

## CRIMINAL TRIAL OF JUDGES AND IMPERATIVES FOR JUDICIAL INDEPENDENCE\*

### Abstract

Judges constitute the judiciary which is the third arm of government of every democratic government. In any country where democracy is practised, the judiciary is created under the Constitution to be independent and to manage its affairs without unnecessary interference from the other two arms of government, the executive and the legislature. The essence of judicial independence is to ensure impartiality and fairness in the dispensation of justice which is freely given without fear of intimidation, threat, ill-will and harassment from any other arm of government. Today, corruption which is an anathema to a sane society is alleged to have crept into the judiciary in Nigeria and the fight against corruption prompted the subjection of serving judges to criminal trial by the agencies of the executive. Thus, in present political dispensation in Nigeria we have witnessed the arrest of judges by government agencies and their subsequent criminal trials. This raises a lot of constitutional issues bordering on judicial independence. This paper inter alia seeks to analyze the constitutionality or otherwise of the criminal trial of judges in Nigeria and its legal implication for Nigeria's nascent democracy; attempts to reconcile with the constitutional imperatives for subjecting serving judges to criminal trials for acts or omissions done by them in the exercise of their judicial powers and functions which amount to breaches of judicial Oath of Conduct and at the same time qualify as offences under the relevant criminal laws in Nigeria and the need to ensure that the judiciary is cleansed of corruption in order to ensure free and impartial judicial system. In the end, the writers found that although corruption may be said to have crept into the judiciary and that there is need to exorcise the judiciary of it, the fight must be done within the constitutional limits in order not to impair or hamper the independence granted the judiciary by the constitution. This will safeguard the gains inherent in the practice of a democratic system of governance.

**Keywords:** Criminal trials, Judges, Independence of the judiciary, Constitutionality, Corruption, Nigeria

### 1. Introduction

In recent times, the issue of judicial independence has become imperative, that the government and people of every clime must have to grapple with and address it, if sustainable development and growth can be ensured. Nigeria is not excluded in this. Independence of the judiciary is the life-blood of constitutionalism in all democratic societies<sup>1</sup>. It is one of the pillars upon which our

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<sup>1</sup> Submissions of the Senior Presiding Justice of the Peace to the 2010 Judicial Compensation Commission Pg.

constitutional democracy rests<sup>2</sup>. 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<sup>3</sup>. This fact notwithstanding, the criminal trial of judges may or may not mar the independence of the judiciary. That is to say that judicial officers may irrespective of the position they occupy still be held criminally accountable for offences committed by them in their position as judicial officers or even in their personal and private lives. The need to hold judicial officers accountable criminally must be juxtaposed with the need to ensure judicial independence. This is so because a judicial tribunal's independence breathes life into the liberties guaranteed for citizens in the Constitution<sup>4</sup>, and promotes human rights<sup>5</sup>. Judicial independence is therefore the key for effective performance of judicial functions.<sup>6</sup> This paper captures the growing concerns regarding the performance of the judiciary especially in a dispensation the Nigerian judiciary is faced with numerous pressure and challenges in the performance of its functions.

## **2. Notion of Criminal Trials**

A criminal trial is designed to resolve accusations brought (usually by a government) against a person accused of a crime. Criminal actions concern conducts against the community at large not just one individual, as a result, enforcement is not left to the victim but to the state.<sup>7</sup> In a criminal trial, a jury examines the evidence to decide whether, "beyond reasonable doubt" the defendant committed the crime in question.<sup>8</sup> Thus a trial is the government's opportunity to argue its case, in the hope of obtaining a guilty verdict and conviction of the defendant.<sup>9</sup> In the context of the present research, criminal trial of judges is taken to mean the criminal trial of judges as judicial officers for offences which amount to misconduct or breach of their oath of office and may not extend to trial for offences generally. Even so, judges may as a result of judicial immunity be clothed against such other trials for other acts or omissions not amounting to judicial misconduct.

## **3. Judicial Independence**

In an attempt to define judicial independence, Aka<sup>10</sup> citing Berman and Murphy, stated that judicial independence is the ability of a judicial tribunal, qualified by law, to make decisions free of undue pressure from outside sources, especially the executive and legislative branches of the government. It is the freedom of judges in a judicial system to decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences,

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<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid*

<sup>4</sup> See L.C. Keith, *Judicial Independence and Human Rights protection around the World*, 85 JUDICATURE 195, 195 (2002) (singling out an independent judiciary as "the indispensable link in the machinery for securing individual protection against states' human rights abuses")

<sup>5</sup> *Ibid*

<sup>6</sup> P.C. Aka, (Supra)

<sup>7</sup> C.McAleer BL, 'Fundamental Principles and Concept of Criminal Law'

<sup>8</sup> 'Criminal Trial Overview' internet material obtained from <http://criminal.findlaw.com/criminal-procedure/criminal-trial-overview.html> accessed on 6 June 2018

<sup>9</sup> *ibid*

<sup>10</sup> P.C Aka, "Judicial Independence under Nigeria's Fourth Republic: Problems and Prospects", in *California Western International Law Journal* Vol. 45 Fall. (2014) No. 1.

inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. According to him, judicial independence is present when individual judges have three types of independence: personal, substantive and internal.<sup>11</sup> Personal Independence exists when “the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control”.<sup>12</sup> Substantive independence exists when “in discharge of his/her judicial function, a judge is subject to nothing but the law and the commands of his/her conscience”.<sup>13</sup> Internal independence occurs when, “in the decision making process, a judge must be independent vis-à-vis his judicial colleagues and supporters”.<sup>14</sup> Of the three, internal independence is the most difficult to measure empirically, given the secrecy that shrouds judicial decision making.

#### **4. Challenges and Impediments of Judicial Independence in Nigeria**

Despite the Constitutional provisions on independence of the judiciary in Nigeria, there are number of challenges facing the judiciary in Nigeria. These challenges are in the form of laws and practices that impede the independence of the judiciary. These range from the power of the executive to play a significant role in the appointment and removal of judges failure of state government to enforce fiscal autonomy constitutionally granted to the judiciary by the Constitution; payment of allowances and other entitlements to judicial officers by the executive, building and maintenance of infrastructures meant for the judiciary by the executive; provisions of accommodation and building of court halls. Practice of leaving these welfare packages meant for the judiciary in the hands of any other arm of government will definitely encourage interference from the other arm of government and impede independence of the judiciary. The judiciary should be allowed to handle these welfare packages by themselves. However, to avoid possibility of abuse of this freedom there should be introduced within the judiciary the concept of checks and balances as it is in South Africa where a Judicial Conduct Tribunal is established to receive complaint against judicial officers.

#### **5. Constitutional Imperatives for Judicial Independence**

Independence of judiciary is the total freedom of the judiciary from the other arms of government, the executive and the legislature. It can also be seen as the ability of judges to decide cases brought before them without fear of intimidation, pressure or inducement. It may also mean the ability of the judiciary to be independent by being separate from government and other concentrations of power.<sup>15</sup> The principal role of an independent judiciary is to uphold the rule of law and to ensure the supremacy of the Constitution. An important element of independence of judiciary that is the crux of this paper is the issue of appointment and removal of judicial officers. The Constitution gives the National Judicial Council prominent roles in the appointment and removal of judicial

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<sup>11</sup> *Ibid*, International Bar Association Minimum Standard of Judicial Independence (Int'l Bar. Assn 1982) s. 1(a), 46 (reprinted in *Judicial Independence: The Contemporary Debate* 388 (shimon Shetreet & Jules Deschenes, eds 1985) [hereinafter IBA Min. Stds.]. NB: These three types of independence are both non-mutually exclusive and interlinked.

<sup>12</sup> *Ibid*, S. 1(b)

<sup>13</sup> *Ibid*, S. 1(c)

<sup>14</sup> *Ibid*, S. 47

<sup>15</sup> J B Dauda, ‘The Independence of the Nigerian Judiciary in the Light of Emerging Socio-Political and Security Challenges’ A Key Note Speech available at [hptt//www.nba.org.ns/web/the\\_independence\\_of\\_the\\_nigerian\\_judiciary](http://www.nba.org.ns/web/the_independence_of_the_nigerian_judiciary) accessed 19/05/2018.

officers.<sup>16</sup> The roles given to the National Judicial Council is to ensure that honest, trusted and trustworthy judicial officers are appointed to the bench. This point is in line with the reasoning of Aguda when he stated that: 'It is beyond dispute that to sustain democracy in the modern world, an independent, impartial and upright judiciary is a necessity.'<sup>17</sup>

Independence of the judiciary is entrenched by the establishment of the National Judicial Council pursuant to section 153(1) of the 1999 Constitution (as amended) and by subsection 2 thereof. The composition and powers of the National Judicial Council are as contained in part 1 of the Third Schedule to the Constitution. Paragraph 21 of the Third Schedule to the Constitution as amended gives the National Judicial Council Power to recommend to the president, the removal from office of the judicial officers specified in Sub-paragraph (a) of this Paragraph and to exercise disciplinary control over such officers. By virtue of section 158 (1) of the 1999 Constitution (as amended), the National Judicial Council shall not be subject to the direction or control of any other authority or person. A careful perusal of the above provisions shows that the only authority that has power to investigate and discipline a judge *qua* judge is the National Judicial Council and no other person. Care must be taken not to mistake the criminal trial of judges as trial of persons occupying the office of a judicial officer for acts or omission committed by such officer in his personal capacity. This is because generally, no judicial officer enjoys any immunity from prosecution<sup>18</sup> under the Constitution as the Constitution only grants powers to discipline judicial officers for misconduct only to the National Judicial Council. In emphasizing the exclusivity of the power of the National Judicial Council in respect of appointment removal and discipline of judicial officers, the Court of Appeal Lagos Judicial Division per Obaseki-Adejumo in the recent case of *Nganjiwa v FRN*,<sup>19</sup> held that:

A cumulative reading of the relevant provisions of sections 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 appointment and removal of judicial officers...

The court went further at page 342 para C-H to hold that:

Whenever a breach of judicial oath occurs, it is a misconduct itself, then the National Judicial Council 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 National Judicial Council may recommend the removal of the judicial officer to the appropriate authority to take action, appropriately. When this is done and accepted by the appropriate authority in compliance with the provisions of the constitution, then the relevant law enforcement agency is at liberty to make the said judicial officer face the wrath of the law. Any act done by law enforcement

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<sup>16</sup> Constitution of Federal Republic of Nigeria 1999 as amended, sections 230-292.

<sup>17</sup> Aguda, *The Judiciary in Government of Nigeria* (Usadem, New Horn Press, 1983) p. 34

<sup>18</sup> See paragraph 2.0 of this Article

<sup>19</sup> [2018]4 NWLR (pt. 1609) p. 340 para E-H

agencies in violation of the above is tantamount to denying the National Judicial Council its powers to discipline judges.<sup>20</sup>

In a similar vein, concerning the independence of the judiciary, The United Nations' Declarations on the Basic Principles on the Independence of the Judiciary, 1985 stipulates that: 'The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law without any restrictions, improper influences, inducements and interferences, direct or indirect from any quarter for any quarter of any reason.'<sup>21</sup> In confirming this position, the Nigerian Court of Appeal held in the case of *Denton- West v Muoma*<sup>22</sup> that the importance of the competent, independent and impartial judiciary in preserving and upholding the rule of law cannot be over-emphasized. There is no doubt that public confidence in the independence of the court, in the integrity of judges that man such courts, and in the impartiality and efficiency of the administration of justice as a whole, play a great role in sustaining the judicial system of a nation.<sup>23</sup> Judicial independence, which we have stated to mean the ability of a judge to decide a matter free from pressures or inducements,<sup>24</sup> entails that the principle role of an independent judiciary is to uphold the rule of law and to ensure the supremacy of the law.<sup>25</sup> The rationale behind the need for the judiciary to be independent is that it will sustain the public confidence in the courts. Therefore, the independence of the judiciary is often measured or described in relation to the amount of control (undue, inappropriate or illegal) internal or external,<sup>26</sup> exerted over the judges. That means, internal independence, refers to the ability of judges to determine cases without undue regard to administrative hierarchies within the court particularly without interference from senior members of the bench while external independence connotes freedom of interference from the elected members of government, administrative agencies or even the society<sup>27</sup>

The independence of the judiciary is guaranteed under the Constitution<sup>28</sup> as opposed to the 1963 Republican Constitution which had the judiciary as an appendage of the executive.<sup>29</sup> The vesting of judicial powers in the courts established by the 1999 Constitution imposes onerous responsibility on judicial officers whose primary function is to administer justice according to law and the constitution. The nature of the office and functions of judicial officer's call for a high sense of duty, responsibility, commitment, discipline, great intellect, integrity, probity and transparency.<sup>30</sup> In the

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<sup>20</sup> *Nganjiwa v FRN*, Supra; see also *Elelu-Habeeb v AG, Federation* [2012]13 NWLR (pt. 1318) p. 423.

<sup>21</sup> FAR Adeleke (et al), *The Role of the Judiciary in Combating Corruption, Aiding and Inhibiting Factors in Nigeria* in IA Abdulaodir (et al) *Corruption and National Development op cit*, p. 299.

<sup>22</sup> [2008]6 NWLR (pt 1083) 418 at pp. 451-52; *Martins v Nicanna Food Co. Ltd & Anor* (1988)2 NWLR (pt 74)75; *Re Diamond Bank Ltd* (2002)17 NWLR (pt 795) 120 at 134.

<sup>23</sup> FAR Adeleke, *op cit*.

<sup>24</sup> FA Umar, 'The Role of the Bar and Benchi in the Sustenance of Democracy, in Contemporary Issues in Nigeria Law', legal Essay in Hon. Justice Umaru Faruke Abdullahi CON 2006, pp. 85 & 89.

<sup>25</sup> I Abdullahi, 'Independence of the judiciary in Nigeria: A myth or Reality?' (2014) *International Journal of Public Administration and Management Research*, p. 56.

<sup>26</sup> P. Randall, 'Judicial Independence in China: Common myths and unfounded Assumptions' (2008) *La Trobe law School Legal Studies Research paper*, p. 3.

<sup>27</sup> FAR, Adeleke *op cit*, p. 300

<sup>28</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended) sections 6, 153 and 158

<sup>29</sup> RO Maduagwu, *op cit*. p. 3.

<sup>30</sup> I Abdullahi, *op cit* p. 57.

execution of its mandate of interpretation of law and administering justice, the judiciary is not tied to the apron string of any political party, pressure group, religious, racial or ethnic group, sex, geopolitical entity; this means that the judiciary is to dispense justice to all manner of people without fear or favour, attention or ill-will.<sup>31</sup> Lord Atkins without mincing words put the above position clear when in the case of *Live Sidge v Anderson*:<sup>32</sup> 'It has been a principle of liberty... that the judges are no respecter of persons and stand between the subject and any attempted encroachment on his liberty alert to see that any coercive action is justified in law'.

## **6. Judicial Independence in Ghana and South Africa**

### **Ghana**

It is imperative to look at the Constitutional independence of the judiciary in other jurisdictions such as Ghana. In Ghana, independence of the judiciary is established in Article 125 (1), 127 (1) and 179 of the Ghanaian Constitution.<sup>33</sup> Article 125 (1)<sup>34</sup> provides that 'Justice emanated from the people and shall be administered in the name of the Republic by the judiciary which shall be independent and subject only to the constitution.' Further on the constitutional imperative of the independence of the judiciary in Ghana, Article 127 (1) provides that: 'Neither the president nor the parliament nor any person whatsoever shall interfere with judges and judicial officers or other persons exercising judicial powers, in the exercise of their judicial functions, and that all state organs shall accord the Courts such assistance as they may reasonably require to protect their independence, dignity and effectiveness'

Ghanaian Constitution also took cognizance of the facts that financial dependence on the other arms of government can impede independence of the judiciary. To address this, the constitution provides for fiscal autonomy of the judiciary.<sup>35</sup> This is provided for in article 197 of the Ghanaian Constitution which gives the judiciary autonomy in the preparation of its annual budget and to provide the judges with financial security. The salaries emoluments of the judges are charged to the consolidated fund and cannot be varied to a judge's disadvantages.<sup>36</sup> Despite the fact that the Constitution of Ghana lays a foundation for an independent judiciary, there are still legal impediments to the independence of the judiciary in Ghana. These impediments are issues bordering on the enormous role the executive and the legislature play in the appointment and dismissal of judicial officers.<sup>37</sup> A look at Article 127 (1) of Ghanaian Constitution and Section 158 (1) of Nigerian Constitution<sup>38</sup> shows that the provisions of Ghanaian Constitution on the independence of the judiciary are more exclusive and all encompassing when compared with Section 158 (1) of the Constitution of Nigeria. Article 127 (1) of Ghanaian Constitution if adopted in Nigeria will better guarantee the independence of the judiciary.

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<sup>31</sup> *Ibid*

<sup>32</sup> (1942)AC 206, *Southern pacific Co v Jense* (1917)244, US 205; *Read v J. Lyons & Co Ltd.* (1947) AC 165; *Okumagba v Egbe* (1965)1 All NLR 62.

<sup>33</sup> Constitution of Ghana , 1992

<sup>34</sup> *Ibid*

<sup>35</sup> Is the Ghanaian judiciary Independence, [www.ghanaian.com](http://www.ghanaian.com).

<sup>36</sup> *Ibid*

<sup>37</sup> *Ibid*, sections 144 and 146.

<sup>38</sup> Constitution of federal Republic of Nigeria, Opcit.

### South Africa

In South Africa, independence of the judiciary is better guaranteed and protected than it is in Nigeria.<sup>39</sup> Independence of the judiciary is guaranteed and protected by the South African Constitution<sup>40</sup> and some other legislation.<sup>41</sup> The Constitution and the Judicial Service Commission Act<sup>42</sup>, provide for the procedure for appointment and discipline of judges whereas the Judges Remuneration and Conditions of Employment Act<sup>43</sup> regulates security of tenure of judges, salaries and benefits of the judges in South Africa. A holistic look at the provisions of the Judicial Service Commission Act shows that there is a clear legislative framework that ought to be followed in matters pertaining to complaints, disciplinary procedures and removal of judges. The preamble to the Judicial Service Commission Act, spells out the purpose of Acts as, *inter alia* to provide for the procedure for dealing with complaints about judges; to provide for the establishment of a Judicial Conduct tribunal to inquire into and report allegations of incapacity, gross incompetence or gross misconduct and to provide for matters connected there with. A look at Sections 14-26 of the Judicial Service Commission Act shows that the Judicial Service Commission of South Africa plays an important oversight role in ensuring that judges are appointed in terms of objective Criteria Stipulated by the Constitutions.<sup>44</sup> Also, there is a legislative framework adopted in terms of complaints disciplinary proceedings and the removal of judges with the establishment of Judicial Conduct Tribunal presided over by judges themselves whose responsibility it is to deal with complaints against judges.<sup>45</sup> There is also a legislative framework that ensures that judges' salaries and allowances are paid and may not be varied against any judge.<sup>46</sup> The above indices is conclusive of the fact that independence of the Judiciary is guaranteed and protected in South Africa and that the Constitutional and Legislative framework adopted in South Africa insulate judges from executive and Legislative interference.

### 7. Legal Implication of Criminal Trial of Judges

Every reference to “judge(s)” creates the impression of sacredness of the judiciary in the mind of the citizenry. It is believed that the judiciary is the conscience of any nation; it also acts as an effective watchdog of the other arms of government in any democracy. In a democracy, legislature make law, executive execute those laws while the judiciary interpret, activate, appraise, punish offenders and defaulters and grant redress to the downtrodden hence its being tagged the hope of the common man. The 1999 Constitution of Nigeria<sup>47</sup> takes cognizance of this enormous honourable position and responsibility of the indicator and provides for an institution to oversee the affairs of the judges (which includes the recommendation of those eligible to be made judges, remunerations, welfare, discipline, removal from office, suspension, retirement etc). Section 158 (1) of the 1999

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<sup>39</sup> L, Siyo and J.C Mubangizi, The independence of South African judges: A Constitutional and Legislative Perspective’ [www.nyslawreview.com](http://www.nyslawreview.com) accessed 02/06/2018.

<sup>40</sup> The Constitution of the Republic of South Africa, 1996.

<sup>41</sup> Judicial Service Commission Act, 1994; the judges Remuneration and Conditions of Employment Act, 2001

<sup>42</sup> *Ibid*

<sup>43</sup> *Op.cit*

<sup>44</sup> L, Siyo and J.C, Mubangizi, *op.cit*, p.15

<sup>45</sup> *Ibid*

<sup>46</sup> *Ibid*

<sup>47</sup> Constitution of Federal Republic of Nigeria 1999 as amended.

Constitution as amended provides for an independent body among other bodies invested with the above mentioned duties. The body is called The National Judicial Council (NJC). This body is constitutionally empowered to operate under no other authority, nor to take directive or be under the control of any authority or persons as regards its constitutionally empowered duties in relation to its primary obligation. Judges in Nigeria are not different most Nigerians who occupy public offices. The tendency to go into public office in order to amass wealth and the get rich quick syndrome that is prevalent in Nigerian people seems to have crept into the judiciary. This inordinate desire to acquire wealth leads to all kinds of corrupt practices. These corrupt practices have also surfaced even in the judiciary in the form of bribery, inducement for pervasion of justice and the rest. Corruption has been cited as the major reason for the call for criminal trial of judges. This paper agrees that leaving judges unchecked in this era where corruption permeates every aspect of human endeavour in Nigeria will bring doom to the national and economic development of Nigeria. This is because the worst thing that can happen to any nation is to have a compromised and corrupt judiciary. A corrupt judiciary cannot be checked effectively by any other arm of government in a real constitutional democracy. There is therefore need to check the judiciary to avoid or rid the judiciary of corruption. This view point is necessary because a corrupt judge is a dangerous weapon to the society where he discharges his functions as a judge. Capturing this position as to the harm corruption in judiciary can cause Uwais CJN<sup>48</sup> as he then was stated thus:

A corrupt judge is more harmful to the society than a man who runs amok with a dagger in a crowded street. The latter can be restrained physically, but a corrupt judge deliberately destroys the moral foundation of society and causes incalculable distress to individuals through abusing his office while still being referred to as honourable.

Reasoning in this same line, Oputa JSC<sup>49</sup> as he then was stated that:

No one should go to the bench to amass wealth, for money corrupts and pollutes not only the challenges of justices but also the very stream itself. It is a calamity to have a corrupt judge. The passing away of a great advocate does not pose such public danger as the appearance of a corrupt judge on the bench, for in the latter instance, the public interest is bound to suffer and elegant justice is mocked, debased, and depreciated and auctioned. When justice is bought and sold, there is no more hope for society. What our society need is an honest, trusted and trustworthy judiciary.

The above dicta of Justices Uwais and Oputa depict the need to purge judicial officers of corruption and ensure that no person who is devoid of honesty and trustworthiness, trusted and trust worthy ascends the bench. However, the need to see that corruption is eradicated and not just reduced in the judiciary though a noble and most needed action must be pursued within the ambit of constitutional provisions; independence of judiciary and the doctrines of rule of law as well as

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<sup>48</sup> Uwaifo JSC, Valictory speech, reproduced in (2005)1 SCNJ at p. 20.

<sup>49</sup> C, Oputa, 'Judiciary Ethics, Law, Justice and the Judiciary' *A Journal of Contemporary Legal Problems* vol. 1, No. 8 (1989)

separation of powers. Criminal trial of judges as it is currently perceived has some implications for the Nigerian constitutional democracy. These implications will be discussed *seriatim*:

**It undermines the doctrine of separation of powers**

The doctrine of separation of powers refers to the division of governmental responsibilities into distinct branches to limit any one branch from exercising the functions of another. It presupposes that the political authority of a state should in a democratic system be divided into the executive, legislative and judicial powers such that its powers and functions are carried out by separate and distinct arms of government. The rationale for doctrine of separation of powers is that none of the three arms of government under the Constitution should encroach into powers of the other arms. Each such arm as the executive, legislature and the judiciary is separate, equal and of coordinate department and no arm can constitutionally take over the functions of the other.<sup>50</sup> Consequently, the powers and functions constitutionally vested in each arm should be encroached upon by the other. The doctrine is to promote efficiency in governance by precluding the exercise of arbitrary power by all the arms and prevent friction between the arms. The criminal trial of judges will definitely face legal, social and political challenges as it did in the case of *Nganjiwa v FRN*<sup>51</sup> wherein the judiciary asserted its independence and maintained that the doctrine of separation of powers does not permit the executive to subject a serving judge to criminal trial without first and foremost petitioning the said judge to the National Judicial Council which will investigate the allegation against the judge and if found to be true recommended the judicial officer for removal by the appropriate authority before handing over the judicial officer to law enforcement agency for prosecution. The Court of Appeal in *Nganjiwa v FRN*<sup>52</sup> re-iterated the constitutional guarantee of separation of power by holding that:

There is no doubt that under the Constitution, the three arms of government in both the federation and the states are distinct and separate and each has its functions and powers clearly set out. A notable feature of the constitution is the distribution of the exercise of governmental function among the three principal and separate departments of the legislature, the executive and the judiciary. The constitution also prescribed the scope and limits for each department and that within its jurisdiction; the exercise of power is supreme. Accordingly, implicit in the powers so vested, the one was not to interfere in the exercise of the powers of the other except to the extent to which the constitution confers such powers of interference.

The Constitution is very clear and specific on the issues bordering on discipline of judges which incidentally by criminal trial of judges in their capacity as judges falls under. Any act done in this respect other than as constitutionally provided undermines the doctrine of separation of power and bound to face the challenge of unconstitutionality.<sup>53</sup> This is because the Constitution of Nigeria is

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<sup>50</sup> *A-G Abia State v A-G Federation* [2003]4 NWLR (pt. 809) p. 124; *Global Transport Oceani Co S.A. v Free Enterprises Nig. Ltd* [2001]5 NWLR (pt. 706) p. 426 at page 344 para B-F.

<sup>51</sup> *Supra*.

<sup>52</sup> *Supra*.

<sup>53</sup> *Nganjiwa v FRN, Supra, Elelu – Habeeb v, A-G, Federation, Supra, A-G, Federation v Guardian Newspaper Ltd* (1999)9 NWLR (pt. 618) *Kayili v. Yilbuk* [2015]7 NWLR (pt. 1457) p. 26 at p.. 344-345 paras H-E.

the *grundnorm* and fundamental legal order of the state and it clearly recognizes and guarantees the doctrine of separation of powers and checks and balances. Section 4,5 and 6 of the Constitution of Federal Republic of Nigeria contain provisions relating to the legislature, the executive and judicial arm of the government. In most known democracies, the judiciary is always accorded the freedom to conduct its affairs without fear of interference, intimidation, threat, ill-will from any other arm of government. It is in a bid to ensure that this is done that the Constitution created the National Judicial Council and specifically granted the Council the power to discipline any of its erring judicial officer who misconducts himself in accordance with the provisions of paragraph 21(b) part 1 of Third Schedule of the 1999 Constitution.<sup>54</sup>

In the light of the above, the researchers posits that the provisions of the Economic and Financial Commissions Act,<sup>55</sup> the National Security and Intelligence Act<sup>56</sup> and the Police Act<sup>57</sup> empowering law enforcement agencies to investigate and prosecute the offences provided in those Acts subject the Constitution of Federal Republic of Nigeria which is the *grundnorm* and the supreme law of the land and consequently, any investigation and prosecutions done outside the ambits of the dictates of the Constitution will fall as a nullity.<sup>58</sup> Therefore subjecting serving judges without first taking the step provided by the Constitution by not allowing the National Judicial Council to investigate and recommend the judge for removal is a nullity.

#### **It encourages executive interference**

A combined reading of sections 6, 153, 158, 292(1) and paragraph 21(b) of Third Schedule to the 1999 Constitution is to the effect that the National Judicial Council is the sole body empowered by the Constitution to determine allegations of misconduct against judicial officers even on allegations of bribery and corruption made against judicial officers. Any law, regulation or exercise of powers which tends to interfere with, or direct the National Judicial Council in the exercise of its powers without having shown that the National Judicial Council has concluded its investigation and handed the judge over to the law enforcement agency is an act interference in the powers of the National Judicial Council. In the celebrated Court of Appeal Lagos Judicial Division case of *Nganjawa v FRN*,<sup>59</sup> the Court per Obaseki-Adejumo stated on the dangers of executive interference thus:

Any act or action by any agency or the Executive Arm of Government in any part of the Federation which tends to or may be seen as an attempt disallow vital component of the judiciary from performing its constitutional functions as envisaged under the Constitution must not be encouraged or allowed, if tenets of democracy and the real true and correct doctrine of separation of power is to be entrenched.

This shows that the major reason for granting independence to the judiciary is to eschew interference from the other arms of government, particularly the executive arm of government which the Economic and Financial Crimes Commission, the Department of State Services and the Police

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<sup>54</sup> Constitution of Federal Republic of Nigeria 1999 as amended.

<sup>55</sup> Economic and Financial Commissions Act,... Cap .... LFN 2004.

<sup>56</sup> The National Security and Intelligence Act, and the Police Act, Cap p... LFN 2004.

<sup>57</sup> Police Act Cap P... LFN 2004.

<sup>58</sup> See also *Eze v FRN* [1987] 1 NWLR (pt. 51) p. 506.

<sup>59</sup> *Supra*.

belong. To allow the executive to interfere in the affairs of the judiciary by using these law enforcement agencies to intimidate and harass the judiciary is an attempt which is prohibited by the Constitution and must be rejected by the Nigerian populace. The executive must allow the judiciary to guard against the infractions of the Constitution or other laws of the land by leaving the judiciary to act and carry out its duties pursuant to its powers conferred upon it by the provision of the Third Schedule to the Constitution. Absence of executive interference in the affairs of the judiciary will afford Nigeria an impartial judiciary, tested and trusted activist judges who will dispense justice without fear of intimidation, harassment and threat of any kind.

**It undermines constitutional independence of the judiciary**

Independence of the judiciary is to ensure that judges exercise their judicial powers without fear of being exposed to potential intimidation by aggrieved politician. This is because there cannot be any nascent democracy if judicial officers are placed in the precarious situation wherein they are exposed to potential intimidation, threat of prosecution, harassment or incessant arrest for any alleged act or conduct carried out in discharging their judicial functions or allegation of official misconduct without following due process or procedure.<sup>60</sup> Consequently, the people of Nigeria must resist any act or action by law enforcement agents or any arm of government which tends to or may be seen as an attempt to cow a vital component of the judiciary from performing its constitutional functions as envisaged under the Constitution.

**It undermines judicial activism**

Judicial activism is the view that the Supreme Court and other judges can and should creatively interpret the text of the constitution and the law in order to meet the ends of justice and not to tie themselves to established precedents. Whereas passivity presupposes the view that judges are tied to precedents even when the circumstances of time and place will warrant a departure from the established precedent. The essence of judicial activism is to meet the ends of justice. A lot of cases particularly political cases in Nigeria during and before the current fourth republic typify the essence and gains of having activist judges.<sup>61</sup> Judicial passivity led to a lot of injustices in the second Republic. In the case of *Musa v Hamza*,<sup>62</sup> where the court upheld impeachment of Alhaji Balarabe Musa on the grounds that the jurisdiction of the court is ousted by now section 188 (10) of the Constitution. Also in *Onuorah v Okafor*,<sup>63</sup> the court declined jurisdiction to entertain an intra-party dispute on the ground that it was an internal affairs of a political party which the court has no jurisdiction to entertain. However, with activism in the judiciary in the fourth Republic, the Court when faced with the same facts as in Balarabe Musa's case in *Dapialong v Dariye*,<sup>64</sup> assumed jurisdiction and nullified the impeachment of Governor Joshua Dariye. Also, in *Ugwu v Ararume*,<sup>65</sup> the Supreme Court rejected the argument that substitution of a candidate who won party primary

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<sup>60</sup> *Nganjiwa v FRN, Supra.*

<sup>61</sup> *A-G, Federation v Atiku Abubakar* [2007]8 NWLR (pt. 1035) p. 117; *A-G Lagos State v A-G; Federation* [2005] ALL FWLR (pt. 244) p. 805; *Amaechi v INEC* [2007]9 NWLR (pt. 1040) p. 504; *Inakoju v Adeleke* [2007]4 NWLR (pt. 1025) 423; *Obi v INEC* [2007]9 MJSC; *Ugwu v Ararume* [2007].. NWLR (pt. )p. , *Fawehimin v President, FRN* [2009]14 NWLR (pt. 1054) p. 275

<sup>62</sup> (1982)3 NCLR p. 229.

<sup>63</sup> (1982)3 NSCC 494.

<sup>64</sup> [2007]8 NWLR (pt. 1036) p. 239

<sup>65</sup> *Supra.*

election is a non-justiceable internal affairs of a political party but ordered that for all the votes cast in Peoples Democratic Party Imo State with the name and image of Engr. Charles Ugwu in 2011 Gubernatorial election belongs to Ifeanyi Ararume. These activist decisions of the judiciary to a great extent shaped the electoral process in Nigeria and restored party internal democracy in Nigeria. If the judges are allowed to be subjected to the whims and caprices of the other arms of government in the guise of fighting corruption in Nigeria, then, Nigeria constitutional democracy may be eroded.

### **It encourages executive recklessness and rascality**

In the case of *Ngajiwa v FRN*<sup>66</sup> the Court of Appeal Lagos Division, held on the 12<sup>th</sup> day of December 2017 in words short of addressing the actions of the executives as executive recklessness and rascality in arresting, arraigning and trying judge(s) without first going through the National Judicial Council (NJC). Same ruling was cited in the dismissal of the case of money laundering and passport fraud brought by the economic and against Justice of the Supreme Court, Honourable Justice Sylvester Nwali Ngwuta before Justice John Tosho delivered on the 23<sup>rd</sup> day of March 2018. Also most recently, the same Appeal Court Ruling was cited in the case of false asset declaration in *FRN v Justice Ngwuta* at the Code of Conduct Tribunal (CCT) on the 15<sup>th</sup> day of May 2018. The courts in these matters made reference to section 158(1) and paragraph 21 (b) of the 3<sup>rd</sup> Schedule of the 1999 Constitution of Nigeria as amended, which provided for the powers of the NJC to make recommendation to the President for the removal of judicial officers and to discipline judicial officers.

### **It causes fear and partisanship among judges**

There is a common adage that he who pays a piper dictates the tune. A major implication of the trial of Judges is that it will create fear for the Judges' lives and will end up turning Judges into stooges for the executive thereby derailing the justice they were meant to give. Though, there may be a little advantage in the sense that such exercise might keep judges on their toes and may ensure discipline, but the little gain may end up being swallowed by the greater disadvantage of the exercise. If this trial of judges is not curtailed or better still stopped, a time might come when the legislature and the executive will end up passing laws which restrict the right of judges to ensure that their decisions in cases they adjudicate are fair and just. Judges will be turned into puppets in the hands of the executive, as they must do as the legislature and the executive direct.

### **It sets wrong precedence**

Laws are made to guide and direct people for their common good, while flouting of such laws set bad precedence for future purposes. Nigeria is still battling the issue of insecurity, mismanagement and corruption, it will be detrimental to us as a nation to include lawlessness into the equation as no nation can and have ever survived the four together. To desecrate and demystify the judiciary the only institution meant to institutionalize law and lawful living will not only set a bad precedence but will end up turning our nation into a lawless one and no nation has survived same in this modern world.

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<sup>66</sup> *Supra*.

### **It undermines the rule of law**

The criminal trial of judges without observing the due process by law undermines the rule of law. Undermining the judiciary also undermined the rule of law as judges were "the ultimate guardians" of it. The rule of law together with democracy is one of the two pillars on which our society is based, and therefore if, without good reason, the executive or anyone else undermines the judiciary that would amount to undermining our society. The country's judges were unjustly humiliated and hurt by trying them for alleged offences sides tracking due process. Being dragged into the forum of court trial without due process is seen as something that diminishes public confidence in their independence. The result will be that courts cannot be trusted with power and must do as they are told. The current trend of arraigning and trying judges contrary to established due process is something one finds in authoritarian states where an independent judiciary is regarded as a danger to the power of executive to control the lives of the citizenry and not in a democratic society like Nigeria where the rule of law is supposed to be maintained.

### **8. Conclusion and Recommendations**

By way of conclusion, the present writers conclude that indeed corruption has crept into the judiciary and there is need to curb the same and to sanitize the institution. That fact notwithstanding, the trial of judges must accord with the constitutional provision laid down in the constitution as x-rayed above. It is only when there is compliance with the constitutional provisions that the independence of the judiciary will be ensured. The writers are mindful of the fact that there could be an assertion that the strict compliance with the constitutional provisions, with respect to the indictment and subsequent trial of judges to be done by the NJC and only when such judges have been found guilty that they are "stripped" and handed over to any executive agency for trial and conviction; could make judges and judicial officers to arrogate to themselves the position of being untouchable; that may not be so because the appointment and removal of a judge from office still lies with the executive in recognition of the doctrine of separation of powers and checks and balances. This is without any derogation from the discussions contained in paragraph 5.9 of this article

The writers agree entirely with the decision of the court in *Nganjiwa v. FRN*<sup>67</sup> that allowing law enforcement agencies such as the Economic and Financial Crimes Commission, the Department of State Services and the Police to subject a judicial officer to criminal trial for acts or omissions amounting to an offence under any of the relevant criminal laws in Nigeria will in no doubt impede constitutional independence of the judiciary and supremacy of the constitution. We therefore recommend that the NJC be allowed to exercise the powers and functions given to it by the constitution and such powers and functions to extend to indictment of the judges, trial and even conviction if found guilty of the offence once such offences have been committed during the tenure of the judge as such. This is similar to the practice in the military wherein offending officers are tried before a court martial and not by the ordinary. The position of judges are even more sacred and revered as they are the courts themselves and until striped of that position, a judge ought to be treated with reverence in order to ensure and safeguard the independence of the judiciary. Again, by virtue of section 1 of the Constitution<sup>68</sup> the Constitution is supreme and supersedes any Act of

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<sup>67</sup> *Supra*

<sup>68</sup> *Op cit.* Section 1

the National Assembly.<sup>69</sup> The supremacy of the Constitution and constitutional independence will be achieved and maintained if erring judicial officers are allowed to be investigated and if found liable be recommended by the National Judicial Council to the appropriate law enforcement agency for prosecution after having been stripped of the office as recommended above. Also the use of the word 'shall' in section 158(1) of the Constitution<sup>70</sup> signifies a command and the act commanded must be complied with. The writers recommend that to ensure and sustain judicial independence in a nascent democracy like Nigeria, the principle of checks and balances could be introduced within the judiciary to check the excesses of its members even before the NJCs 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.

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<sup>69</sup> See *Olafisoye v F.R.N* [2004]4 NWLR (pt. 864) p. 580, *Madumere v Okwara* [2013]12 NWLR (pt. 1368) p. 425 and *F.B.N Plc v. T.S.A Industries Ltd* [2010] 15 NWLR (pt. 1216) p. 247.

<sup>70</sup> *op cit.*