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### The Politics of Regulating and Disciplining Judges in Nigeria

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# The Politics of Regulating and Disciplining Judges in Nigeria

Olabisi D Akinkugbe\*

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## Introduction

An analysis of the regulation and discipline of judges in Nigeria cannot be undertaken outside of historical and socio-political factors critical to understanding the architecture of the Nigerian society and judiciary today. First, since independence, democratic governance in Nigeria has been interrupted by military coups and dictatorships.<sup>1</sup> During these periods of military administration, the tenets of separation of powers, judicial independence and respect for the rule of law were mostly in abeyance, if not grossly abused.<sup>2</sup> Judges were vulnerable to intimidation though, in the majority of cases, Nigerian judges boldly sought to assert the rule of law even in the face of possible recrimination.<sup>3</sup> Second, corruption remains endemic in the socio-economic and political fabric of Nigerian society and its corrosive impact on the rectitude of the judiciary and judicial institutions is undeniable.<sup>4</sup>

The disciplining of judges is a sensitive and complex challenge.<sup>5</sup> In Nigeria, the complexity is heightened because the process is complicated by socio-political factors and public views about the motivations for disciplining some judges, including claims of political

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<sup>1</sup> Hakeem O Yusuf, 'The judiciary and political change in Africa: Developing transitional jurisprudence in Nigeria' [2009] 7(4) Int'l Journal of Constitutional Law 654, 657; Nic Cheeseman, *Democracy in Africa: Successes, Failures, and the Struggle for Political Reform*, (Cambridge University Press, 2015)

<sup>2</sup> *ibid*

<sup>3</sup> MA Ikhariale, 'The independence of the Judiciary under the Third Republican Constitution of Nigeria' [1990] 34(2) Journal of African Law 145.

<sup>4</sup> See generally Olabisi D Akinkugbe, 'Informal networks of corruption: assessing the challenges for public sector whistleblowing in Nigeria' [2018] 9 Jindal Global L Rev 11. An initial exercise to reverse this deterioration in judicial ethics standards and performance was undertaken in 1993 under General Sani Abacha. Popularly dubbed The Eso Panel, they were tasked to probe the conduct of judges across the country and to recommend solutions directed to the causes of the decline in ethical conduct. The Panel found 31 magistrates and some judges of superior courts culpable for various offences. Its recommendations were accepted in 1994 but only acted upon when the National Judicial Council (NJC) was inaugurated in 2000. The delay left the erring magistrates and judges in office without any form of accountability for their ethical breaches. When the Eso Report was eventually implemented, only six judicial officers were recommended and ultimately removed from office by compulsory retirement. Eight others were exonerated: see Nigeria Civil Society Situation Room, 'The Position of the NJC on the Recent Invasion of the Residences and Arrest of Judicial Officers by the Department of State Services (DSS)' (14 October 2016) <[https://www.placng.org/situation\\_room/sr/the-position-of-the-national-judicial-council-on-the-recent-invasion-of-the-residences-and-arrest-of-judicial-officers-by-the-department-of-state-services-dss/](https://www.placng.org/situation_room/sr/the-position-of-the-national-judicial-council-on-the-recent-invasion-of-the-residences-and-arrest-of-judicial-officers-by-the-department-of-state-services-dss/)> accessed 17 August 2019.

<sup>5</sup> Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' [2009] 57(1) American J of Comp L 103-134.

interference by the ruling government. This Chapter argues that both judicial discipline and the work of the National Judicial Council (NJC) – the body responsible for judicial regulation in Nigeria – are caught up within Nigeria’s peculiar socio-politics, a reality that a strictly legal analysis will miss. The recent removal of the Chief Justice of Nigeria – discussed in Part III – illustrates this complex reality.

Part I focuses on the legal and regulatory framework for judicial discipline in Nigeria. Part II analyzes contemporary challenges and controversies associated with the complaints and discipline procedure. In particular, it asks whether the NJC is undergoing a legitimacy crisis. Part III examines the controversial removal of the Chief Justice, situating this within the socio-political and other factors specific to the discipline of judges in Nigeria. The conclusion highlights four specific insights that emerge from the analysis.

## I. Legal and regulatory framework for disciplining judges in Nigeria

### A. Court structure and legal regime for disciplining judges in Nigeria

The legal framework for disciplining judges in Nigeria is contextualized by the jurisdiction and competence of its superior courts as set out under the Constitution of the Federal Republic of Nigeria.<sup>6</sup> The Constitution establishes courts and other adjudicatory institutions (such as Election Petition and Code of Conduct Tribunals) at the federal and state levels, as applicable.<sup>7</sup> Federally, the court structure has the Supreme Court of Nigeria at the top. Downwards from it are: the Court of Appeal, the Federal High Court, the High Court of the Federal Capital Territory, Abuja, the Sharia Court of Appeal of the Federal Capital Territory, Abuja, and the Customary Court of Appeal of the Federal Capital Territory, Abuja. At the State level, the Constitution provides for State High Courts, State Sharia Courts of Appeal, and State Customary Courts of Appeal. There are also specialized courts like the National Industrial Court (NIC).<sup>8</sup> These constitutionally recognized courts are described as ‘superior courts of record.’ Those created by federal or state legislation, including magistrate, area and district courts are classified as ‘inferior courts of record.’<sup>9</sup>

The Federal Judicial Service Commission (FJSC)<sup>10</sup> and State Judicial Service Commission (SJSC)<sup>11</sup> are central to the multi-layered structure for regulating Nigeria’s judges.<sup>12</sup> The FJSC and SJSC nominate judges for appointment to federal and state level courts, and make

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<sup>6</sup> Constitution of the Federal Republic of Nigeria, 1999 (as amended) s 6(5) (Constitution).

<sup>7</sup> Oyelowo Oyewo, *Constitutional Law in Nigeria* (Kluwer Law International 2012); Kehinde Mowoe, *Constitutional Law in Nigeria* (vol 1, Malthouse Press 2003).

<sup>8</sup> The National Industrial Court of Nigeria (NIC) adjudicates trade and labour disputes under legislation including the Factories and Trade Unions Acts. See generally, National Industrial Court of Nigeria <<http://nicn.gov.ng/jurisdiction-and-power>> accessed 1 December 2019. See also Constitution s 254C.

<sup>9</sup> Constitution s 6(3).

<sup>10</sup> The Federal Judicial Service Commission <<http://fjsc.gov.ng>> accessed 1 December 2019.

<sup>11</sup> See for instance the Lagos State Judicial Service Commission <<http://lsjsc.org/>> accessed 1 December 2019.

<sup>12</sup> The FJSC and NJC are established under Constitution s 153(1)(e) & (i). The SJSC is established under s 197(1)(c). There is also a Judicial Service Committee of the Federal Capital Territory, Abuja (FCT) established under Constitution s 304(1). It has the same powers and functions as the SJSC within the FCT. So reference to the SJSC, except otherwise indicated, includes the FCT’s Judicial Service Committee.

recommendations for the removal of judges to the NJC.<sup>13</sup> Regulation and discipline, therefore, reflect the appointment processes at both national and state levels. The final decision to discipline judges is made by the NJC.<sup>14</sup> Without the NJC's *prior* recommendation, no other authority can impose disciplinary measures on a judge.<sup>15</sup>

## i The national judicial council

The NJC is responsible for the discipline of judges. It plays a gatekeeper's role in their appointment and removal.<sup>16</sup> It was created under section 153 of the 1999 Nigerian Constitution to replace the 1966 Advisory Judicial Council. The NJC self-describes as a body established to 'insulate the judiciary from the whims and caprices of the Executive [and] guarantee the independence of [the judiciary] which is a *sine qua non* for any democratic government.'<sup>17</sup> It is committed to ensuring that the Nigerian judiciary is incorruptible and manifests the highest ethical behaviour. Its tenets include easy accessibility by complainants, transparency and fairness to judges and complainants 'as would meet international standards.'<sup>18</sup> But more broadly, the Nigerian Constitution compels Nigerian judges to be guided by the principles of independence, impartiality and integrity.<sup>19</sup>

The NJC has 23 members. The Chief Justice of Nigeria (CJN) chairs the Council and appoints 19 of its 23 members<sup>20</sup> comprised of eleven sitting judges across all levels of superior courts, five retired justices from the Supreme Court or Court of Appeal, five members of the

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<sup>13</sup> See Constitution 3<sup>rd</sup> Schedule, Part I para 13(b)(c) and 6(b)(c), and Part II.

<sup>14</sup> The National Judicial Council of Nigeria <<https://njc.gov.ng/profile-of-NJC>> accessed 3 October 2019; *Kayode Bamisile v National Judicial Council and Ors* [2010] LPELR 8381 (CA). Where the law prescribes a particular method of exercising a statutory power, it must be only so exercised: *Inakoju v Adeleke* [2007] 4 NWLR [Pt 1025] 427.

<sup>15</sup> An inter-related set of instruments govern judicial discipline in Nigeria. In regard to superior courts judges, one must distinguish the scope of the Code of Conduct for judicial officers from that of the Judicial Discipline Regulations. The Code of Conduct purports to apply to 'each and every judicial officer' – which includes superior courts judges – and 'every holder of similar office in any office and tribunal where the duties involve adjudication of any dispute.' The Judicial Discipline Regulations is limited to superior courts judges. The Code of Conduct must further be distinguished from the constitutionally embedded Code of Conduct for Public Officers by which judges are equally bound. However, the Code of Conduct Bureau (CCB) and the Code of Conduct Tribunal (CCT) implement and enforce the Code of Conduct for Public Officers. The contested role of the CCT in the discipline of judges accused of violating asset declaration rules as the basis for their suspension is examined in section III: see Revised Code of Conduct for Judicial Officers of the Federal Republic of Nigeria 2016 (Code of Conduct) Preamble and Explanatory Note 1 <<https://njc.gov.ng/code-of-conduct>> accessed 22 October 2019; Judicial Discipline Regulations 2017 (Discipline Regulations) para 3(7)(8) <<https://njc.gov.ng/judicial-discipline-regulation>> accessed 22 October 2019; Constitution 5<sup>th</sup> Schedule Part I and Part II para 5 (which provides that the CJN, Justices of the Supreme Court, President and Justices of the Court of Appeal and all other judges are public officers for purposes of the Code of Conduct).

<sup>16</sup> Constitution 3<sup>rd</sup> Schedule Part I para 21(a) – (d).

<sup>17</sup> National Judicial Council, 'Profile of NJC' <<https://njc.gov.ng/profile-of-NJC>> accessed 5 October 2019.

<sup>18</sup> National Judicial Council, 'The National Judicial Policy' para 2.2.2 <<https://njc.gov.ng/national-judicial-policy>> accessed 13 August 2019.

<sup>19</sup> Constitution s 17(2)(e) and Chapter 2. This is made non-justiciable under s 6(6)(c). However, judicial 'independence and impartiality' is reaffirmed in s 36(1) though only in regard to the determination of civil suits. Thus, it is arguable that the requirements are constitutionally justiciable. See *Okogie v Attorney-General of Lagos State* [1981] NCLR 2187; *AG Ondo State v AG Federation and Ors* [2002] LPELR-623 (SC).

<sup>20</sup> Constitution 3<sup>rd</sup> Schedule Part I para 20 (a) – (j). Those not appointed by the CJN are the next most senior Justice of the Supreme Court (Deputy Chairman); President of the Court of Appeal; Chief Judge of the Federal High Court; and President, National Industrial Court of Nigeria.

Nigerian Bar Association and two persons who are not legal practitioners.<sup>21</sup> Legal practitioners on the Council only participate in the nomination of judicial appointees and are excluded from the disciplinary process.<sup>22</sup> This is said to be consistent with guaranteeing judicial independence. In fact, the establishment of the NJC, its composition and sole authority in judicial discipline reflect the intention of the framers of the constitution to ensure and preserve judicial independence.

The final decision is made by the NJC to discipline and recommend a judge for removal, either to the President regarding a federal judge, or to a State Governor in the case of a state judge.<sup>23</sup> Further, sections 158(1) and 202 of the Constitution ensure that '[i]n exercising its power to make appointments or to exercise disciplinary control over persons ... the National Judicial Council ... shall not be subject to the direction or control of any other authority or person.' In *Opene v NJC and Ors*<sup>24</sup> and *Nganjiwa v FRN*,<sup>25</sup> the Nigerian Court of Appeal reaffirmed the NJC's exclusive authority under those provisions regarding the discipline of judicial officers.

In *Opene*, the appellant who was removed from office on NJC recommendation, challenged its authority to investigate allegations of bribery and corruption. The court held that 'the various courts of the land' come under the term 'authority' to which the NJC shall not be subject in discharging its disciplinary control function,<sup>26</sup> and that in taking action on a judicial officer who is found wanting, the NJC need not wait for a Court verdict.<sup>27</sup>

Whether a sitting judge should be prosecuted before the NJC investigates allegations against him/her arose in *Nganjiwa*.<sup>28</sup> The appellant, a Federal High Court judge, was charged for behaviour tantamount to breach of his oath of office and conduct contrary to the Revised Code of Conduct which, simultaneously, were criminal offences. He challenged the jurisdiction of the High court on the ground that an NJC investigation must precede initiation of the criminal action by the Economic and Financial Crimes Commission (EFCC).<sup>29</sup> In response, the Appeal Court

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<sup>21</sup> Constitution 3<sup>rd</sup> Schedule Part I para 20 (1) – (j).

<sup>22</sup> *ibid* para 20(i).

<sup>23</sup> *Elelu-Habeeb and Anor v Attorney General of the Federation and Ors*, [2012] LPELR-SC.281/2010 [17 February 2012].

<sup>24</sup> *Opene v NJC and Ors* [2011] LPELR-4795 (CA) <<https://www.judy.legal/case/opene-v-njc-ors-appeal-2011>> accessed 12 August 2019.

<sup>25</sup> *Nganjiwa v FRN* [2017] LPELR-43391 <<http://www.wabusinessnewsng.com/doc/NGANJIWA-Vs-FRN.pdf>> accessed 14 August 2019.

<sup>26</sup> *Opene v NJC and Ors* (n 24)

<sup>27</sup> *Ibid*.

<sup>28</sup> For differences of opinion on *Nganjiwa*, especially regarding procedural appropriateness, see for example, Sahara Reporters, 'Judge Withdraws From Justice Nganjiwa's N81m Bribery Case' (*Sahara Reporters*, 22 November 2017) <<http://saharareporters.com/2017/11/22/judge-withdraws-justice-nganjiwas-n81m-bribery-case>> accessed 21 September 2019; Chioma Unini, 'The Court of Appeal was Palpably Wrong in Nganjiwa's Case, But the Decision remains the Law – Femi Falana SAN' (*The Nigeria Lawyers*, 24 January 2019) <<https://thenigerialawyer.com/the-court-of-appeal-was-palpably-wrong-in-the-nganjiwas-case-but-the-decision-remains-the-law-falana-san/>> accessed 13 September 2019.

<sup>29</sup> The Commission has power to prevent, investigate, prosecute and penalise economic and financial crimes. It has responsibility to enforce the provisions of other laws and regulations regarding economic and financial crimes. See generally, Economic and Financial Crimes (Establishment) Act 2004, ss 6 and 7 <[https://www.imolin.org/doc/amlid/Nigeria\\_EFCC\\_Act.pdf](https://www.imolin.org/doc/amlid/Nigeria_EFCC_Act.pdf)> accessed 7 September 2019.

distinguished between professional misconduct and other offences like theft, fraud and arson. It said that while government agencies can prosecute these without recourse to the NJC:

[I]f any judicial officer commits a professional misconduct within the scope of his duty and is investigated, arrested and subsequently prosecuted by security agents without a formal complaint/report to the NJC, it will be a usurpation of the latter's guaranteed powers under section 158 ..., thereby inhibiting, and interfering with and obstructing the NJC from carrying out its disciplinary control over erring judicial officers ...<sup>30</sup>

The Court emphasized that any attempted usurpation of the NJC would be a flagrant violation of the Constitution. Thus, if a judge is not taken through the NJC disciplinary process, or if vindicated by the process, that judge cannot be prosecuted for the same alleged misconduct.<sup>31</sup> One apparent reason for this is that if a judge is successfully prosecuted and incarcerated, it implies his/her removal or suspension from judicial duties, an outcome which falls under the constitutional authority of the NJC.

However, the human rights chapter of the Nigerian Constitution makes prosecution of criminal offences the exclusive preserve of courts or tribunals.<sup>32</sup> Nowhere in its provisions is the NJC disciplinary process made a condition precedent to criminal prosecution. Similarly, the Court of Appeal's distinction between professional and non-professional offences seems tenuous, given that the Code of Conduct applies to both a judge's professional and personal behaviour. Indeed, 'misconduct' under the Constitution is not restricted to a judge's professional conduct. As we shall see in Part III, the implications of the conflicting interpretations of the *Nganjiwa* case are highlighted in the trial of a former Chief Justice of Nigeria. In any case, some argue that *Nganjiwa* does not grant to judges immunity from criminal investigation. But Femi Falana – a senior lawyer in Nigeria – observes that *Nganjiwa* was a judicial protest against the special treatment accorded to certain personalities and criminal suspects by the Buhari administration in its war against corruption. He points out that the Court cited no Nigerian or other common law case on the point. Instead, it cautiously took 'judicial notice of the decision of the President of the Republic to set up a panel of inquiry to probe former [key government officials] ... As far as the Court is concerned, indicted judges deserve to be treated, in like manner, before they can be properly prosecuted in a court of law.'<sup>33</sup>

What emerges from the foregoing – which is the argument of this Chapter – is that the processes for disciplining Nigerian judges are embedded in salient socio-political factors that a strictly legal analysis will miss. Both *Opene* and *Nganjiwa* highlight whether decisions of the NJC can be challenged in court. While not directly in issue in both cases, in *Nganjiwa*, the court noted that 'if at the end of the measures taken by the NJC, anyone is aggrieved, such a person ...

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<sup>30</sup> *Nganjiwa* (n 25) 18-19.

<sup>31</sup> It is said that the Court of Appeal decision does not endorse judicial immunity but identifies conditions precedent to arresting and prosecuting judges: Daniel Iro, 'Judicial Immunity: Contextualizing *Nganjiwa* vs. FRN' (*Odujinrin & Adefulu*, Lagos, Nigeria) <<http://www.odujinrinadefulu.com/content/judicial-immunity-contextualizing-ngajiwa-vs-frn-cal969c2017>> accessed 25 August 2019; Femi Falana, 'Nganjiwa: Implications of Court of Appeal judgment' (*The Nation*, 2 January 2018) <<https://thenationonline.net/nganjiwa-implications-court-appeal-judgment-falana/>> accessed 25 August 2019.

<sup>32</sup> Constitution s 36(4).

<sup>33</sup> Falana (n 31).

may apply to Court for judicial review...<sup>34</sup> The question was more extensively considered in *Abdullahi v Governor of Kano State and Ors*,<sup>35</sup> where the appellant sought nullification of the NJC's dismissal recommendation. The court held it had no appellate, but only supervisory review power over such recommendations and processes. As such, it could not substitute its opinion 'for that of the authority constituted by law to decide the matters in question ... What the court is concerned with is the manner by which the decision being impugned was reached. It is its legality, not its wisdom that the court has to look into.'<sup>36</sup>

## ii Complaints and disciplinary procedure

All judicial discipline cases in Nigeria commence in the same way, but the result is determined by the rank of the impugned judge and the recommended disciplinary action.<sup>37</sup> The removal of a head of court must involve the executive and legislature, but removal of other judges requires only the executive acting on the recommendation of the NJC. Removal is the ultimate 'disciplinary action,' but other actions – reprimand, suspension, inclusion on a 'watch list', prohibition of nomination for appointment to a higher office – are the exclusive preserve of the NJC.<sup>38</sup>

The discipline procedure is triggered by the submission of a complaint in writing within six months from when the event or matter complained of occurred, or if it relates to a continuing state, during the ongoing state of affairs or within six months from when it ends.<sup>39</sup> The Chairman of the Council has the discretion to extend the time limit 'where there is good reason to do so.'<sup>40</sup> Complaints are addressed to the Chairman but can be submitted in different locations, including the office of the secretary to the Council and the head of court of the subject judge.<sup>41</sup> The complaint can be withdrawn at any time, either expressly or if the complainant indicates that the complaint or any information provided should not be disclosed to the subject judge.<sup>42</sup> If the Council considers that a complaint raises 'sufficiently serious' matters, it may direct that it be further considered.<sup>43</sup>

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<sup>34</sup> *Nganjiwa* (n 25) 34.

<sup>35</sup> *Abdullahi v Governor of Kano State and Ors* [2014] LPELR-23079 (CA). <<https://elibrary.youthandsport.gov.ng/public/files/books/HON.%20JUSTICE%20GARBA%20ABDULLAHI%20v.%20THE%20EXECUTIVE%20GOVERNOR%20OF%20KANO%20STATE%20&%20ORS%203rd%20day%20of%20February,%202014/HON.%20JUSTICE%20GARBA%20ABDULLAHI%20v.%20THE%20EXECUTIVE%20GOVERNOR%20OF%20KANO%20STATE%20&%20ORS%203rd%20day%20of%20February,%202014.pdf>> accessed 24 March 2020.

<sup>36</sup> *Ibid*, p. 31.

<sup>37</sup> This excepts the 'watch list procedure' which is separately provided for: Discipline Regulations (n 15) para 28.

<sup>38</sup> Discipline Regulations (n 15) para 25(1)(d)(i) – (iv).

<sup>39</sup> *ibid* paras 11(1) and 14(1). Paras 14(1) and (3)-(7) allow presenting a complaint in another form if the Council Chairman permits. Among others, the complaint must specify what happened, when and where, its nature, and relevant facts to support allegations of disability. The complainant must provide contact address, sign the complaint and depose a verifying affidavit before a Court of Record.

<sup>40</sup> *ibid*, para 12(1). If extension is refused, complainant can, within 14 days from notice of refusal, apply to the Chairman (CJN) for the Council to consider the request: *ibid*, para 12(2).

<sup>41</sup> *ibid*, para 15. When complaints are submitted to the Council Chairman or a head of court, copies are retained by recipients. The original must be forwarded to the Secretary within 7 days of receipt. It is entered into a register, a file with a serial number is assigned to it, and the Chairman instructs on how to proceed: *ibid*, para 15(3)(6)(7).

<sup>42</sup> *ibid* para 16(1)(2).

<sup>43</sup> *ibid* para 16(3).

An unwithdrawn complaint is assessed by the Council Chairman who, at his discretion, may refer it to a Preliminary Complaint Assessment Committee (PCAC), also known as the sifting committee.<sup>44</sup> The Council Chairman or the PCAC, upon review, can advise its termination or continuation of investigation.<sup>45</sup> The Regulations provide specific grounds on which the PCAC may advise dismissal or continued investigation of a complaint.<sup>46</sup> *Inter alia*, dismissal may be advised: if facts are not adequately particularized after complainant has been given reasonable opportunity to do so; if the complaint touches on the merits of a judicial decision; if the action complained of was not done by the judge; or if it borders on the judge's private life or professional conduct in a non-judicial capacity not affecting his suitability to hold judicial office.<sup>47</sup>

Once a complaint is served on the subject judge,<sup>48</sup> a reply supported with a sworn affidavit must be filed within 14 days of receipt of the complaint.<sup>49</sup> Afterwards, the reply is served on the complainant.<sup>50</sup> The Regulations are silent on whether the complainant has a right of reply to the written representation of the subject judge. After it is advised to investigate a complaint, the Council appoints an Investigation Committee (IC) of three to five of its members.<sup>51</sup> As earlier noted, though Council members include lawyers, they are constitutionally disallowed participation in disciplinary proceedings. Non-lawyer Council members are not explicitly excluded. However, the Regulations appear to limit IC membership to 'serving or retired judicial officers' who may be of a higher or same rank as the subject Judge.<sup>52</sup> In fact, Regulation 20(3) mandates that the IC Chairman 'must be of a higher Judicial rank than the subject of the disciplinary proceedings.'

Once constituted, the IC must notify the subject judge and complainant of its intention to proceed with hearing and invite them to make representations on the proposals.<sup>53</sup> Though a judge ceases to hold office, this does not terminate disciplinary proceedings.<sup>54</sup> The Regulations guarantee the complainant's right to 'produce evidence and call witnesses,' compel attendance and production of witnesses and cross examine personally or through counsel.<sup>55</sup> The Regulations are quiet on whether the subject judge has similar rights to call, compel and cross examine witnesses. However, it may be presumed that, at least, the IC possesses such power. The rules of evidence do not apply to IC hearings. At an 'appropriate stage of the investigation,' the judge and complainant may file written arguments and are allowed reasonable time to present oral

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<sup>44</sup> *ibid* para 17(2).

<sup>45</sup> *ibid* para 17(3).

<sup>46</sup> *ibid* para 18(2)(3).

<sup>47</sup> *ibid* para 18(2).

<sup>48</sup> *ibid* para 18(6).

<sup>49</sup> *ibid* para 18(7).

<sup>50</sup> *ibid* para 18(8).

<sup>51</sup> *ibid* paras 19 and 20(1).

<sup>52</sup> *ibid* para 20(3).

<sup>53</sup> *ibid* para 21 (1)(a) & (b).

<sup>54</sup> *ibid* para 22.

<sup>55</sup> *ibid* para 21(1)(e), (5) and (7). There is a subtle conflict here: if the complainant has the *right* to call witnesses and to cross-examine, the IC cannot have the *discretion* to allow or disallow oral evidence since the examination and cross-examination can only be *oral*.

arguments.<sup>56</sup> Upon completion of a hearing, the IC has the discretion to forward a copy or summary of its draft report, excluding its recommendations, to the judge and complainant and invite further representations within 14 days of notification.<sup>57</sup> The IC must complete its report within 30 days of the representations on the draft and afterward submit it to the Council.<sup>58</sup> Among others, the report must include a statement of the votes through which it was adopted and signed by every IC member.<sup>59</sup> If a member dissents, a separate dissent statement shall be provided.<sup>60</sup> As an interim measure or final decision, the Council may suspend the judge from performing judicial functions.<sup>61</sup>

The law is settled that the NJC has no power to dismiss or compulsorily retire a judge. However, its disciplinary powers include suspension which may be a challenge to exercise in some scenarios, including: where the NJC suspends a judge but the appointing authority – President or State Governor – refuses to act on the recommendation, what are the implication(s)? Can a judge be suspended by the NJC in perpetuity? This question was addressed in *NJC v Aladejana* and *Bamisile v NJC and Ors*.<sup>62</sup> In both cases, the executive and legislature refused to act on the NJC’s recommendation. In *Aladejana*,<sup>63</sup> the court concluded that ‘rejection of the appellant’s recommendation by the Governor ... did not affect the suspension’ of the judge.<sup>64</sup> In *Bamisile*, the court held that the NJC acted *ultra vires* when it construed the suspension of the judge to mean that he ceased to be on the NJC’s payroll and no longer a serving judge, but it refused to annul his suspension. As a matter of practice, when removal is recommended, the judge is placed on ‘suspension until further notice.’ Based on the above decisions, a suspension is not terminated even if it is rejected by other arms of government.<sup>65</sup> Arguably, there are at least two ways to interpret these decisions. First, the power to perpetually suspend undermines the constitutional check and balance which requires the involvement of other arms of government. Second, cases like *Aladejana* and *Bamisile* reflect the dynamics of wider socio-political realities; in particular, they illustrate the complexity of disciplining where this is entwined with the interests of politicians. Thus, the NJC ultimately affirms judicial independence when it refuses to lift suspension where investigation reveals abuse of judicial office to benefit political interests.

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<sup>56</sup> *ibid* para 21(7). The Regulations do not define ‘appropriate stage,’ meaning that written and oral arguments could come during or at the end of the proceeding.

<sup>57</sup> *ibid* para 23(1).

<sup>58</sup> *ibid* para 23(2)(3).

<sup>59</sup> *ibid* para 23(4). The report must also include facts found on each allegation; whether the case is substantiated or not; if substantiated, the kind of misconduct or disability found; whether disciplinary action should be taken and what it should be; and findings regarding other matters in the terms of reference.

<sup>60</sup> *ibid*

<sup>61</sup> See Jiti Ogunye, ‘Justice Salami’s Suspension by the NJC is Illegal and Unconstitutional’ (*Sahara Reporters*, 20 August 2011) <<http://saharareporters.com/2011/08/20/justice-salami%E2%80%99s-suspension-njc-illegal-and-unconstitutional>> accessed 28 August 2019. The issue was laid to rest in *NJC and Ors v Aladejana and ors* [2014] NSCC 447. The court held NJC lacks power to dismiss or compulsorily retire a judge, but suspension is part of its disciplinary powers.

<sup>62</sup> *NJC v Aladejana and Bamisile v NJC and Ors* [2012] LPELR-8381 (CA).

<sup>63</sup> *Aladejana* (n 61).

<sup>64</sup> *ibid*

<sup>65</sup> *ibid*. Yahaya JCA’s supporting judgment was even more explicit: if a body has the power to suspend and another has the power to dismiss, the refusal of the latter to exercise its power ‘will not affect the power of that body to suspend the officer.’

If a case is wholly or partially substantiated by the IC, but found not to be grave, it can be dealt with informally by the Council Chairman or his delegate.<sup>66</sup> The Council may also censure, reprimand, or direct that the judge be put on a ‘watchlist’ or prohibit his/her nomination for appointment to a higher judgeship for a specified period or permanently.<sup>67</sup> The Council may place on the watchlist a judge whose ‘performance has consistently fallen below standard’ or who habitually disregards the code of conduct.<sup>68</sup> A judge proposed by the Council for the watchlist must provide representation within 14 days of notification.<sup>69</sup> For as long as a judge’s name remains on the list, the Council may refuse to have him/her considered for a higher judgeship.<sup>70</sup>

While the Regulations do not address whether disciplinary proceedings are open to the public, in practice, they are conducted *in camera*. The Council may publish the information about, or its decision regarding, a disciplinary proceeding.<sup>71</sup> However, policy forbids leaking or publishing allegations of misconduct and, investigation or decision implementation will cease if a complaint is ‘leaked or discussed in the media.’<sup>72</sup>

As discussed above, ‘removal’ is the ultimate penalty for judicial misconduct. However, there is a process-distinction between the removal of heads of courts (for example, the Chief Justice of Nigeria (CJN) and the Chief Judge of a State) and other judges. A head of court can only be removed by the President or State Governor acting on ‘an address’ supported by two-thirds majority of the Senate or the House of Assembly of the State.<sup>73</sup> Other judges can, however, be removed by the President or Governor simply by acting on the recommendation of the NJC.<sup>74</sup> As to removing heads of court, there is no express requirement for the NJC’s recommendation. The provision only demands ‘an address’ without stipulating what this means or from whence it should emerge. The Supreme Court of Nigeria (SCN) sought to clarify this in *Elelu-Habeeb and Anor v Attorney General of the Federation and Ors*.<sup>75</sup> Here, a State Governor notified the House of Assembly that he had investigated the Chief Judge (appellant) and found her guilty. The House subsequently removed the appellant without hearing her representation. The government argued that the Constitution ascribed no role to the NJC in the removal of the Chief Judge. Rejecting this view, the SCN held that read together, section 292(1)(a)(ii) and paragraph 21(c) and (d) of Part 1 of the 3<sup>rd</sup> Schedule of the Constitution,<sup>76</sup> mandate the NJC’s

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<sup>66</sup> The parameters for determining the graveness or otherwise of the case is not stated. Nor is it clear what an ‘informal treatment’ entails: Discipline Regulations (n 15) para 25(1)(c).

<sup>67</sup> *ibid* para 25(1)(d)(i)(iii)(iv).

<sup>68</sup> *ibid* para 28(1)(b)(c).

<sup>69</sup> *ibid* para 28(4).

<sup>70</sup> *ibid* para 28(3).

<sup>71</sup> *ibid* para 27.

<sup>72</sup> National Judicial Policy (n 18) paras 2.2.4 – 2.2.6. Consistent with the Discipline Regulations, a public disclosure of the investigation findings is allowed subject to ‘following the proper channels for such disclosure:’ *ibid* para 2.2.9.

<sup>73</sup> Constitution s 292 (1)(a)(i)-(ii).

<sup>74</sup> Constitution s 292 (1)(b).

<sup>75</sup> *Elelu-Habeeb and Anor v Attorney General of the Federation and Ors* [2012] 13 NWLR (Pt 1318) 423.

<sup>76</sup> Paras 21(c) and (d) authorize the NJC to recommend to Governors to appoint or remove judges. However, section 292(1)(a)(ii) provides that the ‘Chief Judge of a State, Grand Kadi of a Sharia Court of Appeal or President of a Customary Court of Appeal of a State’ shall only be removed ‘by the Governor acting on an address supported by two-thirds majority of the House of Assembly of the State.’

participation in the removal of a chief judge.<sup>77</sup> The nuances of this provision are examined in Part III.

## II Complaints and judicial discipline in Nigeria: statistical trends<sup>78</sup>

Since its reconstitution in 1999 and full operationalization in 2000, the NJC has investigated 941 complaints with about 22 of them pending. However, judges were only indicted and penalized in about 129 of the 919 concluded cases. The levels of court represented by the subject judges are shown in Table 1 below.

Table 1

<b>Court</b>	<b>Number of Complaints</b>
Supreme Court	37
Court of Appeal	91
Federal High Court	141
National Industrial Court (NIC)	12
High Court of the Federal Capital Territory (FCT)	38
Sharia Court of Appeal of the FCT	-
Customary Court of Appeal of the FCT	-
High Court of States	591
Sharia Court of Appeal of States	5
Customary Court of Appeal of States	4
<b>Total</b>	<b>919</b>

Table 1 shows that more complaints have been initiated against judges in the State High Courts than in any other superior court. The Federal High Court comes a distant second. The State High Courts and the Federal High Court have the largest number of judges and are courts of first instance. Thus, more than any other level of court, these entertain the largest number of cases and litigants.<sup>79</sup> There seems to be a correlation between the number of judges per court, the volume and nature of cases entertained and, the rate of alleged misconduct. For example, Sharia Court of Appeal and Customary Court of Appeal judges have the least number of misconduct cases, although every state has at least one of both courts. Compared to State and Federal High Courts, the few cases initiated in these courts focus on religious and cultural issues pursued by litigants of generally low educational and economic standing. These features directly impact the prospect of complaints of judicial misconduct that may be triggered by this class of litigants. To an extent, this correlation between number and nature of cases vis-à-vis the rate of misconduct complaints also applies to the NIC. Compared to the State and Federal High Courts, the NIC has

<sup>77</sup> *Elelu-Habeeb* (n 23).

<sup>78</sup> The data referenced in this section come from the National Judicial Council Secretariat as at 23 January 2019.

<sup>79</sup> Each of Nigeria's 36 states has a State High Court with various divisions and units and, there is at least one Federal High Court in every state. The various courts also have extensive jurisdiction. For example, whereas the NIC is limited to labour related matters, the FHC has both civil and criminal jurisdiction over subjects ranging from banking to admiralty: Constitution ss 251 and 254C.

fewer judges and entertains fewer cases limited to labour and employment matters often initiated by dissatisfied employees with limited financial ability to engage with a complicated disciplinary process.<sup>80</sup>

In sum, that the courts with limited jurisdictions (NIC, Customary and Sharia Courts of Appeal) generate fewer misconduct complaints might have less to do with the integrity of the judges and more to do with the social, economic and educational capacities of litigants as well as the kinds of cases initiated before these courts. Although judicial misconduct cases in the Supreme Court (37) are less than in the Court of Appeal (91), the Supreme Court has a higher ratio of misconduct cases initiated against its justices.<sup>81</sup>

As to outcomes, a range of disciplinary measures can be issued by the NJC. Indictments and punishments ranging from dismissal to advice have been issued against judges in State, Federal and National Industrial Courts. Table 2 captures these as between 2000 and 2018.

Table 2

<b>Decision</b>	<b>Number of Complaints</b>
Reprimand	51
Compulsory Retirement	50
Dismissal	17
Watchlist	5
Caution	3
Suspension	2
Advice	1
<b>Total</b>	<b>129</b>

Table 2 indicates that the NJC may prefer compulsory retirement to dismissal. The NJC adopted ‘suspension’ in 2001 in response to executive tardiness in taking action on its recommendations. The NJC was particular about ‘instances ... when some Judicial Officers were recommended for removal from office, but the Executive did not approve the recommendation immediately, until some years later and *the Judges continued to sit in court during that period...*’<sup>82</sup> Delayed executive action is a major signal of how complicated it is to discipline judges in Nigeria. Suspension is without prejudice to any investigation or criminal proceeding pending against a judge.

As a disciplinary penalty, ‘compulsory retirement’ is not recognized in the Constitution. Even so, where a judge is compulsorily retired, they receive their pension and other benefits, whereas dismissed judges cannot claim these. It is not clear what determines recommending compulsory retirement in some cases and dismissal in others. This concern is pertinent to the nature and weight of the professional misconduct and allegations of corruption against which the disciplinary measure recommended by the NJC may be pegged. For example, in 2017, two

<sup>80</sup> Constitution s 254(C).

<sup>81</sup> Currently, there are 16 Supreme Court Justices and over 100 Court of Appeal judges in over 16 divisions across the country.

<sup>82</sup> Nigeria Civil Society Situation Room (n 4) 1, 9 (emphasis added).

judges were recommended for compulsory retirement – one for failure to deliver judgment within the constitutionally prescribed 90 days after taking final addresses,<sup>83</sup> and the other for providing misleading representations regarding his qualification for judicial appointment.<sup>84</sup> Two 2018 cases resulted in the dismissal of judges indicted for corruption, financial crime and false pretences.<sup>85</sup> These seem to indicate that the NJC recommends dismissal for corruption, bribery and financial impropriety, and compulsory retirement for less heinous offences like tardiness in delivering decisions.<sup>86</sup> A review of cases determined between 2016 and 2018 shows that the most common complaints against Nigerian judges include bribery, failure to deliver judgments on time, unjustified grant of *ex parte* orders, alteration of judgements *suo motu*, and making unwarranted utterances.<sup>87</sup> Less clear are the differences between, and the implications of reprimand, caution and advice as disciplinary measures.

Despite the significant number of complaints, the NJC's disciplining of judges is far from satisfactory. Allegations of corruption in various forms against judges are common and justice administration elicits little confidence. Added to the NJC's 'wrist-slap' approach to punishment, the integrity of the judicial discipline process is very low. The mismatch between the number of complaints and the number of judges compulsorily retired and dismissed indicates that the discipline of Nigerian judges is not just a matter for the law. The deficit highlights the importance of accounting for the socio-political contexts of disciplining judges in Nigeria. The recent suspension and eventual 'voluntary retirement' of the former CJN, WSN Onnoghen, examined in the next section, further illustrates this point.

### III Socio-politics and judicial discipline in Nigeria: the cases of Justice Ngwuta and Chief Justice Onnoghen

The suspension and removal Nigeria's former Chief Justice illustrates the complex socio-political realities that underlie the process. This is the first time a Chief Justice of Nigeria has been put through a disciplinary process. However, it is not the first time that the executive extended its anti-corruption crusade to Nigeria's Supreme Court.

In 2016, Justice Sylvester Ngwuta and seven other judges had their residences raided on suspicion of corruption and money-laundering. The raids and arrests carried out by the

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<sup>83</sup> Constitution s 294(1).

<sup>84</sup> Justice AFA Ademola, among others, failed to deliver judgment on time. Before being recommended for compulsory retirement, he volunteered to retire (which was refused). Justice O Tokode was indicted for falsely claiming to have conducted six judgments (required for appointment as a High Court Judge). See NJC, 'Press Release' (7 December 2017) <[https://admin.njc.gov.ng/assets/press-release/njc\\_press\\_release.pdf](https://admin.njc.gov.ng/assets/press-release/njc_press_release.pdf)> accessed 24 August 2019.

<sup>85</sup> Justices RN Ofili-Ajumogobia (FHC) and James Agbadu-Fishim (NIC) were indicted and recommended for dismissal: NJC, 'Press Release' (4 October 2018) <<https://admin.njc.gov.ng/assets/press-release/NJC%202018%20PRESS%20RELEASE%20of%203rd%20October.pdf>> accessed 24 August 2019.

<sup>86</sup> This conclusion is supported, for instance, by the NJC's decisions in 2016. A judge was indicted for not delivering judgment for over 23 months after final address. Subsequently, the judgement was altered by the court registrar. He was recommended for dismissal. Another judge recommended for dismissal had made a 'blanket order' regarding an unascertained amount in a probate matter and directed that the money be paid into a lawyer's personal account: NJC, 'Press Release' (16 December 2016) <<https://admin.njc.gov.ng/assets/press-release/NationalJudicialCouncil-3.pdf>> accessed 24 August 2019.

<sup>87</sup> See (n 78) above.

Department of Security Services as part of President Buhari's anti-corruption campaign,<sup>88</sup> drew wide condemnation across Nigeria. The NJC 'expressed grave concern' and 'condemned the action in its entirety.'<sup>89</sup> The Nigerian Bar Association (NBA) called it a 'gestapo' operation,<sup>90</sup> though other lawyers accused the Association of shielding corrupt judges.<sup>91</sup> Femi Falana was blunt:

... the Nigerian Bar Association which has information on all corrupt judges and lawyers in the country has continued to shield them to the embarrassment of incorruptible members of the bar and the bench ... It is on the record that when both the Independent Corrupt Practices and other Offences Commission and the Economic Crimes Commission [sic] sent invitation letters to judges suspected of corruption they had rushed to the Federal High Court to obtain interlocutory injunctions to prevent their arrest, investigation and prosecution.<sup>92</sup>

The NBA denies this allegation.<sup>93</sup> The then CJN, Mahmud Mohammed, saw the exercise as 'illegal and unconstitutional ... a threat to [judicial] independence ... aimed at intimidating the judiciary and the legal profession ... totally unacceptable in a democratic society... unacceptable against private citizens ... [and] more so against serving justices of superior courts.'<sup>94</sup> The subject justices were arraigned and granted bail. Justice Ngwuta's lawyers argued that the pre-conditions for laying charges against their client, as per the Court of Appeal decision in *Nganjiwa*, were not met. The Federal High Court agreed and cleared him of the fraud and money laundering charges.<sup>95</sup> The CCT also said the false asset declaration charge preferred against

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<sup>88</sup> The security agency 'seized \$800,000 in cash' in the raids: 'Nigerian Supreme Court judge charged with corruption' (*BBC News*, 21 November 2016) <<https://www.bbc.com/news/world-africa-38053755>> accessed 25 August 2019. In response to the raid and arrests, the NJC put out in 'Nigeria Civil Society Situation Room' (n 4) that it: had received no petition or complaint against Ngwuta and Inyang Okoro (SCN); had suspended Muhammed Ladan Tsamiya (CA) for demanding bribe and had recommended his compulsory retirement to the President; had suspended Justice IA Umezulike for gross misconduct and had recommended his compulsory retirement to the Enugu State Governor; was investigating AFA Ademola (FHC) on corrupt practices allegations; had suspended Kabiru Auta (Kano State High Court) and recommended him to the Governor for dismissal; had investigated and cleared Muazu Pindiga (Gombe State High Court) of allegations of corrupt practices filed by the Department of Security Services; had just constituted a Fact Finding Committee to investigate corrupt practices and professional misconduct allegations against Justice Nnamdi Dimgba.

<sup>89</sup> Nigeria Civil Society Situation Room (n 4) 1, 2.

<sup>90</sup> 'Nigeria seizes \$800,000 in 'anti-corruption raids' on judges' (*BBC News*, 9 October 2016) <<https://www.bbc.com/news/world-africa-37603857>> accessed 25 August 2019.

<sup>91</sup> Ade Adesomoju, 'Falana slams NBA, says shielding of corrupt judges embarrassing' (*Punch*, 9 October 2019) <<https://punchng.com/falana-condemns-nbas-demand-for-unconditional-release-of-arrested-judges/>> accessed 25 August 2019.

<sup>92</sup> *ibid*

<sup>93</sup> Ade Adesomoju, 'DSS never invited arrested judges before raids, says NBA' (*Punch*, 14 October, 2016) <<https://punchng.com/dss-never-invited-arrested-judges-raids-says-nba/>> accessed 28 August 2019.

<sup>94</sup> Oludare Richards, 'CJN condemns judges' arrest', (*The Guardian*, 11 October 2016) <<https://guardian.ng/news/cjn-condemns-judges-arrest/>> accessed 25 August 2019.

<sup>95</sup> 'Court Acquits Justice Ngwuta of Corruption Charges' (*Channels Television*, 23 March 2018) <<https://www.channelstv.com/2018/03/23/court-acquits-justice-ngwuta-of-corruption-charges/>> accessed 25 August 2019.

Justice Ngwuta by the Federal Government was incompetent and discharged it,<sup>96</sup> noting that the NJC reserved the right to discipline a serving judge.<sup>97</sup> Following this raid, the NJC published the data of petitions and complaints it had received since its inauguration in 2000, as well as the investigative and, where relevant, disciplinary actions taken in furtherance of the petitions. The NJC did this to dispel the notion that ‘it is shielding corrupt Judicial Officers that have been petitioned from being arrested and prosecuted.’<sup>98</sup>

Regarding former CJN Walter Onnoghen, the following discussion is not about the correctness or otherwise of his removal process based upon allegations that he had failed to disclose assets. It is about its context, the intricate and contested relationship between Nigeria’s executive and judiciary as it plays out in disciplining judges. First, a request to remove the head of a court, such as the CJN, requires a two-thirds Senate majority approval.<sup>99</sup> Second, though there was no precedent for the CJN’s removal, the Court of Appeal decision in *Nganjiwa* – that the NJC must complete its processes before a judge is investigated by other competent agencies – had split scholarly opinion on the steps to follow if a judge is accused of a criminal offence. Third, Nigeria’s presidential election was weeks away when the CJN was suspended. Latching on to this, opposition parties accused the ruling party of assaulting, intimidating and interfering with the judiciary and undermining separation of powers. It should be noted that regarding presidential elections, the CJN participates in constituting memberships of the tribunals that adjudicate election disputes arising at various levels. The CJN could also preside over a presidential election dispute if an aggrieved party appeals to the Supreme Court.<sup>100</sup> Fourth, if the reason for initially suspending the CJN was his failure to fully disclose his assets, it is not clear why he was urgently arraigned before the CCT, given that as one way to monitor wrongdoing, the law requires senior civil and government officials to declare their assets before taking office.<sup>101</sup> Further, the executive had consistently accused the judiciary of corruption and frustrating its anti-corruption agenda, particularly by reversing lower court convictions of opposition politicians.<sup>102</sup> In this charged atmosphere preceding the Presidential election, the motivation for Justice Onnoghen’s suspension<sup>103</sup> elicited a range of explanations from legal

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<sup>96</sup> ‘Nigeria Supreme Court judge ‘cleared’ of corruption charges’, (*Premium Times*, 15 May 2018) <<https://www.premiumtimesng.com/news/top-news/268535-nigeria-supreme-court-judge-cleared-of-corruption-charges.html>> accessed 25 August 2019.

<sup>97</sup> *ibid*

<sup>98</sup> Nigeria Civil Society Situation Room (n 4) 8.

<sup>99</sup> Constitution s 292(a).

<sup>100</sup> Nigeria’s main opposition party argued that suspension of the CJN was part of an overall plan to influence the constitution of the election tribunals to favour the ruling party: Success Nwogu, ‘Swearing-in of election tribunal members, a nullity – PDP’ (*Punch*, 26 January 2019) <<https://punchng.com/swearing-in-of-election-tribunal-members-a-nullity-pdp/>> accessed 25 August 2019.

<sup>101</sup> Constitution, 5<sup>th</sup> Schedule Part 1 para 11, mandates every public officer to declare properties, assets and liabilities. For more on the charge against Justice Onnoghen, see Samuel Ogundipe, ‘The Full Corruption Charges against Chief Justice Walter Onnoghen’ (*Premium Times*, 12 January 2019) <[https://www.premiumtimesng.com/news/headlines/305388-exclusive-the-full-corruption-charges-against-chief-justice-walter-onnoghen.html?fbclid=IwAR0iOQk\\_nlhZ\\_XYvvdEZLk-l2NBCHczvu\\_4mCttiXA0F4bLToyylfHktQ-M](https://www.premiumtimesng.com/news/headlines/305388-exclusive-the-full-corruption-charges-against-chief-justice-walter-onnoghen.html?fbclid=IwAR0iOQk_nlhZ_XYvvdEZLk-l2NBCHczvu_4mCttiXA0F4bLToyylfHktQ-M)> accessed 28 September 2019.

<sup>102</sup> Olalekan Adetayo, ‘Anti-corruption war: Judiciary, my main headache, says Buhari’, (*Punch*, 1 February 2016) <<https://punchng.com/anti-corruption-war-judiciary-my-main-headache-says-buhari/>> accessed 26 September 2019.

<sup>103</sup> The ruling All Progressive Congress (APC) saw the suspension as fighting corruption, arguing that the opposition People’s Democratic Party too quickly defended corruption. The PDP countered that the APC presidential candidate (the sitting President) had taken the law into his own hands.

practitioners, the NBA and academics.<sup>104</sup> They all questioned the CJN's speedy trial, alleging failure of due process in doing so. Many believed the executive simply set out to attack the judiciary's integrity.

Another important factor in the Onnoghen saga is Nigeria's geo-politics.<sup>105</sup> His initial confirmation as CJN was embroiled in claims of marginalization by governors of the South-South states and allegations of delay by the Presidency. Justice Onnoghen is the first Southerner of South-South extraction to hold the office of CJN in 30 years leading to his appointment.<sup>106</sup> These states host the major oil-producing communities of Nigeria.<sup>107</sup> Being the stronghold of the opposition, their governors encouraged Onnoghen to ignore CCT summons.<sup>108</sup> It was alleged that the President – from the North – was not disposed to confirm his appointment notwithstanding months of Senate support.<sup>109</sup> In fact, the Vice-President – from the South-West – acting as President when the President was away on medical treatment, initiated Onnoghen's confirmation.<sup>110</sup>

In the midst of the foregoing, on 25 January 2019, the President suspended the CJN and swore in the next most senior Justice of the Supreme Court, Mohammed Tanko, as acting CJN.<sup>111</sup> He did this on an *ex parte* order from the CCT that the CJN had breached assets declaration rules. However, with various petitions filed<sup>112</sup> against the ousted and acting CJN, the latter could not preside over the NJC. Under an interim chairman, the NJC constituted a five-person Preliminary Complaints Assessment Committee to decide the petitions against both judges. The panel's report has not been published due to the 'sensitive nature' of the case. However, the NJC noted that Justice Onnoghen's alleged failure to declare assets was *sub-judice* and did not motivate the action against him.<sup>113</sup>

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<sup>104</sup> Joseph Otteh, 'Prosecution of CJN Onnoghen at this time raises red flags' (*Vanguard*, 14 January 2019) <<https://www.vanguardngr.com/2019/01/prosecution-of-cjn-onnoghen-at-this-time-raises-red-flags-otteh/>> accessed 28 September 2019.

<sup>105</sup> Nigeria has six geo-political zones: North-West, North-East, North-Central, South-West, South-East and South-South. Each is divided along relatively similar cultural and ethnic nationality lines with shared histories.

<sup>106</sup> Leke Baiyewu, 'Senate confirms Onnoghen, South gets CJN after 30 years' (*Punch*, 2 March 2017) <<https://punchng.com/onnoghen-breaks-30-year-old-jinx-emerges-cjn/>> accessed 28 August 2019.

<sup>107</sup> Adamu Abuh et al, 'Niger Delta Agitators Threaten Attacks over Onnoghen's Ordeal' (*The Guardian* republished on *AllAfrica*, 14 January 2019) <<https://allafrica.com/stories/201901140063.html>> accessed 27 August 2019.

<sup>108</sup> Chukwudi Akasike et al, 'Ignore CCT Summons, South-South govts tell CJN' (*Punch*, 14 January 2019) <<https://punchng.com/ignore-cct-summons-ssouth-govts-tell-cjn/>> accessed 27 August 2019.

<sup>109</sup> Seun Opejobi, 'Why we are delaying Justice Onnoghen's confirmation – Presidency' (*Daily Post*, 2 February 2017) <<https://dailypost.ng/2017/02/02/delaying-justice-onnoghens-confirmation-presidency>> accessed 30 August 2019.

<sup>110</sup> Anthony Ogbonna, 'Osinbajo nominates Onnoghen as substantive Chief Justice of Nigeria' (*Vanguard*, 8 February 2017) <<https://www.vanguardngr.com/2017/02/osinbajo-nominates-onnoghen-substantive-chief-justice-nigeria>> accessed 23 September 2019.

<sup>111</sup> John Ameh, 'Buhari Suspends Onnoghen, Appoints Tanko Muhammed' (*Punch*, 25 January 2019) <<https://punchng.com/breaking-buhari-suspends-onnoghen-appoints-tanko-muhammed/>> accessed 2 October 2019.

<sup>112</sup> They were filed by the Anti-Corruption and Research-Based Data Initiative, its Executive Director (Dennis Aghanya), a former NBA President (Olisa Agbakoba) and the Economic and Financial Crimes Commission.

<sup>113</sup> 'Press Release: NJC Decides on the Report of the Five-man Committee set up to Investigate Petitions against Hon. Mr. Justice W.S.N. Onnoghen, GCON and Hon. Mr. Justice I.T. Muhammad, CFR.' (3 April 2019) <<https://admin.njc.gov.ng/assets/press-release/PRESS%20RELEASE%20of%203RD%20APRIL,%202019.pdf>> assessed 6 September 2019.

So, unsurprisingly, on 10 June 2019, the NJC took note of the ‘voluntary retirement of Hon. Justice W.S.N Onnoghen ... as the Chief Justice of Nigeria.’ The NJC said Justice Onnoghen’s decision concluded its deliberations, except to ‘[thank] the President for the acceptance which was in the best interest of Nigeria.’<sup>114</sup> Though Justice Onnoghen’s alleged misconduct remained *sub-judice*, these decisions were unsurprising because, otherwise, the matter threatened Nigeria’s political stability. It also appears that Justice Onnoghen agreed to retire voluntarily to avoid further disciplinary proceedings against him. As well, that the judiciary would face embarrassment *via* litigation of his removal<sup>115</sup> made a political resolution preferable in this contest of political will between the states and the federation.<sup>116</sup>

Another core contention was whether the CJN or, indeed, any judge can be prosecuted before the CCT.<sup>117</sup> It bears emphasizing that like the NJC, the CCB which exercises disciplinary control over public officers through the CCT, is constitutionally established and also enjoys ‘exclusive’ disciplinary power under section 158 of the Constitution.<sup>118</sup> In this context, the suspension of the CJN can be distinguished from *Nganjiwa* where the prosecuting government agency is not recognized under section 153 or 158 of the Constitution. Nevertheless, Chief Justice Onnoghen’s lawyers contended that the federal government violated the *Nganjiwa* precedent that any misconduct regarding judicial office or functions must first be reported to and investigated by the NJC, and only after its findings may a prosecuting federal agency initiate a criminal action.

The issue is complicated by the fact that, among others, the CCT can order the ‘vacation of office’ of the impugned judge.<sup>119</sup> However, the Constitution is clear on the procedure for removing a judge. As well, the Supreme Court decided in *Elelu-Habeeb v AGF*<sup>120</sup> that the NJC is the first port of call in that situation. The CCT has no constitutionally recognized role in the removal of a judge. Indeed, in the early days of the trial, Justice Onnoghen did not appear before the CCT, arguing that it lacked the jurisdiction to try him.<sup>121</sup> Furthermore, the *generalia*

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<sup>114</sup> National Judicial Council, ‘NJC Meets to Formally Note the Acceptance by President Buhari of the Voluntary Retirement of Hon. Mr. Justice W.S.N. Onnoghen, GCON’ (10 June 2019) <<https://njc.gov.ng/17/news-details>> accessed 6 September 2019.

<sup>115</sup> It appears the government’s motivation to prosecute the CJN shortly before the general elections on 16 February and 2 March 2019, was to intimidate the judiciary, the likely final arbiter of the poll. See ‘Onnoghen: Presidency Plotting to Annex Judiciary – PDP’ (*Vanguard*, 12 January 2019) <<https://www.vanguardngr.com/2019/01/onnoghen-presidency-plotting-to-annex-judiciary-pdp/>> accessed 27 August 2019; Godwin Aliuna, ‘CJN Onnoghen: Buhari Trying to Return Nigeria to Dictatorship – Ex-Attorney General’ (*Daily Post*, 14 January 2019) <<http://dailypost.ng/2019/01/14/cjn-onnoghen-buhari-trying-return-nigeria-dictatorship-ex-attorney-general/>> accessed 26 August 2019.

<sup>116</sup> Diego Garcia-Sayan, ‘Judicial independence under threat in Nigeria, warns UN rights expert’ (*UN News*, 11 February 2019) <<https://news.un.org/en/story/2019/02/1032391>> accessed 13 September 2019.

<sup>117</sup> The Nigerian Bar Association argued that the CCT has no jurisdiction beyond *Nganjiwa* (n 25). Others think the decision is limited to a judge’s adjudicatory capacity. See ‘Nigerian Bar Association says Onnoghen’s trial, an Assault on the Judiciary’ (*pulse.ng*, 13 January 2019) <<https://www.pulse.ng/news/local/nigerian-bar-association-says-onnoghens-trial-an-assault-on-the-judiciary/3200dvg>> accessed 14 September 2019.

<sup>118</sup> Constitution s 153(1)(a).

<sup>119</sup> Code of Conduct Bureau and Tribunal Act (CBTA), Cap C15 Laws of the Federation of Nigeria (LFN) 2004, s 23(2) (a). The charge against the CJN included this section as one of the penalties sought.

<sup>120</sup> *Elelu-Habeeb* (n 23).

<sup>121</sup> See Ikechukwu Nnochiri et al, ‘Onnoghen to CCT: You can’t try me’ *Vanguard*, 15 January 2019) <<https://www.vanguardngr.com/2019/01/onnoghen-to-cct-you-cant-try-me/>> accessed 12 September 2019.

*specialibus derogat* rule applies here: while the CCT has general disciplinary jurisdiction over public officers, the NJC has specific disciplinary jurisdiction over judges, and so the specific should override the general.<sup>122</sup> However, this does not mean that the Code of Conduct for Public Officers will not apply to judges. In fact, the Constitution impliedly permits the NJC to investigate its breach and, on that basis, recommend removal to the President or Governor.<sup>123</sup> Thus, the NJC has jurisdiction to investigate the alleged breach of the Code of Conduct by the CJN. Recall that for lack of jurisdiction, the CCT had dismissed a similar allegation of ‘failure to declare assets’ against Justice Ngwuta of the Supreme Court.<sup>124</sup>

The CJN’s prosecution also renewed the debate whether a judge can be suspended by the President or Governor without NJC involvement. That suspension is not explicitly mentioned in the Constitution has generated conflicting views.<sup>125</sup> Those who support the President’s power to suspend, argue that it derives from his power to appoint.<sup>126</sup> However, the Interpretation Act relied on for this argument applies only if there are no relevant statutory provisions.<sup>127</sup> For one, the Constitution is clear that the NJC’s disciplinary control over judges is beyond interference from any state agency. As well, that suspension is an exercise of disciplinary control is supported by the Court of Appeal in *NJC & Ors v Aladejana*.<sup>128</sup> There, the House of Assembly suspended and then replaced a State Chief Judge over disagreement by the State legislative assembly with the composition of a panel the Chief Judge established for the impeachment of the State Governor.<sup>129</sup> The NJC sanctioned and suspended the replacement judge. When its power to suspend was challenged, the court ruled it belongs to the NJC as an exclusive disciplinary power that cannot be interfered with, directed or controlled by any other authority or person.<sup>130</sup> Thus, even if we adopt the ‘appointment’ argument, it is clear the President possesses no sole constitutional power of appointment, given the Supreme Court had affirmed in *Elelu Habeeb v AGF* that the NJC has a role in the appointment of judges.<sup>131</sup> At best, the President can only exercise derivative power to suspend, but jointly with the NJC and the Senate. Therefore, it would follow that a President or Governor cannot singlehandedly suspend a judge.<sup>132</sup>

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<sup>122</sup> See generally *Martin Schroder and Co. v Major and Co. (Nig.) Ltd* [1989] LPELR-1843 (SC).

<sup>123</sup> Constitution s 292(1)(b).

<sup>124</sup> See *Channels Television* (n 95) and *Premium Times* (n 96). The CCT premised its decision on *Nganjiwa*.

<sup>125</sup> In support of the President’s power to suspend, see John Chuks Azu, ‘President Buhari’s suspension of CJN Onnoghen legal, constitutional – Lawyer’ (*Daily Trust*, 26 January 2019) <<https://www.dailytrust.com.ng/president-buharis-suspension-of-cjn-onnoghen-legal-constitutional-lawyer.html>> accessed 26 August 2019. For a contrary view, see Femi Falana, ‘Illegal Suspension of Chief Justice Walter Onnoghen’ (*Vanguard*, 26 January 2019) <<https://www.vanguardngr.com/2019/01/illegal-suspension-of-chief-justice-walter-onnoghen-by-femi-falana/>> accessed 26 August 2019.

<sup>126</sup> This argument is premised on section 11 of the Interpretation Act, Cap I23, LFN 2004, which provides that a statutorily conferred power to appoint includes the power to remove or suspend. Section 318(4) of the Constitution says recourse must be made to the Interpretation Act for interpreting its provisions.

<sup>127</sup> See *Oke and Ors v Atoloye and Ors* [1985] LPELR-2424 (SC).

<sup>128</sup> *Aladejana* (n 62).

<sup>129</sup> *ibid*

<sup>130</sup> *ibid*

<sup>131</sup> *Elelu-Habeeb* (n 23).

<sup>132</sup> It may be noted that the Code of Conduct Tribunal Chairman who issued the *ex parte* suspension order against Onnoghen CJN, Danladi Umar, was himself indicted for corruption and bribery by Festus Keyamo, a President Buhari supporter, now Minister of State for Labour. It is insinuated that the Tribunal’s ‘contribution’ to the exit of the ex-CJN was a *quid pro quo* to softly land its Chairman, Danladi Umar: Eze Onyekpere, ‘Umar, Code of Conduct Tribunal

After the political dust storm stirred by Justice Onnoghen's suspension had settled, the CCT convicted him of false declaration of assets for failing to disclose money he held in foreign bank accounts. He was also banned from holding public office for ten years. His appeal against conviction was overtaken by his resignation on the heels of the NJC recommendation for his compulsory retirement. Some lawyers believe his resignation was an escape strategy. Others think it was in the interest of the judiciary and should have come earlier.<sup>133</sup>

Following his voluntary resignation and its acceptance by the President, Onnoghen CJN was deemed to have retired and was, therefore, entitled to his full pension and retirement package. This he would have forfeited had he been dismissed.

#### IV Concluding remarks

As shown, the discipline process for Nigeria's judges is complicated by socio-political and cultural factors. This is seen not only in the jostle between the NJC and the executive over this process. As well, the executive has often failed to follow a fair process in its charges against allegedly corrupt judges, as *Ngwuta's* case illustrates. In others highlighted by that of Onnoghen CJN, diplomacy and political intrigue were adopted to circumvent potential embarrassment to the judiciary.

Beyond the foregoing, four additional issues arise from this analysis. First, as a matter of politics, one wonders whether the objective for instituting the NJC has been achieved, given the interference and periodic frustration that the Council's due process suffers on account of executive machinations that undermine the process of disciplining judges and, ultimately, the legitimacy of the NJC's processes. Second, one also wonders whether totally insulating the NJC does not eviscerate the checks and balances regime that the Council needs to avoid allegations of incompetence and favouritism. In other words, the NJC may be susceptible to regulatory capture if the CJN retains the power to appoint 19 of its 23 Council members. The NJC is not only struggling to be genuinely independent of the executive. It is also struggling against itself. Overtime, it has introduced and adopted reform measures, such as the Code of Conduct for Judicial Officers, Guidelines and Procedural Rules for appointment of Judicial Officers of all Superior Courts of Record, and a National Judicial Policy, as per the recommendations of the Eso Panel. These reforms were aimed at enhancing ethical standards, increasing productivity and reducing judicial corruption. Commendable as they are, more radical measures are needed to overhaul Nigeria's judicial discipline process. Third is the urgent need to rethink the roles of the Nigerian Bar Association and the wider Nigerian legal and non-legal communities in the discipline of the nation's judges. Finally, the focus on the discipline of judges must not only be at the backend of the process. Rather, the process for the appointment and elevation of judges to higher courts must incorporate greater transparency and strictness with respect to zero tolerance for corruption and conduct unbecoming of judicial officers in general. The process of appointment cannot be disentangled from the process of discipline.

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and executive blackmail' (*Punch*, 28 January 2019) <<https://punchng.com/umar-code-of-conduct-tribunal-and-executive-blackmail/>> accessed 8 November 2019.

<sup>133</sup> The *Punch*, 'Mixed reactions as suspended CJN, Onnoghen, resigns' (*Punch*, 6 April 2019) <<https://www.msn.com/en-xl/africa/nigeria/mixed-reactions-as-suspended-cjn-onnoghen-resigns/ar-BBVFr56>> accessed 23 August 2019.