted in the process of such prosecution will depend on the nature of the criminal act alleged against the judicial officer. Thus if a judicial officer commits theft, fraud, murder or manslaughter, arson and its likes, which are crimes committed outside the scope of the performance of his official functions he may be arrested, interrogated and prosecuted accordingly by the state directly without recourse to the NJC.⁵¹ However where the criminal allegation against a judicial officers amounts to a breach of Code of Conduct for Judicial Officers as well as offences under the Criminal Law, it is the duty of the constitutional body charged with the discipline of Judicial Officers, the NJC to investigate such breaches and deal with the judicial offer in accordance with the provisions of the constitution. Thereafter the law enforcement agent or agency is at liberty to make the judicial officer face the wrath of the law. Thus in the case of *Nganjiwa v FRN*⁵² the appellant was by a 14-count information charged with offences ranging from unlawful enrichment by a public officer to making false information contrary to section 82(a) of the Criminal Law of Lagos State, No. 11, 2011 and section 39(2)(a) of the EFCC (Establishment) Act, 2004. The appellant challenged the jurisdiction of the trial court to hear the case against him mainly on the ground that conditions precedent to filing of the information had not been fulfilled. The trial court dismissed the preliminary objection. The appellant aggrieved by the ruling appealed to the Court of Appeal and in resolving the provisions of section 158(1) and paragraph 21(b) of the Third Schedule, Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Rules 1, 2, 3(i) and 10 (1) (iii) of the Revised Code of Conduct for Judicial Officers of February 2016 and unanimously allowed the appeal. Section 158(1) and Paragraph 21 of the Third Schedule are hereby replicated for a clear understanding of the decision of the court.⁵³

Section 158(1) provides:

In exercising its power to make or exercise disciplinary control over persons, the Code of Conduct Bureau, the National Judicial Council, the Federal Civil Service Commission, the Federal Judicial Service Commission, the Revenue Mobilization and Fiscal Commission, the Federal Character Commission, and the Independent National Electoral Commission, shall not be subject to the direction or control of any other authority or person.

Paragraph 21 of the Third Schedule states: ‘The National Judicial Council shall have power to- (b) recommend to the President the removal from office of the judicial officers specified in sub-paragraph and to exercise disciplinary control over such officers.’ The court of Appeal held *inter alia* that:

A cumulative reading of the relevant provisions of section 153(1), 158(1), paragraph 21(b) of part 1 of the Third schedule of the 1999 Constitution (as amended), is to the effect that the National Judicial Council (NJC) is the sole body with authority to recommend to the president for the appointment and removal of any judicial officer at the federal

⁴⁸ FAR Abeleke (et al), *The Role of the Judiciary in Combating Corruption, Aiding and Inhibiting Factors in Nigeria* in IA Abdullahi (et al) *Corruption and National Development* ep at p. 299.

⁴⁹ The Federal High Court Act Cap F12, Laws of the Federation of Nigeria 2004, section 63(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)

⁵⁰ *Onitiri v Ojomo*(supra), *Egbe v Adefarasin*(supra), *Hon Justice Sotonye Denton West v Hon. Nimi Walson Jack & Ors.*(supra), *Adeyemi Candide-John v Mrs. Esther Edigin* (supra) etc.)

⁵¹ *Ngajuwa v F.R.N* (supra) p. 343.

⁵² Supra.

⁵³ See p 13 for the provision of Rules 1, 2, 3(i) and 10 (1) (iii) of the Revised Code of Conduct for Judicial Officers of February 2016.

level and also exercise disciplinary control over judicial officers. In line with Paragraph 21(h) & (i) thereof, the NJC which has the power to collect, control and disburse all monies for the judiciary and to deal with all other matters relating to policy and administration, and it is in this regard that National Judicial Policy of April, 2016; Judicial Discipline Regulations of 9th March, 2017; Revised Code of Conduct for Judicial Officers of the Federal Republic of Nigeria of February, 2016; Revised NJC Guidelines & Procedural Rules for the appointment of Judicial Officers of all Superior Courts of Record in Nigeria of 3rd November, 2014 were all formulated.⁵⁴

Whenever a breach of Judicial oath occurs, it is a misconduct itself, then the NJC is the appropriate body to investigate such breaches by the judicial officer and if found to be so, such judicial officer shall face disciplinary action and the NJC may recommend the removal of such a judicial officer to the appropriate authority which is either the president in the case of a Federal Judicial Officer or the Governor of the state in the case of a State Judicial Officer, and/or take other actions appropriately. When this is done and accepted by the appropriate authority in compliance with the provisions of the Constitution, then the relevant law enforcement Agent or Agency is at liberty to make the said judicial officer face the wrath of the law. Any act done by the law enforcement Agent or Agency in violation of the above is tantamount to denying the NJC its powers to discipline Judges in accordance with the provisions of section 153(1) and paragraph 21 part 1 of the Third Schedule, of the 1999 Constitution (as amended), particularly paragraph 21 (a) & (b) of the Third Schedule, part 1 of the 1999 Constitution (as amended) respectively. Whenever there is an allegation of official misconduct against a judicial officer and the above stated process is not adhered to, it amounts to jumping the gun and *ipso facto* a direct violation of the Constitution. Recourse to the National Judicial Council is a condition precedent as clearly set out by the Constitution, and any attempt by any Agency of Government to by- pass the Council will amount to failure to observe condition precedent thereby leading to flagrant violation of the Constitution.⁵⁵

It must be expressly stated that if a judicial officer commits theft, fraud, murder or manslaughter, arson and the likes, which are crimes committed outside the scope of the performance of his official functions, he may be arrested, interrogated and prosecuted accordingly by the State directly without recourse to the NJC. These classes of criminal acts are not envisaged and captured by the provisions of paragraph 21, part 1 of the third schedule. On the other hand, if any judicial officer commits a professional misconduct within the scope of his duty and is investigated, arrested and subsequently prosecuted by security agents without a formal complaint/report to the NJC, it will be a usurpation of the latter's constitutionally guaranteed powers under section 158 and paragraph 21 part 1 of the Third Schedule, thereby inhibiting, and interfering with a and obstructing the NJC from carrying out its disciplinary control over erring judicial officers as clearly provided by the constitution. This will thus amount to a violation of the constitutionally guaranteed independence (a fundamental component) of the judiciary...⁵⁶

The decision of the Court of Appeal in *Nganjiwa v FRN* has been applauded as well as criticized for various reasons. The major criticism is that it is unjust and sets a very bad and dangerous precedent with regards to corruption by public officers. One of such criticism was from EFCC through whom the Federal Government brought the action. According to Wilson Uwujaren EFCC's spokesperson '... criminal trial takes precedence over administrative procedures and it is strange that the Court of Appeal wants to put the cart before the horse. This is ridiculous. The appellate court simply wants to confer immunity on public officers from prosecution for corruption, it will not stand.'⁵⁷

The recent suspension of the Chief Justice of Nigeria (CJN) by the President of the Federal Republic also comes to view with respect to the issue. Based on a petition signed, by the Executive Secretary of Anti-Corruption and Research-Based Data Initiative (ARDI), against the CJN for failure to declare his assets contrary to Section 15 of

⁵⁴ *Nganjiwa v FRN supra* at 340

⁵⁵ *Supra* at 342

⁵⁶ *Supra* at 343

⁵⁷ Ben Ezeamalu, Updated! EFCC Lacks powers to prosecute serving judges, Court of Appeal rules (2017) <https://www.premiumtimesng.com/news/headlines/252123-updated-efcc-lacks-powers-to-prosecute-serving-judges-court-of-appeal-rules.html> accessed on 20 June, 2020

the Code of Conduct Bureau and Tribunal Act 1991 (the CCBTA), the Code of Conduct Bureau (CCB) acting under Section 3(d) of the CCBTA brought a 6 court charge against the CJN at the Code of Conduct Tribunal (CCT). The charges include ‘failure to declare and submit a written declaration of his asset within three months of being sworn in as Justice of the Supreme Court in 2005 and named CJN; failure to declare a domiciliary US dollar account, a domiciliary euro account, a domiciliary (pound sterling) account, an e-saver savings (Naira) account and a naira account, all maintained with Standard Chartered Bank (Nig.) Ltd in Abuja; and funding some of his accounts through self-made cash deposits ‘which appear to have been run in a manner inconsistent with financial transparency and the code of conduct for public officials.’⁵⁸ Thereafter the president purportedly acting on an order from an ex-parte motion suspended the CJN and swore in the next senior Justice of the Supreme Court (Tanko Mohammed) as the acting CJN.

A lot of issues arising from the process that led to the suspension of the CJN raise questions with regard to the independence of the judiciary. First is the swiftness in bringing the charges against the CJN. Some accounts highlighted that the charges were brought within 24 hours; i.e. that the CCB received the petition on January 9, and by January 10, the case was already before the CCT.⁵⁹ Some account suggested that it took 3 days to get the case to the CCT by the CCB.⁶⁰ Whether it is a day or three days, it is expected that for an allegation such as acts that took place in 2005 when the CJN was still a Supreme Court Justice, and for several accounts held abroad and in Nigeria and involving certain amounts of money, would require some investigations before charges are properly drawn up. Also such investigations cannot be completed within 24 hours or even three days. Second on the trial date January 14, 2019 the main contention before the court was on jurisdiction; first jurisdiction as regards to ‘personal service’ of the charges and summon on the CJN, and another jurisdiction argument that the CJN has not been investigated by the NJC, and because of that, the CCB has no such power to proceed to the CCT to prosecute the CJN before it. The prosecution informed the court that it has a motion (dated January 9) asking the CCT to order the CJN to step aside as the CJN, and secondly, ordering the Nigerian President to swear-in the next most senior Justice of the Supreme Court as the acting-CJN pending when the allegations before the CCT would be completed. The CCT however agreed to hear arguments on its jurisdiction before it can decide on the motion asking for interim orders. On that date the tribunal found that the CJN was not personally served and adjourned the case to January 22, the aim being for the CJN to be properly served and be able to appear in court personally and for arguments for and against the CCTs jurisdiction to be heard. Third, on the adjourned date 22 January the CJN’s lawyers made an application for indefinite adjournment of the case based on an order of the Federal High Court that the CCT stay proceedings.⁶¹ Ultimately the CCT refused to grant the application for indefinite adjournment of the proceedings and insisted it would continue to hear the case. The CCT wanted arguments from both sides, but this was impossible because the prosecution had served the CJN’s counsel with their response very late (on January 21) and this would prevent the CJN’s counsel from responding on points of law to the response since he is yet to study same. For that reason the court adjourned for the proceedings till January 28.

Based on the above background it is surprising that the same CCT that adjourned a matter a matter (on January 22) to January 28, on the January 23 gave a ruling on an ex-parte motion earlier mentioned to the court in the first proceeding asking for two interim orders which the CJN’s counsel had argued the CCT must first determine its jurisdiction before it can rule on the ex-parte motion. It has been argued that there is no reasonable way the motion ex-parte dated January 9 can be heard and granted on January 23 when the CJN’s counsels have been to court since the beginning of trial and the motion could have been argued if the court really wanted to make an order. Secondly, the same CCT had adjourned the case to determine if it has jurisdiction on January 28. Without any urgency whatsoever, there is no reason to justify granting a motion ex-parte in between the dates (January 22 and January 28). Also, although the ex-parte motion was dated January 9, and the prosecution counsel informed the CCT of it, the CJN’s lawyers having asserted that the CCT itself did not have jurisdiction to entertain the motion; in such instance, it is trite that the CCT must determine if it has jurisdiction or not before proceeding to look at the motions before it.⁶² Indeed, the hearing of the motion challenging the CCT’s jurisdiction has been the issue before the CCT on all the trial dates since the beginning of the case i.e. January 14, January 22 and even the adjournment to January 28 is a continuation on jurisdiction determination. How then can the CCT assume jurisdiction without hearing arguments whether it has jurisdiction and grant an ex-parte motion when its

⁵⁸ <https://opinion.premiumtimesng.com/2019/01/14/onnoghen-in-the-den-of-lions-by-fisayo-soyombo/>

⁵⁹ G Odugbemi, ‘The Recent Suspension of the Chief Justice of Nigeria: Reports and Legal Discourse.’ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3324694 accessed on 21 May, 2020.

⁶⁰ NBA kicks against plans to try CJN Onnoghen (2019) <https://www.vanguardngr.com/2019/01/nba-kicks-against-plans-to-try-cjn-onnoghen/> accessed on 13 May, 2020

⁶¹ There were also similar orders from the High Court and National Industrial Court. Further, notice of a similar action (in form of an appeal) before the Court of Appeal was also given by the CJN’s counsel to further advance reason for the CCT to stay proceedings

⁶² G Odugbemi, *op. cit.*

jurisdiction is still being challenged.⁶³ The only jurisdiction a court or tribunal whose jurisdiction has been duly challenged possesses is jurisdiction to determine whether or not it has jurisdiction. Nothing more! It cannot make more or further orders in the substance of the case as erroneously done by the CCB.⁶⁴ The suspension of the CJN, therefore, cannot be effectively tied to the quest to preserve the rule of law, as claimed by the executive. Indeed what the executive has done is considered to be an inconsiderate abuse of power. If this precedent were to become a permanent rule of law, the security of tenure that is granted to judicial officers under the Constitution will become 'a tenure of insecurity' for judicial officers.⁶⁵

6. Conclusion and Recommendations

The judiciary plays very important and sensitive roles that affect other branches of government and impact greatly on the lives of the citizens. It is because of the place of the judiciary in modern day democracy that the constitution adequately makes provision ensuring their independence. The common law/statutory concept of judicial immunity has also over the years been applied to ensure the judicial officers are independent and allowed to administer their duties under the protection of the law independently and freely, without fear or favour. However as a result of the important role of the judiciary it is important that those who serve in that revered temple of justice must be above board. Holders of these offices must see themselves as holders of the sacred trust of members of the society. It then means that where a Judicial Officer violates or breaches this sacred trust, he must be held accountable because if the standards applicable to the holders of these offices are not set high and the bar is lowered, justice will not only be denied members of the society but the process of anarchy might actually be set in motion. The sacredness of the judiciary should therefore be guarded by ensuring that corrupt judges are removed timeously to ensure that the office is not desecrated and thereby impugning on constitutionalism and democracy. However, caution must be exercised in dealing with erring judicial officers to ensure that adopted procedures are in line with the Constitution and other relevant laws. Such procedures must not lose sight of the primary aim of enforcing accountability without impairing judicial independence.

To maintain the independence of the judiciary and ensure that judicial officers perform their functions without fear or favor, the NJC has to be allowed to exercise their powers and functions as provided for by the Constitution. The law enforcement agencies must be prevented by the courts from denying the NJC its powers to discipline Judges in accordance with the provisions of Section 153 (1) and paragraph 21 part 1 of the Third Schedule, of the 1999 Constitution. The principle of checks and balance should be introduced within the judiciary to check the excesses of members even before the NJC's ultimate responsibility is ignited. Such that once the NJC takes over the offending judge most likely would end up in the hands of the agencies of the executive except the judge is exonerated. The NJC could be encouraged to be more receptive to embracing information technology in the management of the judiciary. Technology can play a big role in reforming the judiciary by addressing the issues related to the backlog of cases, reducing interactions which can be taken advantage of and eventually manifests as corruption etc. The introduction of a judicial ombudsman could work in Nigeria. This office will be tasked with the responsibility of getting complaints from court users based on stipulated criteria. It would also need to provide feedback to the public. The whistle-blowing policy should be adopted to make the work of proposed ombudsman more effective. It will allow the office to get information that is verifiable from both staff and non-staff of the judiciary. The information received can be reviewed and utilised to improve the workings of the system.⁶⁶

⁶³ *ibid*

⁶⁴ Godwin Tsa 'Jonathan's removal of Sanusi different from Onnoghen's – Ozekhome' (2019) <https://www.sunnewsonline.com/sanusi-salamis-removal-by-jonathan-different-from-onnoghen-ozekhome/> accessed on 20 June, 2020

⁶⁵ Jiti Ounye, ANALYSIS: Suspension of CJN Onnoghen: An illegal executive coup against a recalcitrant chief judicial officer (2019) <https://www.premiumtimesng.com/features-and-interviews/308139-analysis-suspension-of-cjn-onnoghen-an-illegal-executive-coup-against-a-recalcitrant-chief-judicial-officer.html> accessed on 12 March, 2020

⁶⁶ Kemi Okenyodo, 'Judicial Oversight in Nigeria Challenges and Opportunities' (2018) *Friedrich-Ebert-Stiftung (FES) Nigeria* <http://library.fes.de/pdf-files/bueros/nigeria/15969.pdf> accessed on 30 June, 2020