Journal of African Law (2025), 1–19
doi:10.1017/S0021855324000330

RESEARCH ARTICLE

Judicial Legislation: The Supreme Court of Nigeria's Model for Strategic Decision-Making?

Yusuf Sulayman*

Portsmouth Law School, University of Portsmouth, Portsmouth, UK
Email: yusulayman@gmail.com

(Accepted 29 February 2024)

Abstract

The Fourth Republic is Nigeria's longest experience in democratic practice. It is a democracy founded upon the ideal of separation of powers; each branch checks the other two within defined boundaries. To act as an effective check on the political branches of government, the judiciary, especially the Supreme Court, is built around structures that guarantee its independence. This article assesses the Supreme Court of Nigeria's use of discretion within this web and argues that the court now inevitably allows powerful actors to bank on its legitimacy and induce it to overstretch its competence to satisfy their individual policy and political preferences. This trend, the article finds, is antithetical to the concept of judicial independence. A court's independence is not only apparent when it is able to do what it is meant to do but also when it is able to refrain from what it is not meant to do.

Keywords: judicial independence; separation of powers; judicial law-making; judicial legislation; strategic decision-making; mega-politics

Introduction

The interrelationship between law and politics cannot be overemphasized. Owing to the very nature of elite Nigerians, there is hardly an issue in the highest-level political space that has not been judicially tested one way or the other. The nature of the questions submitted to the courts has, however, advanced from simple to complex ones with social and political ramifications. The political branches (and even other powerful independent actors) keep expanding their use of power and stature to drive policies of public concern; judicial control of these activities must grow correspondingly.[1] The question has thus gone beyond whether a court should be able to check the excesses of the political branches and override them on public policy grounds when needed; that issue, as such, is not the purpose of this article. The focus, rather, is on the question of *how*, not *if*, the court should be involved in responding to complex issues arising from systemic needs.

* Associate Lecturer in Law, University of Chichester, UK and Graduate Researcher, Portsmouth Law School, UK. Formerly a law lecturer at the University of Abuja, Nigeria. This article was presented at the Global South Network (GSN) PhD seminar series at the University of Leicester in 2023, the Portsmouth Law School PGR Conference 2023 and the Faculty of Business and Law Annual Research and Innovation Conference, University of Portsmouth, 2023, and benefited from the views shared by participants. The author also appreciates his PhD supervisors, Dr Kieran Walsh and Prof. Shubhankar Dam, for their help and advice, and Michael Uche Ukponu and Asma'u Muhammad Sulaiman for taking the time to read the manuscript and make valuable contributions.

1 M Cappelletti "Who watches the watchmen? A comparative study on judicial responsibility" (1983) 31/1 *The American Journal of Comparative Law* 1 at 87.

In October 2022, the Central Bank of Nigeria's (CBN) governor, acting under section 20 of the Central Bank of Nigeria Act 2007, announced a policy of the Federal Government of Nigeria to redesign the naira. The Bank stated its intention to end and replace the use of certain existing currency notes by the end of January 2023. Along the line, and getting close to the Bank's deadline, it became apparent that the implementation of the policy was flawed, and there was an acute scarcity of the new notes. The corridors of power were divided, as there were indications that the policy was targeted at some big political figures who would stash cash in their homes and spend on the lucrative business of vote-buying, among other things. The CBN was pressured to shelve its plan or extend its deadline in a reasonable way. On the eve of the initial deadline, the CBN announced a ten-day extension, but this was not enough. Relying on the "hardships the continued scarcity of naira notes brought to their people", three state governors, later joined by seven others, instituted an action against the federal government before the Supreme Court of Nigeria (SCN).[2] After so much intrigue, the SCN ruled against the federal government; the Court invalidated the policy, for which it was praised for asserting its independence. In essence, the Court stood its ground as the voice of the voiceless – it is at least only an independent court that will rule against a regime without fearing any consequences. However, little attention was paid to the inappropriate role the Court had just been made to play. In granting the reliefs of the plaintiffs, the SCN technically amended the CBN Act by replacing its section 20 with the third relief the plaintiffs sought. The decision, particularly this third relief, was completely against the spirit and the letter of the Act. Furthermore, this is not an isolated case; as this article will establish, the SCN regularly, either ignorantly or by deliberate transgression, takes on the role of the executive, electorate or legislature in a bid to endorse certain vested interests which are impressed upon it.[3] Rather than expounding the law to find answers to complex and novel questions, which it does in some cases, the Court has become a ready tool for endorsing the policy preferences of powerful actors even beyond the realm of its powers.

Thus the focus of this article is on "judicial legislation": how the SCN effectively usurps the functions of the National Assembly by legislating from the bench. In one of his classic works, Dicey used judicial legislation to simply refer to "judge-made law" or "judicial law-making".[4] Lord Hodge, of the UK Supreme Court, however, has differed and has rather suggested confining the use of legislation to legislative law-making.[5] This article agrees that judicial legislation is not a befitting word for judicial law-making as it is known, but when the Court rewrites legislation as if it were a parliament, then that amounts to judicial legislation. In other words, while judicial law-making is a recognized function of courts, judicial legislation is not. I suggest that in the main, rather than reflecting a strong independent posture, the Court has become a ready avenue for high net-worth citizens (HNCs) to achieve rule changes.

The independence of courts: Mapping the boundaries

Judicial independence is first a social fact that owes its foundation to tradition. There has been a long-standing belief that the judiciary as a collective unit and its judges as individuals should

2 D Erezi "Kaduna, Zamfara, Kogi drag FG to Supreme Court over Naira notes scarcity" (6 February 2023) *The Guardian,* available at: <https://guardian.ng/news/kaduna-zamfara-kogi-drag-fg-to-supreme-court-over-naira-notes-scarcity/> (last accessed 28 October 2024).

3 The SCN took on the role of the executive when it replaced the deadline for the naira redesign policy with another date, as impressed upon it by the plaintiffs who are state governors. It may take on the role of the electorate by deciding election winners against the choices of the people, as was blatantly obvious in the cases of *PDP & 2 Others v Biobarakuma Degi-Eremienyo and 3 Others* [2020] SC 1/2020 (*Diri*) and recently *APC v Sherriff and Others* [2023] LPELR-59953 SC (*Lawan*).

4 AV Dicey *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (1905), quoted in Lord Hodge "The scope of judicial law-making in the common law tradition" (paper presented at the Max Planck Institute of Comparative and International Private Law, Hamburg, 28 October 2019) at 1, available at: <https://supremecourt.uk/docs/speech-191028.pdf> (last accessed 28 October 2024).

5 Ibid.

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

enjoy effective guarantees against external domineering. This, in turn, laid the foundation for an established legal norm.[6] The judiciary is an essential part of a democratic setting; it should therefore ground its decisions upon hard convictions of law, beyond extraneous public policy or notions of private interest.[7] It suffices to note that judicial independence is not an end in itself; it is more a means to achieving impartiality in judicial decision-making.[8] This concept is underpinned by the doctrine of separation of powers, an ever-developing concept due to the quest by government branches for more powers. Rather than a pointer to total separation, however, separating powers contemporarily refers to checks and balances. In this sense, while the judiciary needs to be insulated from interference from the executive and legislative branches to function well and sustain the confidence of citizens, it must also purge itself and resist the temptation, in the absence of specific authority, to dabble in the workings or functions of the other branches.[9] It therefore becomes important to understand the exact reach of the court's function within this model.

Going by long-standing constitutional arrangements, the roles of each arm of government can be mapped. Albeit it is arguable that this is purely theoretical rather than practical, the three main arms of government – executive, legislature and judiciary – are designed to operate equally and independently. In Nigeria, the legislative powers of the federation are vested in the National Assembly, the executive powers are vested in the president and his / her cabinet, and the judicial powers are vested in the courts, headed by the SCN.[10] What could demonstrate equality more than the fact that all the organs were created by distinct sections of the Constitution of the Federal Republic of Nigeria (CFRN)? In addition to this parity, the Constitution further guarantees (i) the Court's minimum jurisdiction, composition and membership, which cannot be tampered with, (ii) the source of the Court's finances, just like the other branches, which is to be drawn from the nation's consolidated revenue, (iii) the protection of justices' salaries and conditions of service from any disadvantaged alteration, and (iv) that judgments of the Court are self-enforcing throughout the federation.[11] A common notion is that courts are the weakest of the three arms for having neither "the purse nor the sword", a concern the CFRN seeks to address in regard to the SCN. Institutionally, the SCN is designed to fully regulate its affairs through the Chief Justice of Nigeria's (CJN) office. The National Judicial Council (NJC) is charged with recommending names for appointment and removal as judges, the discipline of judges, management of the funds, and the overall policy and administration of the entire judiciary.[12] The Federal Judicial Service Commission (FJSC) regulates the appointment, dismissal and discipline of the staff of the entire judiciary; both bodies are statutorily headed by the CJN.[13]

Therefore if in reality the SCN does not act as though it is independent, it will not be for lack of formal guarantees or because it has neither the purse nor the sword; it will instead be because of a lack of will to maximize and effectively deploy its enormous powers. In effect, the SCN is to a large extent constitutionally designed as an independent court, but is this reflected in its decisions? Consequently, the point of discourse is no longer *if* but *how* the Court deploys this independence. Judicial independence is without doubt desirable; it must, however, operate within legally appreciable limits. Despite its enormous powers, the role of the Court is classically confined to interpreting the law and nothing more.[14] Even when the Court is said to make laws (judge-made laws), it

6 M Valois *Judicial Independence: Keeping Law at a Distance from Politics* (2013, LexisNexis) at 223.

7 OM Fiss "The limits of judicial independence" (1993) 25/1 *The University of Miami Inter-American Law Review* 57 at 59–60, available at: <https://www.jstor.org/stable/40176330> (last accessed 21 January 2024).

8 Cappelletti "Who watches the watchmen?", above at note 1 at 15–16.

9 S Shetreet "The challenge of judicial independence in the twenty-first century" (2000) 8/2 *Asia Pacific Law Review* 153 at 155.

10 Constitution of the Federal Republic of Nigeria (CFRN) 1999 as amended, secs 4, 5 and 6.

11 Id, secs 232–34; sec 84(2); sec 84(3); and sec 287(1).

12 Id, schedule 3, part 1, art 21.

13 Id, arts 13(c), 12(a) and 20(a).

14 *Cotecna Int'l Ltd v Ivory Merchant Bank Ltd* [2006] LPELR-896 (SC) 13, paras B–D.

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

must be understood in the proper context: the Court's form of law-making is derived from its interpretative and judicial review functions, the interpretation of which is to expound the law and not to expand it. The words of a statute speak to the intention of the legislature for enacting it; where the language of a statute is clear and unambiguous, courts have no jurisdiction to introduce any interpretation or construction that does not emerge from that language.[15] "Judicial legislation" sets in the moment courts dabble in this exclusive domain of the legislature.

Judicial legislation: How and why

How: The foundational basis for rule changes

Nigerians are a peace-loving people but are highly interest-driven, especially the elite population. They will under normal circumstances go to any length to legitimately pursue their interests. Since politics in Nigeria is largely built around personal interests, and fair play entails that a person's right ends where another's sets in, there is hardly an issue in the political space of Nigeria that has not been tested in one way or another since the adoption of democratic practice into the nation's system of governance. This can be espoused from the rate at which HNCs litigate every matter involving their interests. For instance, every presidential election since 1999 has been challenged up to the SCN level, except in 2015. Even then, there were rumours that the president was discouraged from conceding defeat; his political party would have preferred to challenge the "stolen mandate" in court. Virtually every governorship and senatorial contest has also been challenged in court. Nigerian politicians are, to put it sarcastically, "people of stolen mandates"; rather than admit to having lost an election, an average Nigerian politician will lay claim to a stolen mandate that must be reclaimed. "Politigation", so to speak, characterizes the popular culture of elite Nigerians to litigate virtually every political outcome; this can be more loosely termed the judicialization of politics.

Beyond politics, however, different agendas are strategically pushed to the courts for affirmation or differentiation. Despite the seemingly diminished level of trust and confidence in the judiciary, it is still popularly regarded as ordinary people's last hope.[16] In all these, however, cases by HNCs are prevalent, or for some reason, their cases get the courts' attention more often than others. For instance, 324 of the 474 federal litigation decisions by the SCN between 2011 and 2019 (68.1 per cent) involved an HNC.[17] That is, disputes between the federal government (or its ministries, departments and agencies) and states, companies or popular political or public officials alone account for more than half of the SCN's decisions of a federal nature over these years, with the remainder, about 31.9 per cent, arising from matters between federal government and other, ordinary citizens. In other words, 1 in every 1.5 cases decided by the SCN is a potential rule-changing dispute of a federal nature. Different players, such as political actors, state actors, companies and others in pursuit of rule changes, push their agendas to the Court. These disputes frequently present controversial issues that tend to justify a wide interpretative approach by the Court. In all of this, the SCN justices become strategic players in this fast-developing, passive institutional model that now allows HNCs to shift the goalposts and dictate the tone of judicial decisions. Since 1999, there have been rule-changing decisions delivered by the SCN in almost every election year.

Admittedly, the Court has more ways than one to interpret the law. It can adopt (i) the golden rule of distilling the intention of the legislature through the grammatical interpretation of the

15 Ibid.

16 SJ Salau "71% of Nigerians lack trust in the judicial system – report" (4 July 2022) *Business Day*, available at: <https://businessday.ng/news/article/71-of-nigerians-lack-trust-in-the-judicial-system-report/> (last accessed 21 June 2023).

17 This data was derived from the cases listed for judgment by the Supreme Court on its cause list from 2013 to 2019 and cases reported by the *Nigerian Weekly Law Reports* (NWLR) in 2011 and 2012.

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

language used in a statute, which is closely related to the teleological approach that tends to reveal and give effect to the spirit of the statute, or (ii) the mischief rule, that allows the Court to fill an identified gap by suppressing the mischief that informed the legislation in the first place and advancing the remedy originally sought, which is closely related to the purposive approach that tends to reveal and give effect to the history and purpose of the statute.[18] These interpretative attempts must fully accord with the intent of the makers of the legislation in question. The cardinal interpretative rule, therefore, remains the literal rule: the Court's function is confined to the premise of unravelling the "real purpose" or "best purpose" of statutes. Even when the Court digs for the best purpose of statutory provisions, it must act within these confines, no matter the exigency involved or the creativity employed.

Expounding the law: Judicial creativity

It is the judiciary, through the bold and decisive discharge of its functions, that will establish order and provide a sanctuary of justice for the oppressed, no matter how high or low they are placed in society. The SCN is often faced with instances where there are inadequate provisions to cater to certain exigencies. The Court would therefore not be overstepping into legislative duties if it suppresses a mischief and advances its remedy. In *Ugwu v Ararume*, the SCN changed the rules regarding the role of courts in the internal affairs of political parties.[19] Before this case, matters relating to the question of who should be candidates to be nominated and sponsored by political parties for elections were treated as the domestic affairs of the political parties concerned, thus completely out of the arena a court can dabble in.[20] In 2006, the People's Democratic Party (PDP) submitted the name of Ifeanyi Ararume, who had contested and won the governorship primaries for Imo State. Not too long after, the party forwarded the name of Charles Ugwu, who also participated in the primaries but came a distant 13th, to replace Ararume's name on the ground that the latter had been submitted in "error".[21] This decision did not sit well with Ararume, so he approached the Court for a redress that would invalidate the party's arbitrariness and uphold him as the rightful candidate to be sponsored. Based on earlier authorities, the Court decided that the PDP acted within its powers to change its nominated candidate at any time within the 60 days before the elections. However, the Court of Appeal, as well as the SCN, disagreed. The SCN did not agree that "error" makes for a "cogent and verifiable reason", as required by the Electoral Act (EA) 2006, and overturned the decision; it held that the provision of the law relating to the substitution of candidates is justiciable.[22] In nullifying the actions of the PDP for not conforming with the law, the Court notably declared that "there must be a check on whether the laid down procedure is followed in the process of substitution of a candidate. INEC [the Independent National Electoral Commission] and the party who both have roles to play under that section cannot continue to be a judge in their own case. Section 34(2) must be under judicial surveillance."[23] In other words, a political party is only able to control its own affairs to the extent that the exercise of such control does not run against the provision of the Constitution and the laws of Nigeria. This interpretation became the law. To a considerable extent, there was a mischief that was suppressed,

18 See *Nwobike v FRN* [2021] LPELR-56670 (SC) 57, paras A–B; *PPA v Saraki* [2007] 17 NWLR [Pt 1064] 453, 508, paras G–H; *Pickstone v Freemans plc* [1989] AC 66 (HL); *Lister v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546 (HL).

19 *Ugwu v Ararume* [2007] 12 NWLR [Pt 1048] 437.

20 See *Ibrahim v Gaye* [2002] 13 NWLR [Pt 784] 267; *Dalhatu v Turaki* [2003] 15 NWLR [Pt 843] 310; *Okon v Bob* [2004] 1 NWLR [Pt 854] 378.

21 Both Ararume and Ugwu participated in the PDP primaries with 20 other aspirants. While Ararume scored 2,061 votes to come top, Ugwu scored 36 votes. Technically, he can be said to be placed either 12th or 13th, due to the fact that he and one other contestant scored 36 votes each.

22 In this case, the Electoral Act (EA) 2006, sec 34.

23 *Ugwu*, above at note 19.

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

as the main reason the EA 2002 was repealed and replaced with the EA 2006 would have been defeated if this case had been decided otherwise. Following this decision, the EA 2006 was amended to completely limit the process of substituting names after initial nomination to only be possible in the case of death or withdrawal by the candidates themselves.[24]

In *Marwa v Nyako*, the SCN was confronted with uncertainties regarding the terms of office of political office holders.[25] Murtala Nyako, Timipre Sylva, Liyel Imoke, Ibrahim Idris and Aliyu Magatakarda Wammako contested and won elections and took oaths of office as governors of their respective five states in 2007. Their initial elections were annulled, but they all won the rerun elections and took fresh oaths. In 2010, following the announcement of the decision of the electoral body to include the five states in the general elections to be held in January 2011, the governors approached the Federal High Court for a declaration that their four years of office started from the dates they took their second oaths of office; they sought for the elections in their states to not be conducted at the same time as the approaching general elections. The Federal High Court and the Court of Appeal agreed with them; the SCN for its part courageously disagreed with the two lower courts. The SCN did not agree that the voiding of the governors' elections meant that the events that took place between the first and second elections, including the oath-taking, did not happen, either in law or in fact. It reasoned that the acts performed by the governors in their earlier period in office remained valid.[26] Having won the rerun elections, the earlier oaths remained valid and marked the beginning of their tenures. In other words, despite the invalidation of their elections, even though the governors could not be said to be acting de jure during this time, they were in every sense de facto governors for that period, which would now be taken into account in determining the terminal date of their tenure. With this decision, the SCN remodelled the general understanding of "voiding an act". The laws on tenure of office have since been amended and resonate with this decision.[27]

In *AGF v Abubakar*, the SCN was once again confronted with a potential rule-changing dispute.[28] The position of the vice president of Nigeria is fully contingent on the nominating presidential candidate, just as a person cannot become the president of Nigeria without a nominated running mate.[29] Both the president and the vice president run on a joint ticket, sponsored by a political party, and must belong to the same political party. Upon winning, their journey in governance as associates commences with both of them taking the oath of office as president and vice president. The first and second presidential elections in Nigeria in the Fourth Republic produced Chief Olusegun Obasanjo and Alhaji Atiku Abubakar, both of the PDP, as president and vice president respectively. Atiku, unable to make secret his ambition to become president, clashed in public with Obasanjo, who equally was openly aiming for a third term in office.[30] In December 2006, Obasanjo declared Atiku's seat vacant after the latter decamped to another party. Aggrieved, Atiku approached the Court to challenge this decision, which in his view was a "sad and regrettable slide to tyranny and lawlessness".[31] The Court of Appeal and the SCN found Atiku's case meritorious and declared Obasanjo's purported declaration as unconstitutional and of no effect. In reaching its decision, however, the SCN particularly noted with resentment how wrong and unjustifiable it

24 EA 2010 as amended, sec 33.

25 *Marwa v Nyako* [2012] LPELR-7837 (SC)(CON).

26 The Court based this view on the foundations of an earlier decision in *Balonwu v Gov of Anambra State* [2009] 8 NWLR [Pt 1172] 13.

27 CFRN, secs 135(2a) and 180(2a).

28 *AGF v Abubakar* [2007] 10 NWLR [Pt 1041] 1.

29 CFRN, sec 142(1). See also *PDP and 2 Others*, above at note 3.

30 The then president sought and vigorously pushed for the amendment of the CFRN 1999 to allow more than two terms in office for elected executives. The attempt was botched and it failed.

31 "Sacked Nigerian deputy defiant" (24 December 2006) *Aljazeera*, available at: <https://www.aljazeera.com/amp/news/2006/12/24/sacked-nigerian-deputy-defiant> (last accessed 26 October 2020).

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

was for a vice president to join another political party without first resigning his office, and openly criticizing and dissociating himself from the collective responsibility of the cabinet or the president under whom he serves and in whom continued faith should be the basis to continue to serve under. The Court, however, noted further that it was not the duty of the Court to usurp the powers vested in the National Assembly by declaring Atiku's office vacant; in other words, the SCN resisted the temptation to go beyond interpreting the law as is. In truth, there was room for robust creativity here: the SCN could have drawn from a broad interpretative approach to conclusively determine the status of a vice president who abandons his joint ticket with the president. There was (and still is) arguably enough support from the law to justify the SCN if it had chosen to declare the seat vacant. Apart from running on an "inseparably joined" ticket, the votes that brought the duo to office belonged to their sponsoring political party, and leaving the political party and the primary ticket holder was sufficient to justify the active role of the Court. I argue that this would have unravelled the best purpose of the legislation at that point. The Court, however, chose the narrow path, but at least did not transgress its powers.

There are many more instances where the SCN decisively filled several vacuums by simply expounding the laws. This function, as I argue, is the essence of the cardinality of the literal rule of interpretation and its complementary rules, "golden" and "mischief". That is, the Court endeavours to deduce the true intentions of law-makers or the law itself by a holistic reading of the CFRN, and indeed other statutes regarding the subject at hand. Ultimately, the Court's decision must be grounded within the confines of existing provisions, and in the event that this becomes impossible for the Court, then an intention cannot be inserted. Passing remarks could, however, be made by way of obiter dicta, as the Court did in Atiku's case. In this and similar cases, the SCN fulfilled its interpretative role; it is possible to agree or disagree with the Court's reasoning, but not its role. To go beyond and perform tasks that legislators did not undertake would be akin to assuming their position. This practice is what I regard as "legislating from the bench".

Expanding the law: Legislating from the bench

The judiciary, especially the SCN, "must not only be final in name, but must be seen to be really final in the sense that they have legal bite that makes the judgments truly conclusive".[32] There is, however, no power without limits, and the true strength of those saddled with authority lies in their ability to discern when to proceed and when to exercise restraint. The ability of the judiciary to hold rulers and other influential actors accountable must be balanced with its internal accountability. The rule of law entails the realization that the exercise of public power, including judicial power, should be defensible in line with standard rules and guidelines.[33] It is associated with the responsible and principled exercise of governmental power. The exercise of judicial review by the judiciary serves to prevent the arbitrary use of government power and compel all stakeholders to conform to constitutional dictates.[34] Consequently, the judiciary must therefore equally refrain from exercising its powers or independence arbitrarily. The question then is, has the SCN consistently demonstrated prudence in its exercise of power?

In *Amaechi v INEC*, the SCN was arbitrary in its use of power and defied every known rule of interpretation in coming to its decision.[35] Rotimi Amaechi had contested and overwhelmingly won the PDP's Rivers State governorship primaries in 2006.[36] The party then submitted his name to INEC as its candidate for the April 2007 governorship elections. However, in a twist of events,

32 *Amaechi v INEC* [2008] 5 NWLR [Pt 1080] 227, 449, paras E–F.

33 JE Finn "The rule of law and judicial independence in newly democratic regimes" (2004) 13/3 *The Good Society* 12 at 12, available at: <https://www.jstor.org/stable/20711182> (last accessed 3 December 2021).

34 CM Larkins "Judicial independence and democratization: A theoretical and conceptual analysis" (1996) 44 *American Journal of Comparative Law* 605 at 611.

35 *Amaechi*, above at note 32.

36 He gained 6,527 votes, to win against seven other contenders, who scored 28, 10, 6, 4, 0, 0 and 0 votes respectively.

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

the party wrote a letter to INEC in February 2007 requesting the Commission substitute the name of Amaechi with Celestine Omehia as its candidate for the election; its ground was that Amaechi's name had been sent in "error". Omehia had not participated in the primaries at all. Amaechi's case challenging the presumed robbery was brutally frustrated and lingered until the conclusion of the elections, with Omehia representing the party. Omehia was then sworn in as governor, the PDP having won the election.

Amaechi lost at the Federal High Court and the Court of Appeal, but the SCN followed its earlier decision in *Ugwu* in overruling them.[37] It held that "error" did not satisfy the requirement of the law and voided the party's substitution of Omehia for Amaechi.[38] Having declared that Amaechi was the rightful candidate of the PDP, the candidate for whom the party campaigned and canvassed for votes, and on the conviction that the votes that brought Omehia into office actually belonged to the party, the Court chose to grant Amaechi a relief he did not specifically ask for, allowing him to step into the shoes of Omehia, who the party had used to invalidly substitute him. Despite him not having participated in the governorship election, Amaechi was deemed as the candidate that had won, and he was consequently declared the governor of Rivers State.

The controversy was about the fact that Amaechi was made to reap what he did not sow. The decision was bold yet did not befit the SCN, as it amounted to legislative curbing at its highest level. There was no law that even in the slightest way supported the declaration of a non-participant in an election as the winner. Furthermore, the lines are drawn between pre-election and election matters. The determination and declaration of the winner of an election is an election matter that is adjudicated by election petition tribunals (EPTs). Amaechi's case, though, was a pre-election matter. At any rate, the Court is not a charitable institution; its jurisdiction is limited to issues properly placed before it and reliefs specifically asked for.[39] Amaechi never asked to be declared governor, and this was never even envisaged when he filed the case. If the result of his litigation effort should have been rewarded, it should have validly taken the form of damages in his favour against the perpetrators. Like Newton's third law of motion, however, actions and reactions are equal but opposite. The politicians responded: the National Assembly amended the CFRN and reviewed the EA to the effect that no person can be declared winner of any election in which he did not participate in all its stages.[40] This effectively overruled the SCN.

The SCN was faced with a novel issue following the governorship elections of 2016 in Kogi State. Before this experience, it had never got close to a scenario where stakeholders had to grapple not only with the death of one of the major players in an election in the middle of it but also with how to proceed with such an election. In the race for the governorship of Kogi State in 2016, Idris Wada and Abubakar Audu contested as the two leading candidates under the tents of the PDP and the All Progressives Congress (APC) respectively. After counting the votes, the electoral body pronounced that despite Audu having scored more than any other candidate, it could not declare him the winner; the difference between him and Wada, who placed second, was less than the number of invalid votes. It then declared the election inconclusive and fixed a date for supplementary elections. But before then, the death of Audu was announced, and another set of tussles ensued within the political class. It was obvious that the electoral laws did not envisage such a situation. Relying on the doctrine of necessity, the electoral body requested that the APC send another nominee to replace their deceased candidate, which it did by submitting the name of Yahaya Bello, who had initially come a distant second in the party's primary election. Aggrieved for not being nominated instead, James Faleke, the late Audu's running mate, chose to withdraw from the

37 *Ugwu*, above at note 19.

38 By virtue of EA 2006, sec 34(2) (as then applicable), a candidate already duly nominated by a party can only be changed upon giving notice of a cogent and verifiable reason.

39 See *Kassim v Adesemowo and Others* [2021] LPELR-55333 (SC).

40 CFRN, sec 285(13); EA 2010, sec 141. The Electoral Act 2010 was enacted to repeal and replace the Electoral Act 2006.

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

race. In the end, Bello inherited the existing votes and, after a successful supplementary election, was declared as the winner. Wada challenged the declaration on grounds including that Bello did not participate in all the stages of the election. The tribunal and the Court of Appeal disagreed, however, and upheld Bello's victory; the SCN also agreed with them. The SCN stated that "it amounts to an abdication of duty for the electoral umpire and the tribunal and the court to fold their hands and bemoan the fact that the legislature failed to do the impossible – providing for all exigencies both in the present and the future in their legislative duties".[41] The court decided that Audu's votes were rightly added to Bello's since the relationship between a party and its candidate can be likened to that of an agent and his / her disclosed principal. Audu, the Court added, "who was the candidate of [the] APC and scored votes at the election[,] could not have died with those votes since they belong to [the] APC for whom he contested the election".[42]

At first glance, it sounded convincing that the SCN saved the situation. In reality, however, the decision was an arbitrary use of power, or maybe a misplacement of priorities. It was another instance of bench legislation by tactics. Votes cast indeed belong to the party, and Audu could not have died with the votes; indeed, those were not the novel contentions for the SCN. The law-makers were equally clear in the CFRN and the EA as to their intent to prohibit a candidate who did not participate in an election from reaping the votes. The issues that called for creativity by the Court were how to treat the votes cast up until Audu's death and how best to complete the exercise after his death. The SCN had two options, I contend, if it were to act within the purview of its power: one was to order a fresh nomination to replace the deceased candidate and conduct a fresh election. The other was to order the deceased candidate's running mate to step into the shoes of his principal and complete the election. The former, which would have been the narrow path, would spare the SCN the need for much creativity, as it had done in Atiku's case. The second option, on the other hand, would have expounded the law more creatively. It is more logical to infer the status of Audu's running mate from the role he would have played had they been sworn in as governor and deputy before Audu's death. The office of deputy governor has no constitutional role attached to it except as delegated to it by the governor; they are primarily designed to serve as a standby governor who steps in to avoid any vacuum in the event that something happens to the governor. Could this inference not be extended to the role of a running mate? Why did the CFRN not allow a candidate to run alone and then nominate a deputy after winning the election or after being sworn in? What was the intendment or purpose of mandating two persons to jointly run on the same ticket? Why is a governorship candidate's participation in an election not considered valid without a validly nominated running mate? Instructively, if the candidature of the running mate is found to be defective, it disqualifies the governorship candidate too.[43] This, I argue, was intentional, to ensure that there is someone to fill the vacuum in the event that something happens to the governorship candidate, much like for a governor and his / her deputy. The SCN did not, however, see it in this way, but rather chose to usurp legislative functions. The National Assembly again responded by introducing a new provision in the EA that effectively overruled the SCN.[44]

There have been other instances when the SCN overstretched the discretion that comes with its independence. For instance, the decision of the Court in *Diri* offends written laws and defeats the intention of the legislature.[45] In this case, section 31 of the EA was challenged at the Federal High Court; the crux of the matter was centred around the candidature of the election winner. By the nature of the dispute and the venue, it was a pre-election matter; the High Court was not a proper

41 *Faleke v INEC* [2016] 18 NWLR (Pt 1543) 61.

42 Ibid.

43 See *PDP and 2 Others*, above at note 3.

44 EA 2010 as amended, sec 10, now states that where a situation like that of Audu happens, the party affected will have 14 days to conduct fresh primaries and submit the name of its nominated candidate to INEC, for fresh elections 21 days from such submission.

45 Above at note 3.

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

venue to decide on a return or declaration made by the electoral body in respect of an already concluded election. Consequently, having found the claims of the challenger to be true, the limit of the Court's powers was to declare that the defendant was not qualified to contest the election.[46] Once that was done, the Court's job was complete, and it was up to the plaintiffs to use the judgment as evidence to question the defendant's election before the EPT and / or to pursue a criminal charge against the defendants.[47] The law allows a private citizen to obtain the fiat of the Attorney General to pursue a criminal case. It would have been a different matter if the SCN was sitting on an appeal flowing from an EPT, but that was not the case. The intention of the law-makers is clear by virtue of section 133 of the EA: only an EPT can make pronouncements on the validity or otherwise of a candidate's return by the electoral body.[48] Assuming this was an honest mistake on the part of the SCN, or the Court was right to pronounce on the return, it still went overboard; it should have ordered a rerun election instead of nullifying the return and declaring a different winner, and the legislators were clear on this.[49] The decision had a lot of political implications, especially as it related to the fate of the majority of the electorate who had voted for the disqualified candidate; however, asking these questions might detract from the focus of this work and is better saved for elsewhere. It is important to note, however, that the EPT constituted for this election was effectively rendered supine, as there was no subsisting question left for it to determine. The SCN overruled the legislature and took the role of everybody else. It will not be surprising to see a reaction from the legislature, as always happens.

It is easy to tag these decisions as bold and creative; after all, only an independent and active judiciary will go beyond merely endorsing a regime's bidding.[50] However, they appear to reflect emotions and sentiments rather than genuine courage or originality as the hallmark of independence. A truly independent court requires an impartial and objective stance that can transcend personal emotions, sentiments or allegiances that conflict with the law; it should have the ability to rise above such influences and prioritize adherence to the law above all else. It is rather a sign of lack of independence to take on the role of another branch. Judges must be free to decide fairly, but such decisional freedom cannot undermine the principles of institutional responsibility and internal regulations. Citizens trust an independent judiciary, and such independence requires freedom from executive and legislative interference; the judiciary, too, must avoid improperly interfering with the other branches. If the SCN is seen to frequently usurp legislative powers, it will not be uncommon to see retaliatory court-curbing actions from the legislature.

46 See EA 2010, sec 31(5) and (6), which provides: "(5) Any person who has reasonable grounds to believe that any information given by a candidate in the affidavit or any document submitted by that candidate is false may file a suit at the Federal High Court, High Court of a State or FCT against such person seeking a declaration that the information contained in the affidavit is false; (6) If the Court determines that any of the information contained in the affidavit or any document submitted by that candidate is false, the Court shall issue an order disqualifying the candidate from contesting the election."

47 Id, sec 31(8), which provides that "[a] political party which presents to the Commission the name of a candidate who does not meet the qualifications stipulated in this section, commits an offence and is liable on conviction to a maximum fine or N500,000.00."

48 Id, sec 133(1), which provides: "No election and return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return … presented to the competent tribunal or court in accordance with the provisions of the Constitution or of this Act, and in which the person elected or returned is joined as a party."

49 Id, sec 140 provides that "(1) [s]ubject to subsection (2) of this section, if the Tribunal or the Court as the case may be, determines that a candidate who was returned as elected was not validly elected *on any ground*, the Tribunal or the Court shall nullify the election. (2) Where an election tribunal or court nullifies an election on the ground that the person who obtained the highest votes at the election *was not qualified to contest the election*, or that the election was marred by substantial irregularities or non-compliance with the provisions of this Act, the election tribunal or court *shall not declare the person with the second highest votes or any other person as elected*, but shall order for a fresh election" (emphasis added).

50 Larkins "Judicial independence", above at note 34 at 616.

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

The scramble for the SCN: Judgments as a reward for appointments?

The formality of the appointment of SCN justices

The appointment of justices to the SCN has undergone several phases of development in a bid to make the Court more autonomous and independent. At first, under the Independence Constitution of 1960, the governor general appointed justices on the advice of the Independent Judicial Service Commission.[51] The CJN's appointment was to be made on the advice of the prime minister, and by 1963, it became the full prerogative of the executive to make such appointments.[52] The 1979 Constitution brought back the decentralization of the process; the president now required the approval of the Senate to confirm appointments to the bench of the SCN. The provisions of the CFRN 1999 are not different from the 1979 Constitution in this regard; however, it introduced more reforms that tended to weaken the impact of the president and, significantly, in theory moved the judiciary towards some level of self-control.[53]

The SCN is designed to be composed of a maximum of 21 justices (see Table 1 for the composition from 2011 to 2019).[54] Although the exact number is meant to be prescribed by the National Assembly, there has never been a specific peg on such composition.[55] One of those justices is the CJN, who is the head of the SCN by precedence and the head of the Nigerian judiciary by the office.[56] The CJN and other justices of the Court are appointed by the president, on the recommendation of the NJC, and are confirmed by the Senate.[57] The justices remain in office until they attain a mandatory retirement age of 70 years.[58] This is a significant difference from the US, where the justices have a life tenure. The US Supreme Court justices are nominated by the president, confirmed by the Senate and "hold office during good behaviour".[59] The CJN and other SCN justices can resign on their own but may only be discharged of their duties, if they have not attained the mandatory age, by the president, supported by a two-thirds majority of senators in the case of the CJN or as recommended by the NJC in the case of the other justices. For this to happen, they must either have become unable to discharge the functions of their office, be guilty of misconduct or have contravened their official code of conduct.[60] The appointment of justices to the SCN bench follows the practice in the UK, where an Independent Selection Commission (ISC) sends recommended names for the approval of His Majesty the King through the Lord Chancellor and the prime minister respectively.[61] The striking difference here is the nature of the selection commission: while the ISC is convened by the Lord Chancellor based on need, the NJC is a standing commission established by the CFRN.

Unlike in the US, where there are no written constitutional requirements on the qualifications of persons to be appointed to the SCN bench, the CFRN makes a statement on this.[62] A person is only qualified to be appointed as the CJN or as a justice of the SCN if s/he is a legal practitioner who has been qualified to practise in Nigeria for at least 15 years; the 15-year qualification rule is a big feature Nigeria shares with the UK.[63] Constitutionally, therefore, there is no requirement to restrict SCN

51 S Ukhuegbe "Recruitment and tenure of supreme court justices in Nigeria" (2011) *SSRN Electronic Journal* 1 at 39.
52 Id at 40.
53 Ibid.
54 CFRN, sec 230(2); Supreme Court Act 1960 (SCA), sec 3(1).
55 CFRN, sec 230(2)(b).
56 SCA, sec 4; CFRN, secs 230(2)(a) and 231(1).
57 Id, sec 231(1) and (2).
58 Id, sec 291. See also SCA, sec 3(2).
59 Supreme Court of the United States "FAQs – General Information", available at: <https://www.supremecourt.gov/about/faq_general.aspx> (last accessed 26 April 2023).
60 CFRN, secs 306 and 292.
61 The Supreme Court "Appointment of Justices", available at: <https://www.supremecourt.uk/about/appointments-of-justices.html> (last accessed 26 April 2023).
62 Supreme Court of the United States "FAQs", above at note 59.
63 See Constitutional Reform Act 2005, sec 25, and Tribunals and Enforcement Act 2007, secs 50–52. Compare with CFRN, sec 231(3).

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

Table 1. The distribution of SCN justices who participated in decisions, 2011–2019

Names (CJNs in italics)	Date of SCN appointment (as CJN in italics)	Position in CoA	Zone	Position in zone	Date of SCN retirement
Dahiru Musdapher	6/1/2003 / *29/8/2011*	38	NW	1	15/7/2012
Aloma M Mukhtar	8/6/2005 / *16/7/2012*	48	NE	1	20/11/2014
Mahmud Mohammed	8/6/2005 / *20/11/2014*	70	NE	1	10/11/2016
Walter N Onnoghen	8/6/2005 / *7/3/2017*	100	SS	5	25/1/2019
Francis Fedode Tabai	14/3/2006	92	SS	3	25/7/2012
Ibrahim T Muhammad	8/1/2007 / *25/1/2019*	81	NE	1	27/6/2022
Christopher Chukwuma-Eneh	8/1/2007	102	SE	2	23/4/2014
Muhammad Muntaka-Coomassie	2008	79	NW	2	10/2/2016
Olufunlola O Adekeye	12/3/2009	95	SW	3	28/10/2012
John Afolabi Fabiyi	12/3/2009	91	NC	4	25/11/2015
Suleiman Galadima	14/9/2010	85	NC	3	5/10/2016
Olabode Rhodes-Vivour	14/9/2010	125	SW	4	22/3/2021
Nwali S Ngwuta	5/2011	115	SE	2	7/3/2021 (d)
Mary Peter-Odili	23/6/2011	120	SS	3	12/5/2022
Olukayode Ariwoola	22/11/2011 / *27/6/2022*	129	SW	4	31/12/2019
Musa Dattijo Muhammad	13/7/2012	101	NC	2	31/12/2019
Clara Bata Ogunbiyi	13/7/2012	106	NE	1	27/2/2018
Kumai Bayang Aka'ahs	26/9/2012	94	NW	2	12/12/2019
Stanley Shenko Alagoa	26/9/2012	113	SS	2	4/10/2013
Kudirat Kekere-Ekun	8/7/2013	121	SW	1	31/12/2019
John Inyang Okoro	15/11/2013	143	SS	2	31/12/2019
Chima Centus Nweze	29/10/2014	150	SE	5	31/12/2019
Amiru Sanusi	14/5/2015	104	NW	1	2/2/2020
Amina Adamu Augie	7/11/2016	110	NW	1	31/12/2019
Ejembi Eko	7/11/2016	147	NC	4	23/5/2022
Sidi Dauda Bage	5/12/2016	148	NC	4	26/3/2019
Paul Adamu Galumje	5/12/2016	127	NE	4	21/4/2020
Uwani Musa Abba Aji	8/1/2019	119	NE	3	31/12/2019

Notes: (1) The years under study encompass three election cycles: 2011, 2015 and 2019. These years also witnessed six of the ten Chief Justices of Nigeria and all four appointing presidents since the start of the Fourth Republic in 1999. Within this period lies a set of facts that can be juxtaposed in explaining possible motives. (2) The exact day and month of Justice Muntaka-Coomassie's appointment date and the day of Justice Ngwuta's appointment could not be authoritatively confirmed.

bench appointments to the exclusive reserve of persons with judicial experience: SCN justices, including the CJN, can be appointed directly from the Bar, academia or from any level of court, as long as the 15-year qualification rule is met. In practice, however, this has not been the case. Before 1999, it was a regular occurrence for Attorneys General (Federal and State), High Court judges and chief judges of states to be appointed to the SCN bench; the last of these appointments,

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

however, preceded the CFRN 1999.[64] All appointments to the Court since 1998 have not only been those with judicial experience but have been exclusively from the Court of Appeal.[65] By extension, they have risen through the High Court, Federal High Court, Sharia Court of Appeal or the National Industrial Court. Although recent advertisements reflect an intention to appoint persons from the Bar and from academia, actual appointments have yet to reflect this.

On paper, the practice behind the appointment procedure of SCN justices shares striking similarities with the UK Supreme Court. The procedure in Nigeria is for the FJSC to advise the NJC in nominating suitable candidates for appointment, following which the NJC makes its recommendation to the president.[66] The NJC has standing procedural rules that guide its role and that of the FJSC on the appointment of justices. Whenever the SCN seeks to fill vacancies within its ranks, the CJN writes to relevant stakeholders, such as the heads of superior courts of record, justices across courts, the Nigerian Bar Association and others, asking for nomination of suitable candidates.[67] The FJSC then makes a provisional shortlist of not less than double the required number of justices and requests comments from senior judges, serving and retired.[68] Successful candidates are then called to fill NJC Form A, upon which the FJSC reaches the decision to be communicated to the NJC through a memorandum.[69] The NJC then interviews the shortlisted candidates, and the final list of candidates is subsequently forwarded to the president for appointment consideration subject to Senate confirmation. In the case of the CJN, although the NJC is said to normally recommend the three most senior justices of the Court, only the most senior justice has ever emerged. Recent appointments have substantially reflected these rules in practice. Calls for expressions, final NJC recommendations to the president and Senate confirmation get the most public attention. Every other agenda, especially as it relates to the function of the NJC and the FJSC, is handled entirely out of the public gaze. It is thus difficult to judge the extent of compliance with the essential rules aimed at promoting fairness.

The reality of the appointment of SCN justices

Virtually everything about the SCN appears orderly. This includes the seniority of justices and their order of ascension to the position of CJN. The same cannot, however, be said of how justices get to the SCN bench in the first place. An assessment of the appointment pattern of the Court using the justices who participated in Court decisions between 2011 and 2019 shows a high level of irregularity which raises suspicions; this is obvious from Figure 1, which assigns a number to each person based on their hierarchy in the Court of Appeal (CoA). However, whether the irregularity in the appointment of justices to the Court has anything to do with a skewed approach to judgment delivery requires theorizing. To start with, there was a steady progression from judges DM, AMM, MM and WNO, who were numbers 38, 48, 70 and 100 in the Court of Appeal hierarchy respectively; this aligns with the tradition of appointing justices to the SCN based on their seniority at the CoA. The same cannot be said for many of the appointments that came afterwards. For instance, one would expect that at the time of appointing judge WNO, who was number 100 in the standing of CoA justices, judges 1 to 99 were either deceased, retired, removed for incompetence or malfeasance, or already on the SCN bench. That can at least be said of the appointments that preceded his: after judges DM, AMM and MM were appointed in 2003 and 2005, no other justice was subsequently appointed below number 38 (in the case of judge DM) or within the range of 39–47

64 These were of Hon Justice A Nnamani (Attorney General of the Federation) in 1979 and Hon Justice AIC Iguh (High Court Chief Judge) in 1993.

65 Ukhuegbe "Recruitment and tenure", above at note 51 at 28–31.

66 CFRN, arts 13(a)(i) and (ii) and 21(a)(i).

67 NJC Procedural Rules of Appointment of Judicial Officers, r 3(1)(b). In the UK, written applications are invited from candidates instead.

68 Id, r 3(4). In the UK, senior politicians and judges are consulted.

69 Id, rr 4 and 5.

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

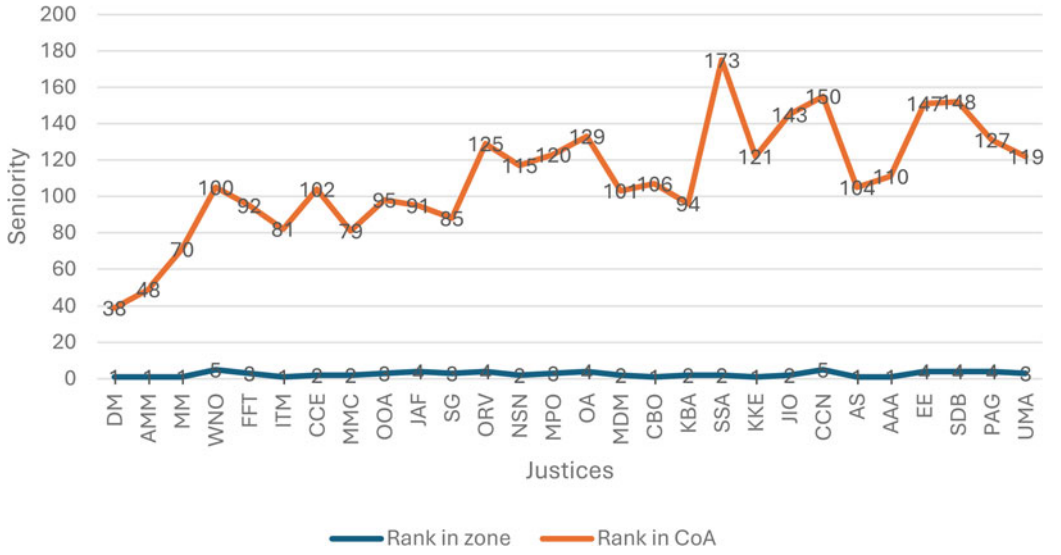

Figure 1. Justices who participated in SCN's decisions, 2011–2019

(in the case of AMM) or 49–69 (in the case of MM). In contrast, FFT and ITM, who were appointed years after the appointment of WNO, were 8 and 19 places above him, respectively. This trend became a regular occurrence in subsequent appointments across the data under study. If seniority were indeed the order, KBA, who eventually joined the Court in 2012, would have been the CJN after MM in 2017, because MMC, had he too been appointed in order, would have retired as his senior just a year before. These distortions ensured that potential CJNs either did not make it to the SCN bench or lined up behind those who had previously been their juniors and retired without attaining the position. This practice can be duplicitously justified by the fact that seniority from the lower court is not a written factor for appointing justices to the bench; rather, it is based on the nomination of "suitably qualified" candidates. This way, it is difficult to question the choice of a lower-ranked justice for appointment to the SCN bench over more senior ones. However, it raises serious questions of institutional competence for someone who is considered not "suitably qualified" for the SCN bench to remain "suitably qualified" to continue to sit as a justice of the CoA, especially since the "elevation" of judges to a higher position or bench is a technical promotion.[70] Once a person is appointed to the bench, subsequent appointments to higher courts are traditionally termed "elevation", as opposed to the looser term of "appointment". Justices of the CoA therefore queue up and rise from being justices of the Court to becoming presiding justices. Naturally, the next expectation would be to either become the president of the Court or be elevated to the SCN bench. Why should there be an ascension queue in the first place if it will play no role in determining who gets elevated to the SCN?

The closest justification that the justice system could offer for this irregularity would be the "federal character" requirement, a design of the CFRN to guarantee that all geopolitical zones in the country are fairly and evenly represented in the country's institutions to reflect its pluralistic nature.[71] If the underlying wisdom is to promote unity and loyalty, then it is a good justification. In this arrangement, the six geopolitical zones must be represented in the composition of the

70 Ukhuegbe "Recruitment and tenure", above at note 51 at 35.

71 CFRN, sec 14(3) and (4). See also AU Jaafar, MU Ukponu and Y Sulayman "Applying FIDIC contracts in Nigeria" in D Charrett (ed) *FIDIC Contracts in Africa and the Middle East: A Practical Guide to Application* (2024, Informa Law from Routledge) 233 at 235–37.

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

SCN; in effect, a judge of the CoA may be appointed to fill the slot of his / her zone even if s/he is not the most senior justice in the CoA hierarchy. In other words, the federal character consideration in the Nigerian judiciary is a tool for achieving judicial diversity and inclusion. Whether this distorted fortune to which some justices are subjected actually promotes their loyalty is a question for another discourse. Despite the commendable purpose, the federal character requirement in the context of the SCN is equally skewed. For instance, judge WNO, again, had four other justices ahead of him from his south-south geopolitical zone when he was appointed. Only about 29 per cent of the time has the most senior CoA justice from any particular zone got appointed to the SCN bench.[72] The reason is not farfetched: the Court is dependent on the CJN and the preferences of its justices. Whoever influences the CJN will likely control the Court; whoever controls the SCN must have influenced the kind of persons that get to the bench in the first place. It all becomes a game of strategy, which is at the core of the culture of irregular appointments: a scramble for the heart of the Court and of the judiciary by powerful personalities. Rather than being a transparent and fair evaluation of candidates based on their qualifications, experience or even their geopolitical zones, the appointment process often devolves into a contest for influence, where the true objective is to shape the judiciary to serve specific agendas, irrespective of the justices' CoA positions or the integrity of the process.

The common ways of controlling a court are through the appointment and promotion of judges, their discipline and the finances of the court, that is, "the purse and the sword". In the case of the SCN, and indeed the entire Nigerian judiciary, all of these measures are jointly managed by the NJC and the FJSC. The idea of giving the NJC and the FJSC unfettered control of the judiciary is to ensure that it can operate without interference from or subservience to anybody.[73] If it were true that the collegium model best safeguards judicial independence, then the SCN should be one of the most independent courts in the world. In fairness, the collegium model is not the problem – it is the Nigerian approach to it which is. The control of the Court is systematically structured around an all-powerful CJN, who is the statutory head of the SCN, the NJC and the FJSC.[74] S/he also sets up panels to hear cases, appoints all the administrative heads of these institutions and directs their powers and functions.[75] The Court is in essence built to be independent of external controls but is dependent on the CJN, who in turn is appointed by politicians and is usually influenced by powerful individuals. The CJN's removal is fully in the hands of the president and the Senate. The Court is essentially still as susceptible to external manipulations as those with no such autonomy.

Nigerianness: Another plausible explanation?

General elections were held in Nigeria on 25 February and 18 March 2023. The reactions that followed the exercise were at best mixed. As some aggrieved persons complained, the popular response they received by the side that benefited was "Go to court" – a statement that, it seems, was meant to be sarcastic. A cabinet minister who doubled as a senior advocate of Nigeria was challenged about this on live television: "If I don't say go to court, what would I say as the winner? Would I say: let's fight?" was his response.[76] In plain sight, he sounded convincing, as the statement literarily means using legal means to seek redress; no reasonable person would have said otherwise. After all, that was the exact message the US government also sent while congratulating Nigeria on a successful exercise.[77] The reality, however,

72 I.e. 8 out of 28 appointments across the data under study.

73 See also CFRN, sec 158.

74 Id, arts 12(a) and 20(a).

75 SCA, sec 6.

76 "Keyamo accuses Labour Party of riling up people" (23 March 2023) *Channels Television,* available at: <https://facebook.com/watch/?v=1307227776889408> (last accessed 31 October 2024).

77 N Price "2023 presidential election results in Nigeria" (1 March 2023) *Press Statement, Office of the Spokesperson*, available at: <https://www.state.gov/2023-presidential-election-results-in-nigeria/> (last accessed 31 March 2023).

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

might be different. The audacity of saying "Go to court" reflects a culture of socio-political impunity; the truth is that the Nigerian judiciary has visibly become an avenue of politics and not justice (or even policy). The SCN has not helped in this regard. Nigerians want to win a challenge at all costs and will then mock the loser with "Go to court". The experience of "winner takes all" from the presidential elections of 1979, 1999, 2007 and 2019 demonstrates how the judiciary had aided this posture and how it is part and parcel of a behavioural trend; the effect is rising scepticism of and distrust in the judiciary. So typically, "Go to court" will trigger the understanding that the jester has the ground prepared for their opponent there and knows what to expect in terms of judicial outcome.

In one of his classic works, Dudley aptly explains that the behaviour of political actors is an accumulation of the processes of socialization they underwent.[78] Cultural background and approach to life without doubt also play a significant role, at a subconscious level, not just for political actors but in everyday decisions, and more so in judicial decision-making.[79] SCN justices, including the CJN, are first Nigerians before becoming judicial officers, and just like political actors, it is only natural for them to be inspired by certain behaviours. "Nigerianness" is therefore used in this context as referring to the values of "being Nigerian", or what is popularly referred to as the "Nigerian factor". Reference will be made to a few of these factors in discussing the attitudinal model of the SCN.

The endemic reality is that what passes as national interest is nothing more than the desire of the rulers of the country at any given time.[80] Loyalty to one's benefactor is a core Nigerian behaviour, and admittedly a positive trait; it is deployed differently at the elite level as it influences the use of discretion. At such a level, loyalty is acquired conjunctively or disjunctively, in two ways: one way is to buy it through a tribal distribution of benefits and differential rewards in the form of positions and jobs or direct bribes; the other way is to ensure it through the inordinate amount of changing of rules.[81] It would therefore not be unusual to have justices being loyal to and protecting the interests of whoever facilitated their appointments, using decisions as the reward. Adopting the federal character requirement within the judiciary is therefore a potent way of having HNCs' "preferred candidates" at the state level make it to the SCN bench and may explain why HNCs have usually had their way in the Court. In the same vein, authority, and the exercise of it, is traditionally conceived in personal terms that ultimately brew intense bargaining and conflict.[82] In explaining this phenomenon, Dudley again observes:

> "As the embodiment of the collective will of the community, the elders and chiefs exercised considerable political discretion. Communal lands, for example, were vested in them and there was no marked distinction between the 'public' and the 'private' as far as the allocation of such lands went. To be allocated a piece of land, or to have a dispute arbitrated, one took 'gifts' of palm wine, or kola nuts (the Hausa called such 'gifts' *gaisuwa*) to the elders irrespective of the fact that what was being demanded was a recognized right. The elders thus prescribed what the norms were and also interpreted them, interpretations which then became authoritative and final."[83]

What Dudley calls "chiefs and elders" is nothing different from "office-holders and elites" in current settings, while "personal gratification" will aptly substitute "palm wine and kola nuts". This explains why independent institutions such as the police, courts, CBN, INEC and others can be easily

78 BJ Dudley *Instability and Political Order: Politics and Crisis in Nigeria* (1973, Ibadan University Press) at 40.

79 RJ Cahill-O'Callaghan "The influence of personal values on legal judgments" (2013) 40/4 *Journal of Law and Society* 596 at 598.

80 BJ Dudley *An Introduction to Nigerian Government and Politics* (1982, Indiana University Press) at 276.

81 Dudley, *Instability*, above at note 78 at 43.

82 Id at 41.

83 Ibid.

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

manipulated, despite the autonomy they have in theory.[84] It is thus not improbable that this phenomenon has found its way into the SCN, with the implication of decisions being used to reward either judges' appointment influencers, regardless of whether they are in power or not, or the litigant who brings more palm wine or kola nuts. Considering the wide discretion SCN justices possess, it is easy for questionable decisions to pass as courageous or creative ones, while personal preferences are termed as the "interest of justice". Furthermore, institutional directions are almost completely premised on the discretion of the rulers. For instance, on a soldier-go-soldier-come basis, the CJN's perspectives shape the institutional direction and image of the Nigerian judiciary, especially the SCN. As Fortes and Evans-Pritchard have described it, a typical African leader is both an enforcer of his / her will and is seen as an embodiment of sacred values who is beyond criticism or revision.[85] Within the context of the SCN, the CJN represents the melting point of judicial values that should not be questioned or opposed, even when in the wrong; it is therefore not unexpected to have a preeminent CJN who cannot (or should not) be questioned by his / her peers. There may also be a revolt if such a personality is attacked from outside. For instance, the only time the justices of the Court openly voiced their opinion, through the infamous letter that led to the resignation of the 17th CJN, was when their collective personal interest was involved.[86] The succeeding CJN later denied the justices had ever had any disagreement with the then "culprit" CJN, despite a great deal of institutional image-tarnishing allegations being levelled against him at the time.[87]

The place of strategic judicial decision-making

The judicialization of politics, or what this article terms "politigation", is a global trend; courts are becoming more involved in the intermingling of powers in high places of government.[88] As opposed to the popular notion that the judiciary is the weakest of the branches of government, in reality the opposite is the case. Constitutional supremacy has made the courts the gravitational centre of democratic states; a court acting strategically is thus an age-old concept with emerging trends. Strategic judicial decision-making is a natural offshoot of the model of separation of powers. Within the design of an integrated web in this model, courts have the power of interpretation and judicial review. Its judicial review ambit, however, keeps expanding as it is more and more relied upon to respond to complex controversies of morals, public policy and political undercurrents.[89] For the courts to evolve over time, and the complexities that come with that, they must react and adjust to their environment; in clearer terms, they must be politically expedient in reaching decisions. Not only must courts do justice according to the law but they must also balance, not replace, this with deciding the law according to the justice of each case. Nothing within this design, however, suggests that a court will advance to usurping known powers and arrogating unknown powers to itself. Nothing within the concept suggests a new role of "legislating from the bench", not even in jurisdictions like the US, where Supreme Court justices are appointed along partisan considerations.

Strategic judicial decision-making rests on the strands of activism and creativity, and these are regular features of independent courts; the SCN is not entirely an exception. These factors suggest

84 Id at 42.

85 RL Sklar *Nigerian Political Parties: Power in an Emergent African Nation* (1963, Princeton University Press) at 476, citing M Fortes and EE Evans-Pritchard, *African Political Systems* (1940, Oxford University Press) at 16–18.

86 U Chioma "[FULL LETTER] Supreme court justices accuse Nigeria's chief justice Tanko of corruption, diversion of allowances, welfare packages" (20 June 2022) *The Nigerian Lawyer*, available at: <https://thenigerialawyer.com/full-letter-supreme-court-justices-accuse-nigerias-chief-justice-tanko-of-corruption-diversion-of-allowances-welfare-packages/> (last accessed 31 October 2024).

87 M Diso "Leaked memo on ex-CJN embarrassed us – Justice Ariwoola" (21 September 2022) *The Will*, available at: <https://thewillnews.com/leaked-memo-on-ex-cjn-embarrassed-us-justice-ariwoola/> (last accessed 12 November 2023).

88 JAG Griffith *The Politics of the Judiciary* (5th ed, 1997, Fontana Press) at 76.

89 R Hirschl "The judicialization of mega-politics and the rise of political courts" (2008) 11 *The Annual Review of Political Science* 93 at 94.

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

that judges will think outside the box in solving complex, novel and emerging issues arising from the exigencies of the time to create a fitting perspective out of an existing framework – and thinking outside the box has never suggested that the box will be broken or turned into a ball. Rather than the SCN being strategically involved and retaining a more definitive role as an active policy-maker, I argue that it instead endorses policy preferences of powerful actors, especially justices' "appointment benefactors", outside its legitimate field. This is at least the impression that is given. Overexerted judicial powers might be overlooked as something else if the Court's appointment process were not skewed in practice, or the skewed appointment process might be overlooked for other reasons if the justices did not overexert their powers, but both occurrences are more than a mere coincidence. The growing deference to the judiciary by the political arms and by powerful actors is, rather, an attempt to bank on its legitimacy to pursue personalized agendas, much like a scramble for the Court's approval. Within this lie the intricacies of interferences that keep diminishing its hitherto much revered legitimacy and independence, which is why the Court must exercise caution. Overexerting creativity and activism to upset the legislature or the executive does little, if at all, to change a political course, as such court decisions are always clawed back.[90] A better way to be strategically involved is to situate new concepts within an expounded context, rather than entirely replacing legislative intentions.

The SCN, like other courts in Nigeria, is built to be non-partisan, and this must be reflected in its choices.[91] The policy preferences of SCN justices must be those of the Nigerian state and not measured by the wishes of a regime, the opposition to a regime or even the public mood. Political expediency must be rationalized within legitimate bounds, which is why the Court is allowed to issue obiter dicta; sentiments can be expressed by way of a dictum, but it should never be a justification to transgress the law. This is not to advocate for judicial timidity or conservativeness but for caution and self-restraint; the Court cannot pose as the chief circumscriber of powers yet assume the role of its chief flouter. As much as the growing trends in politics and governance require the activeness of the judiciary as a strategic player, there is still the need to maintain and respect a clearly defined boundary.

Conclusion

One of the most difficult tasks to embark on is rationalizing the SCN's lack of independence. To be fair to the institution, certain analyses of this nature might be overwhelming and sometimes distracting, but it is in the interest of everyone, including the judiciary, to be called to attention when some of its actions affect the goodwill it is given. The highest arbiter of justice should also be the citadel of it; the SCN, by all standards, should be the model of judiciousness in decision-making. Its ability to deliver justice that is truly situated in the law should be manifest. However, the Court leaves too much room for its users, especially ordinary citizens, to rightly insinuate its favouritism. Assessing and discussing institutional dysfunction, especially of the SCN, is not an attempt to ridicule the system or to simply judge the Court and its respected members. There are positive trends in the system, which should be acknowledged. But in the same breath, when negative developments begin to spring up, concerns must be raised at the earliest possible opportunity.

A look at the SCN's pattern of decisions reveals its penchant for overreaching its powers; it hides under its wide discretion to legislate from the bench. Indeed, law-making is not the exclusive preserve of the legislature, as judges are equally law-makers. But the scope must be clear to both the judges, the advocates of extensive judicial powers and judicial supremacists. The concept and import

90 Griffith *The Politics of the Judiciary*, above at note 88 at 332.

91 Revised Code of Conduct for Judicial Officers of the Federal Republic of Nigeria 2016, r 6, available at: <https://njc.gov.ng/code-of-conduct> (last accessed 4 November 2024).

https://doi.org/10.1017/S0021855324000330 Published online by Cambridge University Press

of separation of powers, from where strategic judicial decision-making evolves, must be properly contextualized. The law-making role of courts is in the context of their statutory interpretative and judicial review functions; it is the decisions of the courts on issues submitted to it and the principles derived from their interpretative functions that accumulate into a body of law.[92] And as much as they must meet social desires and changes, courts must operate within the scope of being "statutory interpreters". This article raises a two-pronged concern: on the one hand, I have observed that the SCN departs from its well-defined boundary to wrongly usurp legislative roles. But if that were the only concern, the Court could be pardoned and acts passed for judicial activism and creativity so that the Court operates within politically defined boundaries.[93] Sticking to those boundaries might perpetually render the Court passive, but this leads to the other concern, which is the clear leaning towards HNCs. It is situations like this that question the operation of the Court. In the absence of this second issue, I would probably just be debating the necessity or otherwise of the SCN becoming an active policy-maker and how best to go about it.

Whereas the status of the "finality" and "near infallibility" of the SCN is never in doubt, it is only an independent judiciary that can guarantee "manifest justice", and the SCN is rapidly departing from this.[94] If judicial independence is simply to rule against the federal government or a ruling party, especially in a potential rule-changing matter, then the SCN could be considered independent. However, independence is not solely reliant on a court's lack of indulgence towards a regime; independence-threatening pressures can also come from other powerful actors. This article has argued that despite it appearing independent in theory, the behaviour of the SCN suggests that it is being controlled, and I have explored plausible explanations. Legislating from the bench is the most convenient way for the SCN to assert the wishes of powerful litigants before it.

Competing interests. None

92 Griffith *The Politics of the Judiciary*, above at note 88 at 5.

93 RH Fallon Jr "Judicial supremacy, departmentalism, and the rule of law in a populist age" (2018) 96 *Texas Law Review* 487 at 541.

94 RT Suberu "The supreme court and federalism in Nigeria" (2008) 46/3 *The Journal of Modern African Studies* 298, available at: <https://jstor.org/stable/30224892> (last accessed 19 May 2021); I Sule "Judicial independence in Nigeria: Between global trends, domestic realities and Islamic Law" (2022) 4/5 *Indian Journal of Law and Legal Research* 1, available at: <https://www.researchgate.net/publication/365616360_JUDICIAL_INDEPENDENCE_IN_NIGERIA_BETWEEN_GLOBAL_TRENDS_DOMESTIC_REALITIES_AND_ISLAMIC_LAW> (last accessed 24 October 2024).

Cite this article: Sulayman Y (2025). Judicial Legislation: The Supreme Court of Nigeria's Model for Strategic Decision-Making? *Journal of African Law* 1–19. https://doi.org/10.1017/S0021855324000330