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A. T. Shehu
Al-Hikmah University

M. K. Tamim
University of Ilorin

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SUSPENSION OF JUSTICE ISA AYO SALAMI: IMPLICATIONS FOR RULE OF LAW, JUDICIAL INDEPENDENCE AND CONSTITUTIONALISM

By
A.T. Shehu
College of Law
Al-Hikmah University, Ilorin, Nigeria
and
M. K. Tamim
Department of Private and Property Law
Faculty of Law, University of Ilorin, Nigeria

Abstract

The suspension of Justice Ayo Salami, President of the Court of Appeal (PCA) opened a new dimension in the Nigerian judiciary; it is the first of its kind at that level. The National Judicial Council (NJC) initiated the suspension and the President of the Federal Republic of Nigeria endorsed it. The paper is concerned with implications of the suspension for the rule of law, constitutionalism and judicial independence. The paper argues that the suspension was unconstitutional for procedural irregularity and further reveals that the mechanisms provided by the constitution to guarantee judicial independence are inadequate and ineffective. It also shows that the much-needed independence of judiciary from the political branches in particular, to a greater extent, depends on internal independence which again largely depends on the leadership of the judiciary and the National Judicial Council. This invariably suggests that for there to be independence from the political branches and internal interference there must be a courageous, just, fearless and pro-active leadership of the judiciary and a more independent Judicial Council, and calls for an amendment to the constitution in that direction.

Keywords: Nigeria, Judiciary, Justice, Judicial Council, Suspension, Implication, Rule of Law, Constitutionalism, Independence, Constitution.

Introduction

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The Nigerian Judiciary has come a long way from the colonial era to the present and it ranks among the best having produced some of the finest jurists of the present generation. (Ketefe 2012). Not only this, it has often succeeded forms of government that have been witnessed in the country from the first republic to the present time; the parliamentary, military and the current presidential constitutionalism (Uwais 2006, 9). Although it may be that it did not operate under the popular rule of law environment during the military interregnum, it however stood its ground against dictatorial tendencies of the military dictatorship as epitomized in the judicial interpretation of ouster clauses and other draconian military decrees and edicts. The judiciary thus often characteristically guarded its sacredness from undue interference to sustain its independence. This was clearly demonstrated in the way the judiciary had courageously interpreted ouster clauses in most draconian military decrees and edicts, which included but not limited to Constitution (Repeal and Restoration) Decree No. 13 of 1967; Constitution (Suspension and Modification) Decrees No. 32 of 1966, No. 32 of 1975, No. 17 of 1984, No. 17 of 1985, No. 107 of 1993; Federal Military Government (Supremacy and Enforcement of Powers) Decrees No. 28 of 1970, No. 13 of 1984; Tribunal and Inquiry Decree No. 41 of 1966.

It is also interesting to note that of all the organs of government, only the judiciary was always shielded from banishment each time the military juntas took over the reign of governance in the country. While the executive and the legislative arms of government were characteristically the first casualties of military interference in governance, the judiciary always remained, though without some bruises (Mowoe 2008, 85–86). This perhaps accounts for one of the reasons for the envious position and prestige of the judiciary until very recently when some of the malaise of the Nigerian society, corruption in particular and partisanship, surreptitiously crept into the judiciary leaving its prestige, sacredness and independence almost extricated (Ketefe: 2012). Unfortunately, these afflicted the judiciary now that the presidential system of government in Nigeria requires a vibrant, courageous and progressively proactive judiciary through its power of review of activities of the other arms of the government, to ensure strict adherence to the rule of law and ensuring democratic constitutionalism in the polity. However, the fathers of the 1999 Constitution of the Federal Republic of Nigeria (as amended) were quite cognizant of this eternally important role of the judiciary in the polity and the need for ensuring its independence. They therefore made provisions in the constitution to ensure independence of the judiciary from the political departments without which the rights of people, separation of powers, rule of law and constitutionalism would be merely cosmetics. The adequacy or otherwise of the constitutional safeguards against interference in judicial process is however central to this paper as shall be seen shortly.

One of the constitutional mechanisms for ensuring the independence is the establishment of the National Judicial Council (hereinafter referred to as the NJC) vested with the power of superintending the affairs of the judiciary (Nigerian Constitution 1999, section 153). The suspension of Justice Ayo Salami,

President of the Court of Appeal (PCA) opened a new dimension in the judiciary thus necessitating controversies as to its rightness and constitutionality. The NJC initiated the suspension and the President of the Federal Republic of Nigeria endorsed it. Thus, this paper is concerned with the implications of the suspension for the rule of law, constitutionalism and judicial independence. NJC is the institution charged exclusively with power of overseeing the affairs of the judiciary and ensuring its independence. As a theoretical foundation, therefore, the effectiveness of the NJC in the discharge of its constitutional functions is a determinant factor in the assessment of the level of judicial independence and consequently the potency and effectiveness of the review power (Shehu 2010, 212 – 231; 2011, 43-72). The paper would rely on content analysis of reports in the dailies and provisions in the constitution on judicial independence in assessing the implication of the suspension.

Conceptual and Constitutional Framework

Independence of judiciary has usually been construed in the sense of independence of judicial officers from interference from executive and legislative officials in the discharge of their judicial decision-making (Ferejohn 1998). This could be described as an aspect of external content of the independence, which does not foreclose interference from other members of the society especially those who hold economic and quasi-political powers, or even from social interest groups. In this aspect, the interference is either direct by holders of such powers or indirectly using their economic or political power to influence judicial process. It may also come in different form including the process of selection and recommendation of candidates for judicial appointments, bribery and other form of corrupt practices. In addition, there is also the internal content of independence of judiciary, which can be subdivided into two. One is that aspect regarded by Ferejohn (1998) as normative, requiring the judges to be “autonomous moral agents who can be relied on to carry out their public duties independent of venal or ideological considerations.” This, as in the words of Karlan (2002, 2), may however be compromised by physical compulsion, pecuniary consequences or personal ambition. This aspect presupposes that the judges must only be guided by the merits of the cases before them, the applicable law being interpreted using the appropriate methodology or cannon of interpretation and apply it to the cases while at the same time not deviating from relevant precedent. This is so because judges are generally obliged to settle disputes between parties in a manner that precludes arbitrariness, sentiment or personal inclination. Thus, their decisions should be predicated on law and justice only and in the process, they must be fair to all. This was the position of the court in the case of *Okezie v Chairman, MPDT* (2011) All FWLR (pt.585) 370 at 381.

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The second aspect of the internal content is freedom of judges from interference from within the judiciary itself as an autonomous institution of government. Freedom of judges from the top hierarchy of the judiciary as it has recently been experienced in Nigeria where the President of the Court of Appeal was suspended consequent upon a misunderstanding between him and the then Chief Justice of Nigeria. The misunderstanding arose out of issues concerning freedom of judges from internal interference as would be seen soonest. Interestingly, scholars do not pay attention to this aspect of judicial independence but have always been concerned about independence from the political branch erroneously believing that, as does Law (2011, 1), that it is the most important and the most difficult to achieve. It must however be conceded that inability to resist temptations of interference from the political branch may impact negatively on the internal content freedom of judges as demonstrated in the crisis between the then Chief Justice Katsina-Alu and Justice Ayo Salami, the suspended President of the Court of Appeal.

Generally, the role of the judiciary in any jurisdictions is primarily to create and ensure a just society through its adjudicatory justice based on the legal order in the society (Oloko 1990, 533; Nnamani 1990, 27). It has however been argued that often times, the debate over independence of judiciary diverts attention from more important question of creating a just society (Hensler 1999, 709). Hensler's position appears doubtful for there is no way of engaging in any articulate debate over the important question of creating a just society without recourse to independence of judiciary. The creation of a just society is a function of the judiciary such that any discourse on role of the judiciary cannot be divorced from independence of judiciary as a functional concept. This is more so when it is acknowledged that the independence is for the "benefit of the judiciary as a whole – and ultimately, of course, for the benefit of our system of government" (Burbank 2007, 927), and the society.

According to Ferejohn (1998), it is apparent that independence, *inter alia*, facilitates three distinct values. That is, maintenance of the rule of law, independence of the courts to be able to overturn any legislation that is constitutionally illegitimate in a constitutional government, and in a democracy such as Nigeria, the courts' autonomy to resist temptations to give too much deference to current holders of economic and political power. These core values, properly evaluated would subsume into one single overbearing value of judicial review. The first of the core values is indeed the very foundation of any civilized society. Its purport is that only laws properly enacted by the appropriate authority recognised by the Constitution (Nigerian Constitution 1999, section 5) other than arbitrary rules of a selected economically and politically powerful few must govern relationships in the polity. The same laws that are enacted by the legitimate institution of governance charged with that responsibility, called by whatever name, must apply equally to both the lowly and the high in the polity without favour or preference based on whatever consideration as dictated by the concept of rule of law. The right of access by any person to an impartial judiciary for redress in the event of breach or imminent breach of his constitutional right

must also be guaranteed as envisaged by some constitutional provisions such as section 6 (6) and section 46 (1). All these apparently necessitate and require judicial intervention as to the determination of; adherence by the law-making institution to the extent of grant of authority, effective execution and faithful maintenance of the laws by the executing department of government, and the respect for the right of individuals. These lead to the second core value. To facilitate the contents of the first value is the requirement for 'independence of the courts', which would mean that the judiciary as an institution and the judges who would ensure the rule of law and insist on justice must be free from influence of any kind in the discharge of those sacred duties. For practical purposes, however, this calls for the following questions: independence for whom, from whom, from what and for what purpose, as queried by David S. Law (2011, p.1), who then characteristically espoused on the questions.

Independence for whom?

Judicial Independence, as opined by Law (2011, 1), is a difficult concept to define and explain because of its conceptual and normative characters. Answers to the questions may to a large extent bring about clarity of the concept without actually addressing the possibility of reality of judicial independence. The first question is about who must be the beneficiary or beneficiaries of that independence; is it the judiciary as a whole; or as an institution of the judges who make judicial decisions? For a practical purpose, in Nigeria, for example, the Constitution guaranteed judicial independence, (Nigerian Constitution 1999, section 292) but in a manner suggesting protection of only the judges of the superior courts as individuals and not as a collective institution. This would then mean that the judiciary as an institution enjoys only constitutional separation and not independence from the other political departments. The separation here does not indicate absolute separation since the appointment and removal of judicial officers is a joint venture between the judiciary, the legislature and the executive. It may however be argued that independence for judges makes consequential independence for the judiciary as a body. But the problem arises again when it is considered that judicial independence embraces independence of judges from the administrative control of the top echelon of the judiciary, the head of the judiciary; the chief judge or chief justice, as the case may be. An example of this is the genesis of the suspension of Justice Ayo Salami, President of Court of Appeal (discussed below). A close understanding of the scenario certainly suggests that independence should be two edged; independence for the judges and for the judiciary as an institution. Any interference in the administrative apparatus of the judiciary has an overbearing implication for independence of individual judges in their decision making process. Thus, judicial independence must be for both the judiciary and the individual judges, and it does not matter the nature of the cases or disputes and the parties before the courts. Matters before the courts may be between private parties, private and public officers, institutions or

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government, or even between levels of government (Nigerian Constitution 1999, section 6).

Independence from whom?

A more difficult question is independence from whom. Answer to this question may differ from jurisdiction to jurisdiction, depending on many factors; constitutional arrangement of relationship between the judiciary and the political organs, the mode of appointment and removal of judges, level of political awareness by the citizenry, the perception of the judiciary by the people themselves and even the personality of the judges themselves, and even some judges do not seem to appreciate the need for separation of powers; they are judges in the day and politicians at night such that their judgment in the open courts are not just determined by the sacred law, but by the class of persons involved in the case.

The more pronounced and most important is independence from control by the government, which dates back to the England's Act of Settlement 1701 (Law 2011, 1). Nigerian Constitution, 1999 maintains that once a judge is appointed and sworn-in, having subscribed to his oath of office. Section 290 and the seventh schedule of the Constitution indicate that a judicial officer can only assume duty in that wise after he had taken and subscribed to both the oath of allegiance and judicial oath to the effect that he shall give paramount consideration to the Constitution. He will not allow interests that inure to him personally to influence his official conducts and decisions; he owes his loyalty to the people and not the appointing authority, that is, the government. The people themselves are the sovereign, from whom the constitution derives its power to create the departments of government and allocate to them their respective areas of competences (Shehu 2011, 43-47). This position was aptly addressed in the case of *Abiodun v Chief Judge of Kwara State* (2008, 396), *Attorney General of Abia State and 35 others v. Attorney General of the Federation* (2001). The constitution thus provides for independence of the judiciary from the government; but it appears the selection and appointment procedure of the heads of respective branches of judiciary suggests otherwise. The President on the recommendation of the National Judicial Council appoints certain judicial officers subject to confirmation by the Senate. They include the Chief Justice of Nigeria and Justices of the Supreme Court, President and Justices of the Court of Appeal, Chief Judge of the Federal High Court and the Chief Judge of the Federal Capital Territory (Nigerian Constitution 1999, sections 231 (1) and (2), 238 (1) and (2), 250 (1) and (2), and 256 (1) and (2)). Others are the Grand Kadi of the Shariah Court of Appeal of the Federal Capital Territory and President of the Customary Court of Appeal for the Federal Capital Territory (Nigerian Constitution 1999, sections 261 (1) and (2) and 266). The president subject to recommendation by the National Judicial Council makes appointments of other federal judicial officers. At the state level, in consonance with the principle of

federalism, the Governor appoints the Chief Judge of the State High Court, Grand Kadi of the State Shariah Court of Appeal, where established pursuant to section 276 (1) and (2) of the Constitution, on the recommendation of the National Judicial Council subject to confirmation by the State House of Assembly. Appointed in the same manner is the President of Customary Court of Appeal pursuant to section 281 (1) and (2) of the constitution. It is important to note that while appointments of heads of all the courts mentioned are subject to confirmation by the senate or the state house of assembly, as the case may be, appointments of judges and kadis of the courts are not. The president or the governor, as the case may be, appoints on the recommendation of the National Judicial Council without resort to the legislatures. The implication of this is that while the appointments of certain judicial officers in the land undergo legislative screening or oversight, the appointment of others needs only the recommendation of the National Judicial Council for the President or the Governor of a state to make such appointment. That legislative oversight in such appointments ensures that both the National Judicial Council and the President comply with the provisions of the constitution for making such appointments. It is difficult to understand and appreciate need for the different requirements since all the judges are members of the same judiciary established by the constitution. This also brings about the question as to whom those judges whose appointments are not subject to legislature's oversight are responsible to; is it the people or the president? The judges are responsible to the people themselves if their appointments and removal are subject to legislative oversight and only to the executive if their appointments and removal begins and ends with the executive. Further, there is possibility of different level of loyalty and independence. Those whose appointments are made subject to confirmation by the senate are more prone to see their appointments as national; enjoying independence from the executive, whose actions or inactions and those of whose officials are most likely and more frequently to be subject of decision-making by the courts, thus deserving loyalty to the nation. On the other hand, those whose appointments are not subject to legislative oversight are likely to regard their appointments as commanding loyalty to the chief executive in which case judicial independence suffers.

Significantly, the judicial officers mentioned above enjoy security of tenure as they may only retire upon the attainment of certain specified age (Nigerian Constitution 1999, section 291). A federal judicial officer cannot be removed from office before his age of retirement except upon an address supported by two-thirds majority of the senate; or two-third majority of the State House of Assembly in the case of a state judicial officer praying "...that he be so removed for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct," and in any case, other than those to which the foregoing applies, by the President or, as the case may be, the Governor acting on the recommendation of the National Judicial Council that the judicial officer be so removed for his inability to discharge the functions of his office or appointment

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(whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct (section 292). As noted earlier, the judicial officers are subject to different requirements for their appointments, so also for their removal before age of retirement, thus creating unnecessary division within the judiciary.

As a further protection from the external content interference, the “recurrent expenditure of judicial offices in the federation (in addition to salaries and allowances of the judicial officers mentioned in subsection (4) of this section) shall be charged upon the Consolidated Revenue Fund of the Federation” (Section 84 (2)). The remuneration and salaries payable to the holders of the said judicial offices (such as Chief Justice of Nigeria and Justices of the Supreme Court, President and Justices of the Court of Appeal and Heads and Judges or Kadis of High Courts, Customary Courts of Appeal, and Shariah Courts of Appeal both of the FCT and the States) and their conditions of service, other than allowances, shall not be altered to their disadvantage after their appointment (Nigerian Constitution 1999, sections. 84 (3) and 291 (3)). Unfortunately, however, with these provisions on funding the judiciary, head of courts still go to the chief executives to beg for the release of their budget. A former Chief Justice of Nigeria, Dahiru Musdapher (Dahiru 2012, 13) recently lamented that “most heads of courts have to go, cap in hand, to the Governors of States, in order to receive the State Judiciary’s budget.” He lamented “I dare say how demoralizing and damaging this can be to the independence of the judiciary. The Executive must realise that a poorly funded Judiciary does not augur well for the nation...”

Certainly, all the schemes for judicial independence are to shield the judges and, by extension, the judiciary from executive interference, more importantly. The mechanisms do not take cognizance of the need for protection of judges from likely interference from within the judiciary itself, particularly from the headship of the judiciary. The National Judicial Council by virtue of section 153 of the Constitution is charged with the responsibilities of overseeing the activities of the judiciary, including as stated earlier, recommending to the President or the Governor the removal from office of the judicial officers and exercise of disciplinary control over such officers (Nigerian Constitution 1999, S. 21 (b), Part I of the Third Schedule). There is no guarantee that the body is not capable of interfering with the independence of individual judges, and besides, as would be seen shortly, the enormity of the powers of the council couple with its composition makes the council potentially an internal threat to judicial independence.

Independence from what and for what purpose?

The third and fourth questions on judicial independence as identified by Law are more normative than conceptual as they deal with form and essence of independence. The question, from what, investigates the type of interference that is capable of inhibiting judicial independence. Law (2011, 4) posits, narrowly

though, that not all forms of influence over judicial decision-making constitute threats to judicial independence. Broadly, this may be a wrong assertion because any form of influence has the tendency of affecting the smooth running of the judiciary. Influence is a wide term connoting any form of act from an external person or body or even from within the judiciary capable of, apart from the merits of the case before a judge, operating on the mind of the judge while sitting to make decision in the case before him. The mere concern for career prospect in term of ambition to become the chief judge may be a great influence on a judge. Also, the mere promise of better condition of service may not be a strong influence, whereas to any other judge the mere fear of public protest and indignation resulting from a judgment and the love for his job may be enough to hinder him from the merits of the case, especially in volatile political situations as in Nigeria. Religion, like any other primordial sentiment in some cases may influence the decision of a judge. Bribery and other forms of corrupt practices may propel even the most courageous judge to trade-off a decision.

The report by Transparency International (2007) has shown that corruption undermines judicial systems worldwide, Nigeria inclusive as buttressed by a survey recently conducted by the Economic and Financial Crime Commission and National Bureau of Statistics with the support of the United Nations Office of Drugs and Crimes (UNODC) (Fagbemi 2010, 71). Social and political ties are equally very strong when considering sort of influence that may inhibit the proper application of the law to a case by the judge. Unless viewed from a narrower perspective, any influence apart from the factual demeanour of the parties standing before the judge, the evidential value of totality of the facts put before the court weighed on the scale of justice in accordance with the appropriate statutes would one way or the other have impact on the judgment of the court. However, the scale of interference by such influence may differ, and bearing in mind that judges themselves are human, they are quite often susceptible to intimidation and harassment especially from public officials, except the very few ones that are overtly courageous on the side of the public, justice and judicial integrity as demonstrated by Justice Ayo Salami.

Judicial independence is the foundation of democratic governance (Kak 2010, 8), it may however be argued that it does provide for stability in governance even under the military. The military, wherever it rules, has a set of legal instruments guiding its activities even though such may be set aside at will by the military itself consequent upon any seeming negative review by the court. Apparently, the aim of judicial independence is to empower the judiciary as guardian of the rule of law (Verma 2010, 2). Usually, dispute arises between individuals, the three levels of government, individuals and a level of government or even between individuals and government officials as in the case of exercise of discretionary powers or even violation of or threat of violation of fundamental rights. It is the duty of the courts to adjudicate in the disputes as well as interpret the constitution and other statutes. These call for impartial and independent judiciary as unbiased umpire in the resolution of disputes including review of

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activities of governmental officials and interpretation of the law. This is with the view to ensuring peace and stability which are the very foundation for development in the polity. Thus, the constitution provides that the social order of Nigeria shall be based on freedom, equality and justice and to that extent “the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained” by the government (Nigerian Constitution 1999, section 17 (2) (e)). All these are the hallmark for justice in the society, but how far they have been accomplished or capable of been accomplished in Nigeria would be examined using the suspension of Justice Isa Ayo Salami, President, Court of Appeal, the Nigeria’s second highest court. Appeals from high courts go to court of appeal from where it may go on further appeal to the Supreme Court, as the apex court.

Prelude to suspension

The suspension of Justice Isa Ayo Salami was preceded by a plan to move him as President of the Court of Appeal (PCA) to the Supreme Court. The attempt though may ordinarily look like an elevation because Supreme Court is not only the apex court in the land, it is also a constitutional court, and its decision is binding on all courts in the land. The news of the imminent suspension was reported in one of the Newspapers (The Nation, February 4, 2011, 1) that the move was hatched sometime in January, 2011 at a meeting of the Federal Judicial Service Commission presided over by the former Chief Justice of Nigeria (CJN), Justice Katsina-Alu, who initiated the plan though it was not on the agenda for that meeting. Although it was reported that the CJN argued in support of the plan that the erudition and experience of Justice Salami would strengthen the Supreme Court if transferred there, such a move was the first of its kind in the judicial annals of Nigeria. The plan generated some frustration from the Bar and the general public against the background that the previous September a top leader of the National Assembly allegedly invited Justice Salami for interaction on why the Court of Appeal had been delivering verdicts against the PDP in some states. It is interesting to note that five Justices of the Court Appeal (Clara Bata Ogunbiyi, M. R. Garba, P. A. Galinje, C. C. Nwabueze and A. Jaure) were queried by the National Judicial Council (hereinafter referred to as the council or NJC) over the judgments of the Court in Ekiti and Osun State Governorship Election Petitions (The Nation, February 6, 2011, 4).

Justice Isa Ayo Salami protested the purported plan to move him to the Supreme Court. In his letter entitled “Offer of appointment to Supreme Court-Rejection” with reference number PCA/S.25/Vol.1/143 and dated 4th February 2011, he not only rejected the “offer”, he described it as unholy move to push him out of the Court of Appeal, that it has no precedent in the country’s legal history and that it was capable of “creating dangerous precedent which may give rise to chain reactions” (The Nation, February 6, 2011, 4). In utter rejection of what he referred to as “unholy” promotion and perhaps with determination to fight what

seemed like a dangerous judicial politics, he filed a suit, by way of originating summons, against the CJN, Federal Judicial Service Commission, the National Judicial Council and the Attorney General of the Federation at the Federal High Court, Abuja.

In the affidavit he personally deposed to, Justice Salami averred, among others, that after he had set up the Sokoto State Governorship Election Petition appeal panel, parties filed and exchanged briefs, and the parties adopted the briefs and judgment reserved. Later, the CJN summoned him to his office. According to him, the CJN asked him to disband the panel he had set up for the appeal “on the excuse that if the panel allowed the appeal and removed the Governor, the ripple effect would lead to a removal of our highly revered Sultan of Sokoto.” He said as the reason given by the CJN could not convince him as to why the panel on appeal should be disbanded, he declined the request (The Nation, August 11, 2011, 4). He averred further in the affidavit that the CJN, in the alternative, asked him to “direct the panel of justices to decide against the Appellant,” which he also declined.

In a counter-affidavit, the CJN on 7th March 2011 denied all the allegations leveled against him by the PCA. He however averred that in his capacity as Chairman of the National Judicial Council he directed the Court of Appeal vide a letter No. NJC/CIADM/IV/148 of 19th February, 2010 that the judgment that was to be delivered in the Sokoto Gubernatorial Election Petition Appeal ‘be put on hold’ pending the investigation of the petition he had received (The Nation, August 5, 2011, 54). Besides, he averred that he summoned the PCA and that when the PCA arrived, he (CJN) told the PCA, in the presence of Hon. Justice Dahiru Musdapher (now a retired CJN) that he received a complaint that the judgment to be delivered in respect of the Sokoto governorship election petition appeal had leaked, that he showed the petition to the PCA and that the PCA admitted that the judgment had leaked. The PCA denied all in another affidavit sworn to on the 31st March 2011. Apparently, the crisis between the CJN and the PCA arose out of the appeal in the governorship election of Sokoto State. Subsequently however, a committee set-up by the National Judicial Council under the chairmanship of Hon. Justice B. O. Babalakin, JSC (retired) cleared both the CJN and the PCA of any misconduct in relation to the Sokoto appeal. The committee, however, found that the CJN, “as Chairman of the National Judicial Council has no power to interfere with any proceedings in any Court” (Ehikioya 2011, 54) as was done in the Sokoto appeal petition. Interestingly, however, the Supreme Court eventually dismissed the appeal in the Sokoto State governorship election, which was still pending before the Court of Appeal, on the 21st November, 2010 even when the appeal was not before the Supreme Court. It is important to note that the Court of Appeal was then the final appellate Court in all election matters except that of presidential election (Nigerian Constitution 1999, section 246 (1) (b)).

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The National Judicial Council again set-up a fact-finding committee on the crisis of confidence between the suspended PCA and the CJN; the committee was chaired by a former President of the Court of Appeal, Justice Umaru Abdullahi and at the end of its deliberation absolved the two warring judicial officers. Yet, curiously, the NJC set-up Justice Auta Review Committee (Justice Auta is the Chief Judge of the Federal High Court) to review the findings of Justice Umaru Abdullahi. The committee exonerated the two warring senior judicial officers. On the 10th August, 2011, the National Judicial Council deliberated on the reports of the two committees. And in a statement by the Council's Deputy Director of Information, the Council absolved the CJN and Justice Salami of any judicial misconduct, but however found that "...the allegation by the Hon. President, Court of Appeal, Hon. Justice Isa Ayo Salami, against the Hon. Chief Justice of Nigeria, Hon. Justice Aloysius Katsina-Alu, regarding the Sokoto Gubernatorial Election Appeal was false" (The Nation, August 11, 2011, 1, 2, 6). The Council thus decided, "it is a misconduct contrary to Rule 1 (1) of the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria" (The Nation, August 11, 2011, 2) and directed that Hon. Justice Salami be warned and that he should apologize in writing to both the CJN and the National Judicial Council within a week from the 10th August, 2011. However, rather than apologize as demanded by the National Judicial Council, Hon. Justice Salami headed for the Federal High Court to challenge what seemed to many Nigerians a plot to remove him from the high bench. Eventually, while the suit was still pending, at its seventh emergency meeting held on the 18th August, 2011, the National Judicial Council suspended Hon. Justice Salami while it made a recommendation to the President of Federal Republic of Nigeria to retire him from service. Hon. Justice Salami has since challenged in court the suspension that was immediately ratified by the President, appointing Hon. Justice Dalhatu Adamu as President of the Court of Appeal in acting capacity.

Nevertheless, Chief Justice Katsina-Alu retired at the mandatory age of 70 years on the 28th August, 2011 and Justice Dahiru Musdapher was sworn-in as the acting Chief Justice of Nigeria on the 29th August, 2011. Meanwhile, the suspension of Justice Ayo Salami remained despite the attendant public cries for his reinstatement. On the 14th May 2012, the National Judicial Council, by a split decision of eleven to nine recommended the reinstatement of Justice Salami. The recommendation was forwarded to the President, but he has since refused or neglected to approve the recall of Salami. The Attorney-General and Minister of Justice, Adoke Mohammed was however reported to have said that recalling Justice Salami when cases connected to his suspension were still pending in courts "will be subjudice" (The Nation, May 23, 2012, 1-2). Besides, the Attorney-General added that Hon. Justice Salami would not be recalled "until the judiciary puts its house in order" ((The Nation, May 23, 2012, 1-2). Just as the suspension generated public condemnation the refusal to approve the NJC's recommendation to recall Salami generated more reactions from some members of the public including members of the Bar. Some 'concerned' citizens instituted actions in the court challenging the President's refusal to approve the council's recommendation to recall Salami. They saw in the suspension saga an agenda to

rid the judiciary of activist and radical judges like Salami or possibly render the judiciary a mere agent or appendage of the executive whose bidding the judiciary must oblige.

The Constitution and the Suspension

The divergent views generated by the suspension however bother on (1) whether or not a judge can be suspended from his judicial position. (2) Whether it was constitutional and proper for the NJC to have the way it did refer the suspension to the President for approval, and finally, whether the President has the power to so approve the suspension the way he did. All these questions get to the constitutional root of the suspension and thus call for a careful appraisal of the relevant provisions of the constitution. The constitution is the fundamental law of the land, albeit the charter of governance regulating the powers of and relationships between the departments of government and the balancing of the powers. Thus, all exercise of power by any departments of government, though must be in trust for the people, should have basis in the constitution (Shehu 2011, 70); else such exercise of power is unconstitutional (*A.G. Lagos State v A.G. Federation*, 2004). Not only this, where the procedure for exercising the power is expressly laid down in the constitution (*Inakoju v Adeleke*, 2007) such must be strictly followed otherwise the exercise shall be unconstitutional.

Firstly, on whether a judge can be suspended from his judicial position, the paper contended that a judge can properly be suspended following strict compliance with the constitutional procedure. The National Judicial Council recommends to the President persons for appointment to federal judicial offices from the lists of persons submitted to it by the Federal Judicial Service Commission, and to judicial offices of the Federal Capital Territory, Abuja, from the lists of persons submitted to it by the Judicial Service Commission of the Federal Capital Territory (S. 21a, Part 1, Third Schedule). The body is also charged with the 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” (S. 21b, Part 1, Third Schedule). Thus, could the NJC’s recommendation to the President for the suspension of Justice Salami be regarded as an exercise of constitutional power? The answer is in the negative for although the NJC has granted power to recommend to the President for “removal”, nowhere in the constitution is the NJC granted power to recommend for suspension. The framers of the constitution may have envisaged a situation requiring the discipline of a judge that the constitution uses the word “discipline” rather than “removal” recognising the two words and their respective implication. The constitution empowers the NJC to recommend to the President for removal:

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... judicial officer shall not be removed from his office or appointment before his age of retirement except in the following circumstances -

(a) in the case of -

(i) Chief Justice of Nigeria, President of the Court of Appeal, Chief Judge of the Federal High Court, Chief Judge of the High Court of the Federal Capital Territory, Abuja, Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja and President, Customary Court of Appeal of the Federal Capital Territory, Abuja, by the President acting on an address supported by two-thirds majority of the Senate.

(ii) Chief Judge of a State, Grand Kadi of a Sharia Court of Appeal or President of a Customary Court of Appeal of a State, by the Governor acting on an address supported by two-thirds majority of the House of Assembly of the State.

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

It granted the power to ordinarily discipline to the Council. The constitution makes discernible distinction between the two words; whereas it provides grounds for removal of a judicial officer, it only granted the NJC power to discipline without providing for grounds for discipline. It may therefore be said that any act or omission by a judge not befitting the standing of his judicial office or of a judge and not being one of the grounds for removal or that is in breach of judicial ethics may warrant discipline. Discipline for such an act or omission may take the form of suspension for which the constitution does not require NJC recommending to or seeking approval of the President. Therefore, the recommendation by the NJC to the President for the suspension of Justice Salami was ultra vires the power of the Council and hence unconstitutional. By the same token, the President also acted in error by approving the recommendation of the NJC to suspend Justice Salami. There is nothing in the constitution granting such power to the President, except if the recommendation is for removal as provided by the constitution. It must also be pointed out that the NJC is theoretically/constitutionally independent in making decision to discipline any erring Judge, (Nigerian Constitution, section 158(1)):

In exercising its power to make appointments or to 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 Mobilisation 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.

Implications of Suspension

A careful understanding of the suspension saga would indicate that the whole crises started from an allegation by the suspended President, Court of Appeal, that the retired CJN, Hon. Justice Aloysius Katsina-Alu directed him to compromise the Sokoto Gubernatorial Election Appeal. The allegation was made on oath and the CJN denied it on oath. The National Judicial Council looked into the allegation and absolved the CJN while also absolving the PCA of any judicial misconduct except that he made false allegation against the CJN. The Nigerian presidential system calls for this council as the constitutional body charged with powers and responsibilities over the Nigerian judiciary. Separation of powers requires that, though absolute separation may be a mere utopianism, the three powers of government, notably the executive, legislative and judicial must be effected by three different autonomous bodies with the power of each complementing the power of the other (Young 2003, 9). Thus, the establishment of the council is to enhance the independence of the judiciary as an autonomous democratic institution to ensure sustainable democracy, rule of law and constitutionalism in the country.

Without going into the politics surrounding the suspension, it is necessary to examine the attendant implications on the judiciary particularly on its independence and power of review of both executive and legislative actions, and by implication on constitutionalism generally. First, it is important to start by examining the composition and powers of the National Judicial Council to appreciate the role it played in the saga and the implications. The Council is established under Section 153 of the 1999 Nigerian Constitution (as amended). It is composed of (Nigerian Constitution 1999, Third Schedule, Part I, section 20):

- (a) the Chief Justice of Nigeria who shall be the Chairman
- (b) the next most senior Justice of the Supreme Court who shall be the Deputy Chairman;
- (c) the President of the Court of Appeal;
- (d) five retired Justices selected by the Chief Justice of Nigeria from the Supreme Court or Court of Appeal;
- (e) the Chief Judge of the Federal High Court;
- (f) five Chief Judges of States to be appointed by the Chief Justice of Nigeria from among the Chief Judges of the States and of the High Court of the Federal Capital Territory, Abuja in rotation to serve for two years;
- (g) one Grand Kadi to be appointed by the Chief Justice of Nigeria from among Grand Kadis of the Sharia Courts of Appeal to serve in rotation for two years;
- (h) one President of the Customary Court of Appeal to be appointed by the Chief Justice of Nigeria from among the Presidents of the Customary Courts of Appeal to serve in rotation for two years;

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(i) five members of the Nigerian Bar Association who have been qualified to practice for a period of not less than fifteen years, at least one of whom shall be a Senior Advocate of Nigeria, appointed by the Chief Justice of Nigeria on the recommendation of the National Executive Committee of the Nigerian Bar Association to serve for two years and subject to re-appointment.

Provided that the five members shall sit in the Council only for the purposes of considering the names of persons for appointment to the superior courts of record; and

(j) two persons not being legal practitioners, who in the opinion of the Chief Justice of Nigeria, are of unquestionable integrity.

A careful appraisal of the power of the Chief Justice of Nigeria in connection with appointment of other members of the council shows that, ordinarily, it is envisaged to enhance the independence of the judiciary such that the affairs of the judiciary is purely in the hands of members of the Bench particularly the most senior of all serving. Of the twenty-three (23) members excluding the Chairman (CJN), only the Deputy Chairman of the Council, President of the Court of Appeal and the Chief Judge of the Federal High Court are automatic members by virtue of their position and not selected or appointed by the CJN. It is also important to note that the CJN enjoys wide discretion in the appointment of members, except in the appointment of the five (5) members of the Nigerian Bar who must be recommended by the National Executive Committee of the Nigerian Bar Association to serve for two years and subject to re-appointment. Apparently, the Chief Justice of Nigeria occupying the position of Chairman of the Council is like the chief executive of the council whose decisions or indecision would always carry heavy weight in the council. The five (5) members of the Bar are only to “sit in the Council only for the purposes of considering the names of persons for appointment to the superior courts of record” (Nigerian Constitution 1999, S. 20 (i) of Part I of the Third Schedule). Besides this constitutional mandate, they cannot participate in any other deliberation of the council as was the case in the suspension of Justice Salami. Thus, all other members, being appointees of the CJN are more likely to do the bidding of the CJN in taking any other decisions at the council (Ketefe 2012). This position is in tandem with the observation of the Court of Appeal in *Abiodun v Chief Judge of Kwara State* (supra) at p. 396 where Agube, JCA enthused that:

I liken the scenario created by the Chief Judge to the position of a Chief Priest and custodian of an oracle turning around to desecrate the oracle. The Chief Judge of the state who is a custodian and head of the judicial arm of the state ought to abide by the laws of the State nay the land. I wonder what he would do if his orders are flouted with impunity by either members of the public or another arm of Government as he has done in this case. One may sympathise with the dilemma of the Chief Judge who had just been appointed being enthusiastic to do the biddings of the Governor in order not to rock the boat.

This position is significant because the members are most likely to have allegiance to the CJN who appointed them than to the Constitution, which granted him the power to appoint them. This can be seen glaringly in the suspension of Salami where in spite of the fact that all the committees set-up by the council itself to look into the crisis exonerated Salami, but the council yet went ahead to suspend him. It therefore means that with the present composition of the council, the fact of influence, personal interest or aggrandizement cannot be ruled out in decision-making. It is obvious that the power of the CJN in relation to appointment of members of the council is to satisfy that neither the executive nor the legislature bears influence in the matters that are purely judicial in nature. The reality of the power so conferred on the CJN is that there is a need for regulating the power to avoid abuses bearing in mind that one of the bases of the notion of separation of powers is that men are by their nature prone to abuse power if not checked.

Besides, the independence of judicial officers from internal interference cannot be guaranteed with the present composition of the NJC particularly when the Chairman, “chief executive of the council”, is directly or indirectly interested in a matter. This has been demonstrated in Salami’s case where the basis of disagreement was that the CJN, Hon. Justice Katsina-Alu wanted him to compromise the Sokoto State governorship election appeal. Although the CJN denied the allegation on oath, his letter to Justice Salami in respect of the matter is capable of being interpreted as an attempt to interfere in the appeal case. This is further corroborated by the dismissal of the Sokoto governorship election petition appeal pending before the Court of Appeal by the Supreme Court when in fact of law it lacks jurisdiction to adjudicate in such matters in accordance with the provision of section 246 (1) (b) of the Constitution.

Furthermore, the rule of law and constitutionalism demand that there should be independent, courageous, just, fair and proactive judges to ensure that nothing but the law rules, that is the enthronement of the supremacy and predominance of the law. The Constitution is supreme over all sectors of governance in Nigeria including the Executive and the Legislature (Shehu 2011, 51-2). Actions of both must have legitimacy from the law or the constitution otherwise the rule of law and constitutionalism, the very foundation of democracy, suffer and the rights of individuals in such situation become toys in the hand of officials of the state. The suspension of Justice Salami is not just his suspension; it is largely an affront to justice, the end result of the rule of law and constitutionalism. The suspension was carried out when there were cases instituted against it notwithstanding the extant position of the law that status quo ante must be maintained in such situation. Besides, rule of law and constitutionalism demand that there must be respect for the law and the judiciary to ensure and sustain obedience to and respect for judgments of the courts. The courts have their judgments, but public respect for the judgments and the judiciary is the only enforcement mechanism the courts have. Therefore, when the public loses respect for the courts, the courts lose obedience for the judgment and a state of anarchy may ensue.

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The perception of public reaction to the suspension was indicative of indignation, frustration and apparent loss of respect in the leadership of the judiciary (Uwah 2012; Ketefe 2012). Lack of respect for leadership of the judiciary is an indication of lack of respect for the entire judiciary and consequently loss of confidence in the judicial system. If the judiciary itself is found not to have respect for the courts, who then should have? A situation like this could threaten public peace and order making the country ungovernable with far-reaching consequences on the nascent democracy. It is worthy of note that the judiciary plays an important role in rebuilding and stabilizing of democracy in Nigeria through its adjudication in election matters. Examples of how the judiciary plays this role in Nigeria could be found in innumerable election petition cases some of which include Udeh v Okoli (2009); Odedo v INEC (2008); Bala Hassan v Babangida Aliyu (2010); Albert Akpan v Bob (2010); Ehinlawo v Oke (2008); Ehuwa v INEC (2006); Ezeigwe v Nwaulu (2010); Amaechi v INEC (2008). This role is enviable, as it has prevented the country from diving into crises reminiscent of the pre-1966 military take-over in the country.

Summary and Conclusion

Judiciary is the foundation for peace and stability in any society because of the sacred role it has to play in settling disputes and ensuring adherence to the rule of law and constitutionalism. Independence of the judiciary as an institution and that of its officers is therefore paramount and essential to guarantee effective, efficient and unbiased justice delivery system. The suspension of Justice Isa Ayo Salami has brought to the open that independence of judiciary is conceptually multidimensional; freedom from interference from members of the public particularly the highly placed in the society, from executive and legislative officials, generally from the political class and from within the judiciary itself. The suspension has therefore shown that the constitutional mechanisms to guarantee judicial independence in Nigeria are inadequate and ineffective. It has also shown that the much-needed internal independence largely depends on the leadership of the judiciary and the National Judicial Council. This invariably suggests that for there to be independence from internal interference there must be a courageous, just, fearless and pro-active leadership of the judiciary and a more independent Judicial Council.

Therefore, there is a need to amend the constitutional provisions on the composition of NJC to ensure an enviable independent judiciary in Nigeria. The appointment of members should be subject to confirmation by the Senate. In addition, there is need to increase membership representation of the Nigerian Bar Association from the present five to eleven with the right to participate in any deliberation of the council rather than in only matter of appointment to the superior courts. This would ensure that the votes of serving judicial officers who are members of the council would not be the sole determinant of policy or decision direction in the judiciary. Besides, no fewer than two-third majority

should form the quorum for decision-making in matters connected with investigation of allegation of misconduct and any other matters appertaining to discipline of judges of the superior courts of record. Yet Judges should appreciate the essence of separation of powers and an independent judiciary rather than seeing the judiciary as an appendage of the executive arm of the government, and should be at all times ready to judicially protect and defend the sacredness of independence of judiciary as a prerequisite for justice and a just society.

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