JUDICIAL ACTIVISM AS A TOOL FOR IMPLEMENTING FEDERAL CHARACTER PRINCIPLE IN NIGERIA*

Abstract

One of the constitutional policies for managing ethnic diversity and pluralism in Nigeria is the federal character principle which is enshrined in section 14 (3) of the 1999 Constitution as amended. By this principle, all organs of government and all authorities or persons exercising legislative, executive or judicial powers shall ensure that every section of the country is fairly represented in the composition of the Government of the Federation. The responsibility for enforcing compliance with the principle of federal character primarily rests on the Federal Character Commission established by section 153 of the Constitution. But as a federal executive body, this Commission is directly under the control of the federal government, and this makes it almost impossible for the Commission to discharge its functions without interference from the federal government. This ugly situation is compounded by the fact that the federal character principle is contained in Chapter II of the 1999 Constitution, which is made non-justiciable by section 6 (6) (c) of the Constitution. The implication of this is that where the federal character principle is violated, no one could approach any court in Nigeria to enforce compliance with it. This paper examined the possibility of implementing the federal character principle in Nigeria through judicial activism. This paper found that even though federal character principle is ordinarily non-justiciable that it could still be implemented through judicial activism pursuant to section 13 of the Constitution which mandates judicial officers to conform to, observe and apply the provisions of Chapter II of the Constitution in the exercise of their judicial powers. The paper also found that the federal character principle could be implemented via judicial activism where it is directly or impliedly linked to any justiciable part of the Constitution or any statute with constitutional flavour. Therefore, this paper called on the judicial officers in Nigeria to rise to the occasion by taken active steps in the exercise their judicial powers to ensure that the essence of the federal character principle is not lost because of the legalism of its character.

Keywords: Constitution, Federal Character, Implementation, Judicial Activism, Nigeria, Principle.

1. Introduction

Nigeria is one vast and huge country made up of so many diversities in terms of tribe, cultures, sociology and anthropology.[1] Accordingly, one of the major challenges confronting Nigeria since its amalgamation in 1914 is the issue of how to manage its diversities. It was in a bid to maintain unity in diversity in Nigeria that its founding fathers adopted federalism as the most suitable system of government for the country. But what is being practiced in Nigeria since the end of the First Republic is not true federalism but partial federalism. Under thus faulty arrangement, the bulk of governmental powers reside with the federal government leaving state governments with only limited powers. For example, under the 1999 Constitution, the Exclusive Legislative List in which only the federal government can legislate contained about 68 items, while the Concurrent Legislative List in which both the federal government and state governments can legislate contains only 30 inconsequential items. Even at that, the Concurrent Legislative List is subject to the common law doctrine of covering the field[2], which states that where there is a conflict between an Act of the National Assembly and a Law enacted by the State Houses of Assembly, the former shall prevail.[3] While emphasizing this point, Sagay observed that the 1999 Constitution 'concentrates too much resources and power to the centre and has failed to appreciate that Nigeria is made up of diverse ethnic nationalities'.[4] The failure of the federal

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[1] In *Buhari v. INEC* (2008) 19 NWLR (PT. 1120) 246 at 427, Niki Tobi (JSC) noted that 'Nigeria is one vast and huge country made up of so many diversities in terms of tribe, cultures, sociology, anthropology.'

[2]The doctrine of covering the field is provided for in s. 4 (5) of the 1999 Constitution.

[3] C. E. Okeke and M. I. Anushiem, 'Implementation of treaties in Nigeria: issues, challenges and the way forward', *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, vol. 9, No. 2 (2018), 216-229 at 218 available at <https://www.ajol.info/index.php/naujilj/article/view/168850/158317> (last accessed 22 August 2020).

[4] J Ushigiale, 'Nigeria: Sagay Urges Action On 1995 Draft Constitution', This Day (Lagos), 6 October 2002, <https://allafrica.com/stories/200210060151.html> (last accessed 22 August 2020).

system of government to effectively address political problems occasioned by ethnic diversity and pluralism in Nigeria led to the invention of the federal character principle as a means of ensuring fair and equitable participation of every section of Nigeria in the management and administration of the country.[5] This principle which hitherto existed as a mere administrative practice became constitutional when it was introduced into the defunct 1979 Constitution as one of the constitutional policies of Nigeria.[6] This principle of federal character, which has remained one of the major constitutional policies in Nigeria ever since, is strengthened by the 1999 Constitution which established the Federal Character Commission for the purposes of promoting, monitoring and enforcing compliance with the federal character principle.[7] The Commission is also mandated to take such legal measures, including 'prosecution' of the head or staff of any Ministry or government body or agency which fails to comply with the federal character principle or any formula prescribed or adopted by the Commission.[8] The Commission was created as a federal executive body; and as such, it is directly under the control of the federal government. This renders the Commission impotent to oversight the federal government and its agencies, who are the major violators of the federal character principle. What is more, no one could approach any court in Nigeria to compel the federal government or its agencies to comply with the federal character principle because it is contained in Chapter II of the Constitution which is rendered non-justiciable by Section 6 (6) (c) of the Constitution. It has been observed that the non-justitiable character of the federal character principle is one of the major reasons why the federal government has persistently violated federal character principle in the composition of the Government of the Federation or its agencies and in the conduct of its affairs.[9] But as we shall see below, the power of the judiciary to intervene in the event of violation of the federal character principle is not completely ousted by Section 6 (6) (c) of the Constitution as judicial officers may pursuant to section 13 of the Constitution compel the relevant government agencies to conform to, observe or comply with the federal character principle through the instrumentality of judicial activism, a legal philosophy which encourages judges to act *ex debito* justitiea in deciding matters before them.[10]

2. Meaning and Nature of the Federal Character Principle

The federal character principle is a constitutional principle founded on the federal character of Nigeria. Section 318 (1) of the 1999 Constitution defines the federal character of Nigeria as the distinctive desire of the peoples of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation as expressed in section 14 (3) of the Constitution. The said section 14 (3) of the Constitution provides that 'the composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in that Government or in any of its agencies'. By the community reading of sections 318 (1) and 14 (3) of the Constitution, the federal character principle may be viewed as the distinctive desire of the peoples of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation by ensuring that the composition of the Government of the Federation or any of its agencies and the conduct of its affairs are carried out in such a manner as to reflect the federal character of Nigeria. The government of the federation refers to the federal government as against state governments and local governments. But this does not mean that the notion of federal character principle is unknown to state governments and local governments. Thus, section 14 (4) of the constitution provides that 'the composition of the Government of a State, a local government council, or any of the agencies of such Government or council, and the conduct of the

[5] In *Buhari v. INEC* (2008) 19 NWLR (PT. 1120) 246 at 427, Niki Tobi (JSC) noted that 'Nigeria is one vast and huge country made up of so many diversities in terms of tribe, cultures, sociology, anthropology.'
[6] See section 6(6) (b) of the 1979 Constitution
[7] 1999 Constitution, sec. 153.
[8] I999 Constitution, Third Schedule, Part I C, item 8(1)(c).
[9] C E Okeke, 'Enforcement and Implementation of the Federal Character Principle in Nigeria', NAUJILJ10(2) 2019, 174-185 at 185.
[10] I Imam and others, 'Judicial Activism and Intervention in the Doctrine of Political Questions in Nigeria: An Analytical Exposition', *African Journal of Law and Criminology, Vol. 1 Number 2* (2011), 50-69 at 55, <http://www.sachajournals.com/user/image/samboajlc002.pdf > (last accessed 22 August 2020).

affairs of the Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation.' It has however been argued that that the use of the term 'federal character' to describe geographical balance and spread in the composition of the government of a state and a local government council in Nigeria, or any of their agencies is a misnomer as the terms 'state character' and 'local character' would be more appropriate for them respectively.[11]

The federal character principle as enshrined in section 14(3) of the Constitution applies to appointive positions, and so does not apply to elective positions, which are generally determined by means of elections. Thus, it could be possible for a particular section of the country to be perpetually excluded from occupying sensitive elective offices like the office of President or Vice-President. This is in fact the situation in Nigeria today where the Southeast Geopolitical Zone of Nigeria has been denied access to the office of President of Nigeria even though the zone is one of the three largest ethnic nationalities in Nigeria. A deliberate attempt was made under the ill-fated 1995 Constitution to rotate the office of President and the Vice-President among the six Geopolitical Zones in Nigeria, but that Constitution that paid special home federal character principle did not see the light of the day following the sudden death of the then Military Head of State, General Sani Abacha. Also, restricting the federal character principle to only appointive positions makes it ordinarily inapplicable to geographical spread in the distribution of the federal infrastructure, parastatals and institutions because express mention of one thing excludes all others.[12] In a bid to fill this gap the Federal Character Commission Act empowers the Federal Character Commission 'to work out an equitable formula, subject to the approval of the President, for distribution of socio-economic services, amenities and infrastructural facilities' [13] in such a way that no section of the country will be disadvantaged. The Commission is also expressly empowered by the Act to compel relevant government agencies to comply with any guidelines for distribution of infrastructural facilities and socio-economic amenities formulated by it.[14] But since its establishment, the Commission is yet to to work out an equitable formula for distribution of socio-economic services, amenities and infrastructural facilities among the various sections of the country, and this is responsible the concentration of the major federal infrastructure, parastatals and institutions in few geopolitical zones of the country. In fact, some sections of the country are utterly excluded in the distribution of socio-economic services, amenities and infrastructural facilities in Nigeria. For example, there is no single seaport in the entire Southeast Geopolitical Zone of Nigeria, even though Onitsha International Market, the largest market in the entire West Africa, is within the Zone. Similarly, there is no truly international airport in the entire Southeast Geopolitical Zone, even though southeasterners are said to be the most travelled people in Nigeria. Even the Guiding Principles and Formulae for the Distribution of All Cadres of Posts made by the Commission pursuant to section 4 (1) (a) of the Act is more honoured in the breach than in the observation. For example, section 5 of the said Guideline provides that 'the appointment to the various categories of political offices shall be done on the basis of equitable representation of the States of the Federation and the Federal Capital Territory or zones as appropriate using the relevant formula.' Even though the political offices in question include the Special Advisers to the President, yet none of the Special Advisers to President Buhari is from the Southeast and the Northcentral Geopolitical Zones.[15]

3. The Legal Character of Federal Character Principle

Although the federal character principle is enshrined in the 1999 Constitution of Nigeria, it is ordinarily not justiciable. In *Yisa vs Ojo Local Government*,[16] the Nigerian Supreme Court held that 'the word 'justiciable' as in whether an action is justiciable means a matter appropriate for court review.' The federal character principle is non-justiciable because it is contained in Chapter II of the Constitution

[11] Above at note 9 at 176.
[12] *Ojukwu v. Yar' Adua* (2008) 4 NWLR (Pt. 1078) 435 at 461.
[13] Federal Character Commission Act, sec. 4(d) (i).
[14] *Ibid*, sec. 5(c).
[15] <https://www.osgf.gov.ng/storage/app/media/pdf/politicalappointees2a-2.pdf > (last accessed 22 August 2020).
[16] **(**2004) FWLR (194) 439, R. 1 at 454, B-C.

which is rendered non-justiciable by virtue of section 6(6) (c) of the Constitution, which provides that the judicial powers of the courts shall not 'except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.' The non-justitiable character of the federal character principle could equally be inferred from section 318 (1) of the Constitution, which provides that the federal character principle is a mere aspiration and desire of the peoples of Nigeria; and as such, it falls short of command of the sovereign as expected of a positive law. It is for this reason that the Supreme Court stated in the case of *Att.-G Ondo v. Att.-G Federation*,[17] that those objectives and principles, which are provided for under Chapter II of the Constitution including the federal character principle are mere declarations.

It must however be noted that where Chapter II of the Constitution is incorporated into any justiciable part of the Constitution, it shall automatically become justiciable. This is implicit from the proviso to section 6 (6) (c) of the Constitution which renders the entire Chapter II of the Constitution non-justiciable. For emphasis, the section commenced with the proviso 'except as otherwise provided by this Constitution.' While interpreting this proviso in the case of *Federal Republic of Nigeria vs. Aneche & 3 ors,*[18] Niki Tobi (JSC) stated thus: 'In my humble view section 6 (6) (c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words 'except as otherwise provides by this Constitution.'[19] Thus, once it is otherwise provided in any other section of the Constitution, the relevant section or sections of the said Chapter II of the Constitution shall become justiciable. A good example of this example is section 147 (3) of the Constitution which provides that the President shall conform to the federal character principle in choosing the ministers of the Federation. In fact, the proviso under the said section 147 (3) expressly makes it mandatory for the President to choose at least one Minister from each State of the Federation and the Federal Capital Territory, who shall be an indigene of such State. The federal character principle shall also become justiciable if the Constitution in its justiciable parts authorized the National Assembly to implement the provisions of Chapter II of the Constitution through legislation. For example, item 60 (a) of the Exclusive Legislative List under Part 1 of the Second Schedule to the 1999 Constitution provides that the National Assembly can establish and regulate authorities for the Federation to promote and enforce the observance of the Fundamental Objectives and Directive Principles which are laid down in Chapter II of the Constitution. By this provision the National Assembly is empowered to make the federal character principle justiciable by means of ordinary legislation. But as noted by Mohammed Uwais, CJN, 'the breath-taking possibilities created by this provision have sadly been obscured and negated by non-observance' by the National Assembly.[20]

4. Responsibility to Implement the Federal Character Principle in Nigeria

Section 13 of the 1999 Constitution provides that it shall be the duty and responsibility of all organs of government and all authorities and persons, exercising legislative, executive and judicial powers to conform to, observe and apply the provisions of Chapter II of the Constitution. But this is a clear case of responsibility without accountability because by virtue of section 6(6) (c) of the Constitution no one could be held account for to live up to the responsibility imposed by section 13 of the Constitution. Thus, according to Okeke and Okeke, '[i]n reality, section 13 created responsibility without liability. A government that cannot be liable for its failure to carry out its constitutional obligations cannot be said to bear any responsibility. Such government cannot be accountable to the people who are the ultimate sovereign in a democratic system of government which is purportedly in practice in Nigeria.'[21] But in giving effect to the federal character principle as laid down in section 14 (3) of the Constitution, the Federal Character Commission is established by section 153 of the Constitution promote, monitor and

[17](2002) FWLR (Pt. 111) 1973 at2138.
[18]*FRN v. Aneche & 3 Ors, In Re Olafiasoye* [2004] 1 SCM 36.
[19] *Ibid* at 78.
[20] As quoted in C E Okeke, above at note 9 at 179.
[21]G. N. Okeke and C. E. Okeke, 'The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria', *IOSR Journal of Humanities and Social Sciences* Vol.7 Issue 6 (Jan. 2013), 9 - 14 at 13, <http://www.iosrjournals.org/iosr-jhss/papers/Vol7-issue6/B0760914.pdf?id=6018> (last accessed 22 August 2020).

enforce compliance with the federal character principles of proportional sharing of all bureaucratic economic, media and political posts at all levels of government.[22] The Commission is also empowered to work out an equitable formula subject to the approval of the National Assembly for the distribution of all cadres of posts in the public service of the Federation and of the States, the armed forces of the Federation, the Nigeria Police Force and other government security agencies, government owned companies and parastatals of the states.[23] In pursuance of its aforementioned powers, the Commission has produced Guiding Principles and Formulae for the Distribution of All Cadres of Posts in the Civil and the Public Services of the Federation and of the States,[24] which itemized the ways and manners in which the federal character principle should be implemented in Nigeria both at the federal and state levels.[25] But these Guiding Principles and Formulae are more honoured in the breach than in the observation even though the Commission is expressly empowered by its Act to compel relevant government agencies to comply with them.[26] This is so because the Commission is directly controlled by the same federal government, which the Commission was primarily established to oversight. And the non-justiciable character of the federal character principle estopped citizens from approaching any court in Nigeria to either enforce the federal character principle or compel the Federal Character Commission to carry out its constitutional functions in the face of the mindboggling abuse of the federal character principle in the recent time.[27] But the power of the judiciary to enforce the federal character principle is not completely ousted by its non-justiciable character as judicial officers may in discharge of their judicial functions under section 13 of the Constitution compel the relevant government agencies to comply with the federal character principle by means of judicial activism.

5. Legality of Judicial Activism under the Nigerian Jurisprudence

Judicial activism according to Black's Law Dictionary is a '(j)udicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate judges.'[28] It encourages judges to act *ex debito justitiae* (in accordance with the requirement of justice) in deciding matters before them even when such action appears to be in opposition to the supposed legislative intent, or amount to a departure from the applicable case law. It is for this reason that judges who engage in judicial activism (activist judges) are often accused of usurping the law-making power of the legislature. But, in essence, activist judges only seek to advance the ultimate goal of the legislature, *to wit,* to make laws that will promote the wellbeing of the citizenry. In Nigeria, for example, the primary duty of the legislature is to make laws for peace, order and good governance of the society. This is evident from section 4 (2) of the Constitution, which provides that '[t]he National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List.'[29] On the other hand, the judiciary, as the chief guardian of the Constitution, has an inherent power to circumvent any interpretation of any piece of legislation which does not promote or which has ceased to promote the peace, order and good governance of the country, even when such interpretation appears to be the express or implied intent of the legislature, because such intent itself is *ultra vires* the Constitution. This is so because the legislature is only empowered to make laws for the peace, order and good governance of Nigeria. The issue of whether a law made by the National Assembly or any state House of Assembly is for the peace, order and good governance of Nigeria is a question of fact, and only a court of competent jurisdiction could make such determination. Once it is found that such law is at crossroad with the peace, order and good governance of Nigeria or that the law has ceased to promote the peace, order and good governance of

[22] I999 Constitution, Third Schedule, Part I C, item 8 (1) (b). See also Ikenga K. E. Oraegbunam, 'Human Rights Jurisprudence in Nigeria: Reflecting on its Naturalist Roots', *African Journal of Law and Human Rights* 1(2017), 21-43.
[23] I999 Constitution, Third Schedule, Part I C, item 8 (1) (a).
[24] Federal Character Commission (Establishment, etc.) Act, Subsidiary Legislation, Guiding Principles and Formulae for the Distribution of All Cadres of Posts, 1997.
[25]See C E Okeke, note 9 at 176.
[26] *Ibid.,* sec. 5(c).
[27] Ikenga K.E. Oraegbunam, 'A Philosophy of Human Rights Law in Nigeria: Focus on Intersubjectivity and Jural Relations', *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,* Vol. 3, 2012, pp. 47-58. Available at http://www.ajol.info/index.php/naujilj/article/view/136315.
[28] BA Garner *Black's Law Dictionary* (7th ed, 1999, Thompson West), p. 1464.
[29] State Houses of Assembly has similar powers as regards matters within their legislative competence.

the country, the same should be nullified by judicial activists because as Kastina –Alu, CJN, once noted, 'statutes are construed to promote the general purpose of the legislature,'[30] and so, 'Judges ought not to go by the letters of the statute only but also by the spirit of the enactment.'[31] Viewed in this light, judicial activism does not amount to a usurpation of the legislative power, but amounts to a true assertion of the independence of the judiciary as a co-ordinate arm of the government, which is saddled with the responsibility for the interpretation of laws made by the legislature.[32] Also, this distinguishes judicial activism from 'judicial rascality', a term which *simpliciter* connotes the application of judicial power without due regard to rule of law. But judicial activism at the lower courts does not only require great deal of courage, but must also be done cautiously especially where it involves departure from the prevailing case law. This is so because such activism is usually treated as judicial rascality by the appellate courts.[33] Thus, according to Justice Jude Okeke of the Federal Capital Territory High Court, '[j]udges should try to be involved in judicial activism. But lower court judges are somehow inhibited. They have to be more careful or else they be accused of judicial rascality.'[34]

6. Judicial Activism in the Nigerian Fourth Republic

Countries that move from military regime to democratic regime often witness increased rights-based and social justice lawyering after the transition.[35] Thus, in a country like Nigeria that just returned to a civilian rule after donkey's years of military government, judicial activism plays a very crucial role in dealing with the herculean task of running a democratic government with military paraphernalia and promulgations. It shall be recalled that the bulk of the laws in force in Nigeria today, including the Constitution itself, are mere decrees and edicts, which automatically metamorphosed into Acts and Laws respectively at the dawn of the Fourth Republic.[36] These glorified decrees and edicts are not only anti-people, but were also tacitly tailored to serve the parochial interest of certain sections of the country to the detriment of other sections of the country. Thus, one of the major challenges confronting judicial officers since the birth of the Fourth Republic is how to equitably apply these draconian laws, which were hitherto meant to serve the interest of the political elites, in favour of 'the people', who are the focal point in any democratic dispensation. Research evidence has shown that judicial activism is one of the best ways of confronting this challenge, because activist judges like activists in other fields of human endeavour, are always on the side of the people. This is, in fact, what Professor Upendra Baxi meant when he observed as follows: 'the distinction between an activist judge and non-activist judge, thus, lies in the exercise of its power. A non-activist judge prefers to exercise its power as an agent of the government whereas an activist judge exercises its power as an agent of the people.'[37] Accordingly, the degree of judicial activism displayed by Nigerian courts, especially the Supreme Courts, at the dawn of the Fourth Republic was very impressive.[38] This point was amply made by Suberu when he noted that 'the level of independent judicial activism exhibited by the Supreme Court in the Fourth Republic is unprecedented in Nigeria's history.'[39]

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[30] *Omoijahe v. Umoru* (2000) FWLR (Pt. 29) 2401 at 2413.
[31] *Ibid.*
[32] Also, activist judges would not hesitate to attune or turn their back on any case-law that has ceased to promote the peace, order and good governance in the society.
[33] *Dada v. FRN* (2014) LPELR-24255(CA) at 28; *Akingbola v. FRN & Anor* (2014) LPELR-24258(CA) at 40-41; *Oyewole & Ors v. Lasisi & Anor* (2014) LPELR-23076(CA) at 34. In *Ardo v. Nyako & Ors* (2014) LPELR-22878(SC), the Supreme Court held (at 43) as follows: '[w]here the lower courts are encouraged not to follow the previous decision(s) of this court on similar facts such an encouragement is designed to promote anarchy, chaos and judicial rascality' which is not the design or purpose of the principles of the Rules (sic) of Law.'
[34] Scannews, 'Appointment of Wrong Persons as Judges Hinder Administration of Justice –NBA', *Scannews*, Dec. 11, 2012, available at <http://scannewsnigeria.com/news/appointment-of-wrong-persons-as-judges-hinder-administration-of-justice-nba/> (last accessed 2 September 2016).
[35] J K Krishnan and K Ajagbe, 'Legal Activism in the Face Of Political Challenges: The Nigerian Case' Vol. 42:2 (2018), *Journal of the Legal Profession*, 197-241 at 197, https://core.ac.uk/download/pdf/232679439.pdf
[36] 1999 Constitution, sec. 315(1).
[37] As quoted in S D Mandrinath, *Judicial Activism in Post-Emergency Era* (Chennai, India, Notion Press, 9 Jan 2015), p. 10.
[38] R T Suberu, 'Democratizing Nigeria Federal Experiment' in R I. Rothberg (ed) (Boulder, CO: Lynne Rienner Publishers, 2004) pp. 61-84 at 77.
[39] *Ibid.*

Unfortunately, Nigerian courts have failed to sustain the tempo of this noble trend following the general decline in judicial activism in the country especially in the recent time. This decline may not be unconnected with the menace of judicial corruption which has not only eaten so deep in the very fabric of the Nigerian judiciary, but has also become its undoing. Of course, an activist judge must be incorruptible and morally upright and forthright in the discharge of its juridical functions, since the need to do what appears to be just in the face of detouring case law or statutory provisions is the whole essence of judicial activism. Another major factor responsible for the disappearance of judicial activism in the Nigerian judiciary and the concomitant re-emergence of judicial passivity and timidity, which used to be the order of the day during the dark days of military rule, is the undue interference of the executive in the judicial affairs. This development, which has become a commonplace in the recent time, amounts to a clear violation of the immutable principle of separation of powers which occupies pride of place in the 1999 Constitution.[40] Judicial officers who give judgments against the vested interests of the government of the day are frequently trailed and harassed by the executive-controlled security agencies under the guise of war against corruption,[41] and by so doing, the executive has succeeded in gagging the judiciary. The height of this appalling and detestable development is the inglorious removal of the then Chief Justice of Nigeria, Walter Samuel Nkanu Onnoghen, from office via an ex parte order issued by the Code of Conduct Tribunal (the CCT), an inferior tribunal under the Nigerian judicature, and his concomitant replacement with Ibrahim Tanko Muhammad through the same ex parte order.

This incident was viewed in many quarters as part of the systematic plot by the Buhari-led Federal Government to plant his kinsmen into key positions in all organs of the government in utter violation of the federal character principle. It shall be recalled that President Buhari initially refused submitted the name of the said Walter Samuel Nkanu Onnoghen to the National Assembly for Confirmation as the Chief Justice of Nigeria even after he was recommended to Buhari by the National Judicial Commission in line with the Constitution.[42] In fact, Walter Samuel Nkanu Onnoghen's name was submitted to the National Assembly for Confirmation at the eleventh hour by the Vice President while he was acting as the President when President Buhari was receiving treatment for an undisclosed illness at an undisclosed London hospital. The failure of the judiciary to stop the travesty of justice against the former Chief Justice of Nigeria clearly indicated the depth of judicial passivity and docility currently prevailing in the Nigerian judiciary.[43] It shall be recalled that the Nigeria Court of Appeal deliberately delayed delivering its judgment in the appeal filed the embattled erstwhile Chief Justice of Nigeria challenging the Ex parte Order of the CCT directing the President to suspend him from office. If the judgment was delivered timeously as expected in an appeal bordering on the fundamental human right of the appellant, the said Ex Parte Order would have been nullified and the suspension of the appellant abated. This is so because in its belated judgment, a three-man bench of the Court of Appeal led by Stephen Adah (JCA) held that the CCT breached Onnoghen's right to fair hearing when it ordered his suspension based on the false assets declaration charges filed against him at the CCT without hearing from him. The Court also held that the CCT ought to have been bound by the various court orders from the National Industrial Court and the Federal High Court restraining it from proceeding with Onnohens's trial.[44] Having held that the CCT breached Onnoghen's right to fair hearing by ordering his suspension and that the CCT is bound by the orders the National Industrial Court and the Federal High Court stopping Onnohens's trial, the Court of Appeal ought to quash the said offensive *ex parte* order,

[40] *Ugwu v. Ararume* (2007) 12 NWLR (Pt. 1048) 367 at 484.
[41] A Bamgboye, 'DSS Arrest Two Supreme Court Justices, Others Nationwide', *Daily Trust* (Lagos 8 October 2016) available at <https://www.dailytrust.com.ng/news/general/dss-arrest-two-supreme-court-justices-others-nationwide/165804.html> (last accessed 22 August 2020).
[42] I999 Constitution, Third Schedule, Part I C, item 21 (a) (i).
[43] SA Adewale, 'Appraisal of Suspension of Chief Justice Walter Onnoghen of Nigeria on Order of the Code of Conduct Tribunal,' <https://www.researchgate.net/publication/335515496_20_APPRAISAL_OF_SUSPENSION_OF_CHEIF_JUSTICE_WALTER_ONNOGHEN_OF_NIGERIA_ON_ORDER_OF_THE_CODE_OF_CONDUCT_TRIBUNAL> (last accessed 22 August 2020).
[44] A'court Strikes out Four Appeals of Onnoghen but Faults his Suspension (updated) <https://www.thecable.ng/breaking-cct-breached-onnoghens-right-to-fair-hearing-appeal-court-rules> (last accessed 22 August 2020).

but instead of doing so, the Court of Appeal dismissed Onnoghen's appeal on the pretext that the decision to suspend Onnoghen had already been overtaken by events.[45]

7. The Role of Judicial Activism in the Implementation of the Federal Character Principle in Nigeria

The non-justiciable nature of the federal character principle relates only to the three issues contemplated under section 6(6) (c) of the constitution, *to wit*, whether any action or omission by any authority or person is in conformity with the federal character principle, whether any law made by lawmakers is in conformity with the federal character principle, and whether any decision made by the judicial of arm of government is in conformity with the federal character principle. The implication of this is that no court in Nigeria has jurisdiction to determine any cause of action founded on the above issues. However, in the exercise of their judicial powers, judicial officers are mandated by section 13 of the Constitution to implement the federal character principle and other directive principle contained in Chapter II of the Constitution. Thus, according to Karibi-Whyte, JSC, ' [t]he Constitution has enjoined all organs of government and all authorities and persons, exercising legislative, executive and judicial powers to conform to, observe and apply the fundamental objectives and directive principles of state policy which are not justiciable.'[46] This provision is the basis for judicial activism in Nigeria vis-à-vis the non-justiciable Chapter II of the Constitution. By this provision any judge of superior courts of records in Nigeria can easily implement the federal character principle and other principles contained in Chapter II of the Constitution or direct any authority, person or agency of the Federal Government to comply with the federal character principle notwithstanding its non-justiciable character. For example, a court may while upholding the removal of a member of the board of the federal Government agencies from office order that such person shall be replaced with somebody from his geopolitical zone in compliance with the federal character principle.

Also, the federal character principle and other principles contained in Chapter II of the Constitution could be implemented through judicial activism where it could be directly or impliedly linked to any justiciable section of the Constitution or any statute that possesses constitutional flavor and dignity. Thus, in the celebrated case of *Fawehinmi v. President, F.R.N*,[47] the Court of Appeal held that non-compliance with the relevant provisions of the Certain Political, Public and Judicial Office Holders (Salaries and Allowance, Etc.) Act 2002[48] by the Federal Government amounts to an abuse of power which is contrary to section 15 (5) of the Constitution of the Federal Republic of Nigeria that provides that '[t]he state shall abolish all corrupt practices and abuse of power.' It shall be recalled that the said section 15(5) like section 14 (3) which provides for the federal character principle is contained in Chapter II of the Constitution which is not justiciable. Hence, activist judges could while adjudication on any matter involving the interpretation of any provision of the Constitution or any statute that possesses constitutional favour nullify any action of the federal government or its agencies that violates the federal character principle. It must, however, be noted that the adversarial system of administration of justice which Nigeria operates would not permit any judge, not even a justice of the Supreme Court, to hide under the guise of judicial activism to compel the federal government or its agencies to comply with the federal character principle unless it crops up in a contentious matter before the court. This is what Tanko Muhammad, JSC, meant when he noted that '[t]he Supreme Court … is not like a revolver machine gun which operates itself automatically. There has to be someone to ignite it into action.'[49] In this Connection, public spirited individuals and civil society groups have enormous role to play in motioning activist judges into action as regards the implementation of the federal character principle in Nigeria.

[45]*Ibid*.
[46] *A. G., Federation vs. Guardian Newspapers Ltd*. (2001) F.W.L.R. (Pt. 32) 87 at 144.
[47](2007) 14 NWLR (Pt.1054) 275 at 344.
[48]Certain Political, Public and Judicial Office Holders (Salaries and Allowances etc.) Act, No. 6 of 2002 [Now Certain Political, Public and Judicial Office Holders (Salaries and Allowances etc.) (Amendment) Act, No. 1, 2008.
[49]*Aladejobi v. NBA* (2013) LPELR-20940 at 32; (2013) 15 NWLR (Pt.1376) 66.

8. Conclusion and Recommendations

The relevance of the federal character principle in the promotion of the national unity in Nigeria cannot be overstated: it engenders mutual trust among various nationalities of Nigeria. It is for this reason that the federal character principle has evolved from a mere ideology to a fundamental constitutional policy in Nigeria. However, even though the federal character principle has formed part of the Nigerian constitution since 1979, the principle is honoured more in the breach than in the observation. The reason for this is not far-fetched: the federal character principle is provided for in Chapter II of the Constitution which is ordinarily non-justiciable. The implication of this is that no one could approach any court in Nigeria to enforce the federal character principle in the event of its violation.[50] The political gladiators in Nigeria have capitalized on this misnomer to consistently violate the federal character principle in the composition of the government of the federation and its agencies especially in the recent time. And the Federal Character Commission which is established by section 153 of the1999 Constitution to promote, monitor and enforce compliance with the federal character principle has woefully failed over the years to live up to its constitutional mandate. *Ab initio*, the Commission was structured to fail because it was established as a federal executive body, which is not only funded by the federal government, but is also under the effective control of the federal government, the very institution the Commission was established to oversight. Thus, there is a pressing need to amend the relevant sections of the 1999 Constitution and the Federal Character Commission Act so as to make the Commission wholly independent of executive control in its day to day operations. But notwithstanding the non-justiciable character of the federal character principle, section 13 of the Constitution mandates any authority or person exercising judicial powers to conform to, observe and apply the federal character principle in the discharge of its constitutional functions. By this provision, superior courts of records in Nigeria can implement the federal character principle by compelling the Federal Government and its agencies to comply with the federal character principle notwithstanding its non-justiciable character. Thus, the judiciary has a very critical role to play in the implementation of the federal character principle in Nigeria.

[50] CE Okeke, 'The Legality of Ouster Clauses under the Nigerian Legal System: A Lesson from India, IJOCLLEP 2 (2) 2020, pp. 178- 185 at 180.