CODE OF CONDUCT TRIBUNAL: A CLASH OF JUDICIAL AND EXECUTIVE POWERS

INTRODUCTION

The Code of Conduct Tribunal (CCT) is a special institution, established by the 1999 Constitution of the Federal Republic of Nigeria as amended[1], for the adjudication and trial of public officers guilty of contravening the provisions of the Part I, Fifth Schedule of the constitution and also on complaints of corruption by public officers. In ***Attorney-General of the Federation v. Abubakar*** *Per Muhammad, JCA* stated as follows:

> ***"The Code of Conduct Tribunal is empowered to try and punish any public officer who is in breach of the code of conduct. Part II to the fifth schedule prescribes public officers for the purposes of the code of conduct. They include the President of the Federation and the Vice President of the Federation.[2]"***

The Code of Conduct Tribunal is established as a special tribunal for the entire federation to combat corruption and sanitize the offices in all the levels, arms and agencies of government in Nigeria and ensure that public officers in every respect are of impeccable character.

HISTORICAL BACKGROUND TO THE CODE OF CONDUCT BUREAU AND TRIBUNAL

The Code of Conduct Tribunal was first established in Nigeria under the Constitution of the Federal Republic of Nigeria, 1979. Under the said 1979 Constitution, paragraphs 17 to 20 of Part I of the Fifth Schedule (which is impari materia with the now operative paragraphs 15 to 18 of Part I of the Fifth Schedule to the 1999 constitution) established the Code of Conduct Tribunal. It must be noted that while the entire Fifth Schedule to the 1979 and the 1999 Constitutions are devoted to the Code of Conduct for Public Officers generally and the persons to which the code would be applicable, only paragraphs 15 and 16 of the Fifth Schedule to the 1979 Constitution deal with the Code of Conduct Bureau. Paragraphs 15 and 16 of Part I of the Fifth Schedule to the 1979 Constitution provides for the composition of the Code of Conduct Tribunal and the powers of the Bureau. A careful look at Section 140 of the 1979 Constitution would clearly show that the

[1] Paragraph 15, Part I, Fifth Schedule and Section 20 of the Code of Conduct Bureau and Tribunal Act, 1989

[2] (2007) WRN (Vol.44) 138 at 147 lines 25 - 30 (CA)

Code of Conduct Bureau was not included unlike under Section 153 of the 1999 Constitution where the Code of Conduct Bureau is included as an executive body. Also, under the 1989 Constitution which was never operative, the Code of Conduct Bureau and Tribunal maintained their status as under the 1979 Constitution. Prof. P.A.O Oluyede noted:

> ***"The Fifth Schedule in the 1989 Constitution deals with the Code of conduct for public officers and provides for the method for ensuring the right attitude of mind in public affairs by public officers. The body to punish for any breach of it is the Code of Conduct Tribunal, which in fact is a Court. Under the 1979 Constitution paragraphs 15 and 16 of the Fifth Schedule were devoted to the Code of Conduct Bureau which does not belong to the judicial arm of the Government but the Executive arm of the Government. This error has now been corrected and the Bureau as earlier stated is now under the third schedule while the Code of Conduct Tribunal is left under this fifth schedule***
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> ***Part II paragraph 17 adds a new but powerful provision. It says: 'Any other category of offences as the National Assembly may prescribe on the recommendation of the Code of Conduct Bureau'. It is enough to say that the list here is not exhaustive and should be capable of being added to from time to time in the light of the experience of the members of the Code of Conduct Bureau as found on the field[3]"***

Furthermore, while the 1989 Constitution never came into operation, the Code of Conduct Bureau and Tribunal (CCBT) Act was enacted in 1989 as Decree No. 1 of 1989. The Act was patterned after the 1979 Constitution. Paragraph 15 (1) (d) of Part 1 of the Schedule to the 1979 Constitution provides:

> ***"15. – (1) There shall be established a Code of Conduct Bureau whose functions shall be -***
>
> ***(d)* to *receive complaints about non-compliance with* or *breach of this Code and where* it *considers* it *necessary* to *do***

[3] See P. A. Oluyede and D.O. Aihe, Cases and Materials on Constitutional Law in Nigeria, 2nd Edition, (2003), University Press Plc. Pp. 563 - 564

> ***so, to refer such complaints, unless the person concerned makes a written admission of such breach or non-compliance, to the Code of Conduct Tribunal."***

The effect of paragraph 15(1), (d) of the 1979 Constitution reproduced above is that once a public officer who contravened any provision of the Code of Conduct is invited and he/she makes a written admission, the Bureau would be incapacitated and would not be able to try such public officer or refer the case to the Code of Conduct Tribunal. This absurd situation led to the failure of the Code of Conduct Bureau and Tribunal under the 1979 Constitution. All that an erring public officer needed to do was to make a written admission and he would then go scot-free without any consequence for his action. With that absurd situation prevailing, it became almost impossible for both the Code of Conduct Bureau and Tribunal to perform their constitutional duties. This provision of 1979 Constitution was however adopted in section 3(d) of the Code of Conduct Bureau and Tribunal Act when it was enacted in 1989.

The draftsmen or the wise men that drafted the Constitution of the Federal Republic of Nigeria 1999 noticed this deficiency and lacuna in the law and took positive steps aimed at remedying the defect. How did they go about this? This can be found in paragraph 3 (e) of Part 1 of the 3rd Schedule to the 1999 Constitution which provides thus:

> ***"The Bureau shall have power to-***
> ***3(e) receive complaints about non-compliance with or breach of the provisions of the Code of Conduct or any law in relation thereto, investigate the compliant and, where appropriate, refer such matters to the Code of Conduct Tribunal;"***

It would be observed that the 1999 Constitution deliberately removed the ***PROVISO*** under the 1979 Constitution and the Code of Conduct Decree No. 1 of 1989. Thus, the ***proviso*** that once a written admission is made by the erring public officer, no reference should be made to the Tribunal, is conspicuously omitted under the 1999 Constitution. This was a deliberate act under the 1999 Constitution (as amended).

It is therefore important to bear in mind the principle guiding the interpretation of statutes when the new law replaced the old enactment. In **Abioye .v. Yakubu** (1991) 5 NWLR (Pt 190) 130 at 200 -

201 the Supreme Court per Bello CJN stated thus:

> ***"In the interpretation of an Act or a Law, it is relevant* to *consider what was the law before the enactment of the Act* or *Law* to *be construed; what was the mischief or defect for which the old law did not provide and what remedy the Act* or *Law intended* to *cure the mischief* or *defect."***
>
> See also **Ifezue .v. Mbadugha** (1984) 1 SCNLR 427, ***Savannah Bank .v. Ajilo*** (1987) 2 NWLR (Pt. 57) 421.

It is obvious that the position under the 1979 Constitution is that once an admission is made by the erring public officer, the Code of Conduct Tribunal would not be competent to try such officer again. This position was also repeated under Section 3(d) of the CCBT Act otherwise known as Decree NO.1 of 1989. The defect inherent in the old law was that the Bureau as well as the Tribunal created by the 1979 Constitution could not function and perform their constitutional role effectively and the erring public officers always went scot-free without facing the consequences of their infractions of the Code of Conduct and their corrupt acts. Offenders were getting away with their corrupt practices without any legal consequences for their actions. The remedy introduced under the 1999 Constitution as amended is to completely remove the proviso under the old law. Thus, under the 1999 Constitution, the Bureau needs not to request the erring public officer to either admit or deny the allegation of breach of the Code of Conduct. That remedy has completely cured the mischief and the defect under the old law. Given this legislative history of the power of the Code of Conduct Bureau, it would amount to erroneous and misleading argument as posited by some lawyers to continue to rely on the proviso in the 1979 Constitution and the CCBT Act as the lacuna under the said laws has now been corrected under the 1999 Constitution.

It must be pointed out that there is no way the provision of Section 3 (d) of the Code of Conduct Bureau and Tribunal Act which was Decree No. 1 of 1989 can override the clear provisions of paragraph 3 *(e)* of Part 1 of the 3rd Schedule to the 1999 Constitution. This is in view of the provision of Section 1 (3) of the same 1999 Constitution. The provision of Paragraph 3 (e) of Part 1 of the 3rdSchedule to the 1999 Constitution must prevail over Section 3 (d) of the Code of Conduct Act.[4]

[4]See ***Obasanjo .v. Yusuf*** *(2004)* 9 NWLR (Pt. 877) 144 at 183, ***A.G., Abia State .v. A.G. Federation*** (2006) 16 NVVLR (Pi. 1 005) 265 at 381, *Dapianlonq* ***. v. Dariye*** (2007) 8 NVVLR (Pi. 1036) 332.

In any case, Decree No. 1 of 1989 codified in the Laws of Federation as Code of Conduct Bureau and Tribunal Act. CAP CIS LFN, 2004 is an existing law under Section 315 of the 1999 Constitution and it is only applicable to the extent that it is not inconsistent with the provisions of the Constitution itself. In other words, by the provision of Section 315 (1) of the 1999 Constitution, the Code of Conduct Bureau and Tribunal Act or Decree No. 1 of 1989 being an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of the Constitution. So, it cannot derogate from the Constitution.[5]

Furthermore, the Constitution has covered the field as to the functions, the powers and the duties of the Code of Conduct Bureau and Tribunal. It has also covered the field as to when the Code of Conduct Bureau can refer any charge or complaint to the Code of Conduct Tribunal. No Act of National Assembly can legislate into an area that has been covered by the Constitution.[6]

Even though the Code of Conduct Tribunal in ***FRN* v. *Bola Ahmed Tinubu*** delivered a ruling on 30th November, 2011 where it erroneously applied the proviso under Section 3 (d), this decision cannot override the constitution particularly provision of paragraph 3 (e) part 1 of the 3rd Schedule to the 1999 Constitution which has deliberately deleted the PROVISO contained in paragraph 15 (1) of the Fifth Schedule to the 1979 Constitution. Thankfully, the Code of Conduct Tribunal in its subsequent judgment realized that its decision in ***FRN v. Bola Ahmed Tinubu*** was given per incuriam and it departed from it by following the prescription of the Constitution. In the case of ***FRN v. Emil Lemke Inyang*** Charge No: *CCT/ABJ/02/2012* the issue was ***"whether the Tribunal can assume jurisdiction to try the Defendant/Applicant when the mandatory requirements for the initiation of the proceedings as stipulated in section 3(d) of the Code of Conduct Bureau and Tribunal Act, 1999, have not been complied with".*** In resolving the issue, the Tribunal held as follows:

> ***"The proviso under S. 3 (d) of the Code of Conduct Bureau/Tribunal Act has introduced a different dimension to the usual way of prosecuting cases in our law court. The tribunal agrees with learned SAN that S. 3(d) of the Code of Conduct Bureau and***

[5]See ***A. G. Lagos State .v. A.G. Federation*** (2003) 12 NVVLR (Pt. 833) 1 at 114-116 and 119-201

[6]See ***Musa .v. INEC***(2003) 3 NWLR (Pt. 806) 73 at 200 - 201 &203 - 204, **A. G. *Ogun .v. A.* G. *Federation***(1982) 3 NCLR 166.

Tribunal actually creates a condition precedent. It was on the basis of this that this Tribunal struck out the charge - CCT/ABJ/01/11 filed against Ashiwaju Bola Ahmed Tinubu on 30/11/11. Although many ex-governors, who had a case to answer, were invited by the Code of Conduct Bureau, and the complaints against them were not referred to the Tribunal, courtesy of the proviso in S. 3(d) of the Act, governor Bola Ahmed Tinubu was not so invited. Justice must not only be done but it must be seen to have been done.

Again the attention of the Tribunal was not drawn to S. 3(e) of part I of the 3rd schedule to the 1999 Constitution of the Federal Republic of Nigeria, when the charge CCT/ABJ/01/11 was being considered.

The phrases, "where necessary and where appropriate" used in the Code of Conduct Bureau and Tribunal Act and the 1999 Constitution seem to complement each other.

But what has caused this Tribunal to lose some sleep is the directive (Proviso) inserted in S. 3 (d) of the Act that the Bureau shall allow 'the suspect to go home if the suspect, who has been invited by the Bureau to make a statement on the allegation against him/her, admits the commission of the offence. In other words the suspect should not be prosecuted once he admits committing the offence. But he shall be prosecuted, referred to the Tribunal, if he pleads not guilty to the offence. Once a suspect admits committing the offence, he shall be given tea, and asked to go home a free man, after shaking hands with the Chairman and Members of the Bureau for a job well done.

What is the import of this proviso? Is this not an absurd or a ridiculous provision inserted in a serious law that is meant to check abuse of office

by public officers? What mischief is this proviso meant to cure? What the devil is the idea behind this proviso? What is the purpose of *this proviso? What is this proviso supposed to achieve? What is the aim* of *the law makers in the inserting this proviso?*

Could this be a typographical error or is it printer's devil?

The drafters of *the* 1999 *constitution lifted the provisions in the Code of Conduct Bureau and Tribunal Act into the Constitution - see 3rd and 5th Schedules of the 1999 Constitution (as amended).*

But why was this famous proviso not reflected in our grund norm? Was it deliberate? Was it by mistake? I think it was deliberate because the proviso is an absurdity. It is the view *of the Tribunal that the law makers could never have intended to insert this funny proviso.*

This means that the Code of *Conduct Bureau is bound to invite any suspect to its office in order to give the suspect opportunity to admit or not to admit the allegation against them.*

It is our considered view that if invited to the Code of *Conduct Bureau office, in the process* of *investigation, the suspect shall be referred to the Tribunal for trial, whether or not he admits to having committed the offence, provided the Code of Conduct Bureau is satisfied that he has a* case *to answer.*

It is the Tribunal that punishes suspects who plead guilty to having committed an offence or who are found guilty of *having committed an offence. Even in plea bargaining, the suspect is not let* off *without any form of punishment....*

Since there is a conflict, a disagreement between the

provisions of the Code of Conduct Bureau and Tribunal Act and the 1999 Constitution, the provisions of Code of Conduct Bureau and Tribunal Act must become null and void to the extent of the inconsistency.

The proviso to section 3 (d) of the Code of Conduct Bureau and Tribunal Act, 1989, is declared null and void. There was therefore no condition precedent to be fulfilled by Code of Conduct Bureau before commencing this action against the Accused/Applicant. This Tribunal in the circumstances has jurisdiction to handle the matter"

The Tribunal or any other Court must depart from its previous decision once it discovers that the decision was given per incuriam. See ***Orubu v. N.E.C*** (1988) N\NLR (Pt. 94) 323: ***Ibaku &Orsv. Ebini & Ors.*** (2009) LPELR - *CAIA/EP/288A108;* ***Buckno*** *r* ***- Maclean v. Inlaks Ltd.*** (1980) 8 - 11 SC 1.

It is important to note that the current position of the Constitution in respect of the powers of the Code of Conduct Tribunal was considered and it received a definitive judicial pronouncement in the unreported decision of the Court of Appeal, Abuja division in Appeal No: CA/A/172C/2016 between: ***Dr. Olubukola Saraki v. Federal Republic of Nigeria*** delivered on 27th October, 2016 where it was held at pages 63 to 66 as follows:

"Upon a close and comparative reading of Section 3(d) of the Code of Conduct Bureau and Tribunal Act and paragraph 3(a), (b), (c), (d) and (e) of the Third Schedule to the Constitution it is quite obvious that the provisions of the Constitution is clear and unambiguous. While section 3 of Code of Conduct Bureau and Tribunal Act feebly said:

"The function of the Bureau shall be to- Receive complaints ...

Paragraph 3 of the Third Schedule begins in commanding tone thus;

"The Bureau shall have power to:-
(a) receive declarations by Public Officers made under paragraph

12 of Part 1 of the Fifth Schedule to this Constitution.

(d) ensure compliance with and where appropriate enforce the provisions of the code of Conduct or law relating thereto.

(e) receive complaints about non' compliance with or breach of the provisions of the Code of Conduct or any law in relation thereto, investigate the complaint and where appropriate refer such matters to the Code of Conduct Tribunal.

This all encompassing (sic) and I am certain in my mind that proviso to Section 3(d) of CCBT Act cannot operate to cut down or whittle down the clear provisions of Third Schedule of 1999 Constitution which gives power to the Bureau and Code of Conduct Tribunal.

The 1999 Constitution did not give any room for subversion of the provisions relating to Code of Conduct for Public Officers.

It is also clear that while Section 3(d) of Code of Conduct Bureau and Tribunal Act gives to the Bureau functions to receive complaints only in respect of non compliance or breach of the Act, paragraph 3(e) of the Third Schedule to the Constitution empowered the Bureau to investigate the complaint and to refer any matter of investigation appropriately to the Tribunal.

No proviso was created for any Public Officer under paragraph 3(e) to make admission and be set free. It will be outlandish and absurd to allow such awkwardness in the interpretation of the clear provisions of the 1999 Constitution and the CCBT Act. The power to prosecute offences under the Constitution the 3rd Schedule and Fifth Schedule to

1999 Constitution as amended can be found also in Section 24 of the Code of Conduct Bureau and Tribunal Act and Section 174 of the Constitution.

Prosecution for all offences relating to breach or non compliance with Code of Conduct for Public Officers is to be carried out by the Attorney-General of the Federation in the name of Federal Republic of Nigeria.

The Third Schedule to the Code of Conduct Bureau and Tribunal Act makes provisions for Code of Conduct Tribunal Rules of Procedure pursuant to Section 24 thereof and defined "prosecutor" to mean "the Attorney-General of the Federation or any other person authorized by him.

The powers given to Code of Conduct Bureau to make referral to the Code of Conduct Tribunal concerning a Public Officer who breaches Code of Conduct IS NOT AT ALL CONTINGENT UPON the making or non making of a written admission by any Public Officer. The proviso relied upon by Appellant is a slippery ground. It cannot stand side by side with provisions of paragraph 3(d) and 3(e) of the Third Schedule to the Constitution. The said Constitution having expressly established the constitutional powers of the Bureau and at the same time bestow, power to investigate upon the Bureau all the added and unsolicited burden contained in the proviso to section 3(d) of CCBT Act cannot stand. They have been expressly excluded under Latin Maxim of "expressio unis est exclusio alterius alerius".

At pages 68 to 69, the Court held:

The alleged or proven evidence that the Appellant was not afforded opportunity to make a written admission pursuant to Section 3(a) and (d) of Code of Conduct Bureau and Tribunal Act is not a condition precedent for adjudication by Code of

Conduct Tribunal. It is not an issue of jurisdiction. It is not relevant as the provisions of the Third and Fifth Schedules to the Constitution particularly paragraph 3 of 3rd Schedule and paragraphs 12 and 18 of the Fifth Schedule actually render the provision of Section 3(b) and (d) of Code of Conduct Bureau and Tribunal Act inoperative and otiose. The said provisions cannot impede or obstruct clear provisions of the Constitution as articulated in this judgment. Section 3(d) of the Code of Conduct Bureau and Tribunal is no doubt moribund and I have no doubt in my mind that the lower Tribunal was right In striking it down in view of the provision of Section 1 (3) of the 1999 Constitution as amended. The provision of Section 3(d) of Code of Conduct Bureau and Tribunal Act is void and of no effect.

The provision of Section 3(d) of CCBT cannot create a clog in the way of prosecution of alleged offenders under Code of Conduct for Public Officers. It is not a condition precedent to the presentation of a charge.

The Court held further at pages 83 to 84:

The idea that Section 3(d) of the Act creates a condition precedent or what the Appellant describes as a pre-action notice which the Code of Conduct Bureau must give to Appellant before putting him on trial before Code of Conduct Tribunal is acerbic and alien to criminal jurisprudence of this country.

Section 3(d) makes no provision for such thing as Pre- action Notice in criminal prosecution concerning violation or breach. Provisions of Code of Conduct for Public Officer contained in Third Schedule of the 1999 Constitution. The Constitution has of its - own provided the mode of bringing a culprit to book in the schedules aforementioned "and what the National Assembly

could do to in furtherance of prosecution of offenders under Code of Conduct for Public Officers.

Section 3(d) of CCBT Act which to me is a general law or enacting clause that cannot curtail the express provision of powers given to the Code of Conduct Bureau and the Attorney- General of the Federation to prosecute offenders pursuant to the provisions of 1999 Constitution and Code of Conduct Bureau and Tribunal Act. Section 3(d) of the Act cannot stand side by side with the provisions of sections 20 - 26 of Code of Conduct Bureau and Tribunal Act bearing in mind the express and unambiguous provisions of 3rd and 5th Schedules to 1999 Constitution 1 that is not the intention of the law and the 1999 Constitution.

At Pages 86 to 87 the Court held

The Constitution has effectively covered the field concerning initiation of criminal prosecution before Code of Conduct Tribunal against Public Officers that may be found to have breached the provisions of Code of Conduct for Public Officers. The same is true of Section 20 - 25 of Code of Conduct Bureau and Tribunal Act.

Section 3(d) of the same Act cannot impede or stand In the way of the rest of the sections contained in CCBT Act and most importantly the express provisions of the Constitution contained in paragraph 3(d) and 3(e) of the Third Schedule to the 1999 Constitution and s" Schedule to the same Constitution having regard to Section 1 (3) of the 1999 Constitution as amended and Code of Conduct Bureau and Tribunal Act. ...

There is nothing in section 3(d) of the CCBT Act making it mandatory for the Code of Conduct Bureau to give any type of a pre-action notice to Appellant or making it compulsory for Code of Conduct Bureau to invite any Public Officer

including Appellant to make a written statement admitting or denying the allegation against him. An Accused person or Defendant is entitled to reserve his statement until when he gives evidence in his own defence (if he so chooses) at the trial. The 1999 Constitution of the Federal Republic of Nigeria as amended section 36(11) thereof and under section 6 of the Criminal Justice Act.

The lower Tribunal was right in adjudging Section 3(d) of the CCBT Act to be invalid and inoperative.

Issue 7 is hereby resolved against the Appellant."

From the above decision of the Court of Appeal, it is safe to say that the potency and effectiveness of the Code of Conduct Bureau and Tribunal to carry out their constitutional mandate of checking corruption among public officers have been tremendously enhanced by the drafters of the 1999 Constitution. Even though the bodies have been greatly strengthened there is still ample room for improvements.

SEPERATION OF POWERS[7]

The instant discussion focuses on whether there exists a clash of judicial and executive powers in the Code of Conduct Tribunal. This touches on the doctrine of separation of powers. It must be noted that unless power is checked, it will be abused and the only guarantee against abuse is the establishment of mutual checks between legislative, executive and judicial functions. Functions may therefore be shared as in England, where the executive is an integral part of the legislature and performs some legislative functions, or separated in a greater form though with some inter-relations, as in the United States of America. Thus, according to the doctrine, a person or body is not expected to exercise more than one of the powers of government, one arm of government should not control or interfere with the others and one arm of government should not exercise the function of the other[8]. Madison noted that:

[7] The concept stemmed from the writings of John Locke on the situation in England in the seventeenth century. He argued that it was foolhardy to give lawmakers the power to execute laws made by them because, in the process, they may exempt themselves from the observance of the law. The modern form of the concept is however due to the work of Montesquieu in his book 'Esprit de Lois' (The spirit of laws) where he argued that the secret of the English constitution was that power was not concentrated in the hands of an individual or group.

[8] See Kehinde M. Mowoe, Constitutional Law in Nigeria, Malthouse, 2008, Lagos, Nigeria, Pp. 24 - 26

> ***"...there can be no liberty where the legislative and executive powers are united in the same person or body of magistrates or if the power of judging be not separated from the legislative and executive powers."***

In the case of ***Chevron (Nig) Ltd v. Imo State House of Assembly & Ors***[9]*, the court held per Per AGUBE, J.C.A. as follows:*

> ***"In the words of Akanbi, JCA;- "There is no doubting the fact that the doctrine implies that ideally subject to what other checks and balances the Constitution may provide for; the doctrine of separation of powers presupposes that the operative Constitution ensures that: (a) Each of the three organs of government is in the hands of different persons. (b) That no one organ has control of the other. (c) No one organ performs the function of another. If these postulates are correct, it would be safe to say that it is the function of the Legislature to make laws and the Judiciary to interpret the law." As for Uche Omo, JCA; whose dictum was succinct and apt on the scenario created in this case by the Legislature: "Basically, what the doctrine provides is that the Legislature, the Executive and Judiciary are independent arms of Government with their respective functions. Each arm must not encroach on the functions of the others, and any such invasion of the other's turf must be regarded as a breach of this doctrine and consequently unconstitutional,"***

Up till 1960, Nigeria was under colonial rule and the concept of separation of power was in operation to a very limited extent because of the overriding authority of the colonial masters. After independence, the 1960 and 1963 parliamentary constitution operated the British concept of separation of powers whereby power was shared between the judiciary on one side, and the parliament and the executive on the other, the latter being an integral though distinct offshoot of the former. Under the 1979, 1989, and 1999 presidential constitutions, there was greater separation in a manner similar to that of the United States of America. Under all these constitutions, section 4 vested legislative powers in the National Assembly and House of Assembly; section 5 vested executive powers on the

[9] (2016) LPELR-41563(CA)

president and governors, and the powers may, subject to other constitutional provisions or laws made by the National Assembly, be exercised by them directly or through the vice –president, ministers or officers of the public service; and by virtue of section 6, judicial powers were vested in the courts established by the constitution.
As was observed by the constitution drafting committee of the 1979 constitution however, strict compartmentalized separation is not possible under modem systems of government, according to them:

> ***"Modern governments should be a co-operative coordinated effort and not a tug of war between the principal organs of government... separation of executive and legislative function is necessary and desirable if limited government and individual liberty are to be secured, but certainly not a rigid separation."***

According to profess*or Abi*ola *Ojo*:

> ***".... A complete separation of powers is neither practicable nor desirable for effective government. What the doctrine can be taken to mean is the prevention of tyranny by the conferment of too much power on anyone person or body and the check of one power by another."***

SEPARATION OF POWERS IN THE UNITED STATES OF AMERICA

As noted above, the American constitution is based on the theory of separation of powers. According to article 1 of the constitution of the United States, "all legislative powers therein granted shall be vested in a Congress." The legislature alone exercises law making power. According to article 2 of the constitution of the United States, "the executive power shall be vested in the president of the united states. He is not responsible to the congress." According to article 3 of the constitution of the United States, "the judicial power shall be vested in the supreme court." The judiciary is independent of the executive and the legislature. A concrete evidence of this theory is seen in American constitution as the position of president under the constitution has been secured by providing fixed tenure of office, the legislature is not subject to any executive control. Congress consists of two houses- Senate and House of Representatives. Both are directly elected by the people for a fixed period. Neither the President nor the congress is responsible to each other. President is not empowered to remove a judge after he is appointed on the post. The senate has got no power to choose, control or dismiss the executive or

the judiciary; the executive also cannot dissolve the legislature and dismiss judges.[10]

APPLICABILITY OF THE DOCTRINE OF SEPARATION OF POWERS IN INDIA

In India, there are different branches to carry out the different activities of the government. The legislative and executive wings are closely connected with each other and the executive is responsible to the legislature for its actions and derives its powers from the legislature.

The head of the executive is the president, but a closer look shows that he is only a nominal head and the real power rests with the Prime Minister and his Cabinet of ministers. The judiciary can perform administrative and legislative functions. The parliament too may perform judicial functions. It is important to note that the separation of powers is still being practiced in India, but not in its strictest sense nor being given Constitutional status but a diluted and modern approach is followed. Most noteworthy is the judicial system which is completely independent from the executive and the legislature. The High Courts and Supreme Courts have the power of judicial review which empowers them to declare any law passed by the parliament unconstitutional, if necessary. As regards the judges, their appointment can only be made by the President in consultation with the Chief Justice of India and the judges of the Supreme Court.

In the modern world, the Separation of Powers has come to not only mean organs such as the Executive, the legislature and the judiciary but also institutions such as the press and academic institutions. Thus, in a modern society, implementation of Separation of Powers doctrine in its strictest sense, the way Montesquieu envisaged it to be in his book “The Spirit of laws” is an extremely difficult task. Even civil institutions wield a lot of power in all spheres of governance.

COMPOSITION, POWER AND NATURE OF THE CODE OF CONDUCT BUREAU AND TRIBUNAL

Subsequent discussions in this paper would consider the laws establishing the Code of Conduct Bureau and Tribunal to determine whether the principle or doctrine of separation of powers has been or is likely to be contravened.

[10]https://www.slideshare.net/udishasingh1/theory-or-principle-of-separation-of-powers-and; last visited, 30th July, 2019, by 5:00pm.

It must be pointed out that while Section 153 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides for the establishment of certain executive bodies which include the Code of Conduct Bureau, the Code of Conduct Tribunal was not established under the said section as an executive body. Section 153 of the 1999 Constitution provides:

> ***"153. (1) There shall be established for the Federation the following bodies, namely:***
>
> ***(a) Code of Conduct Bureau;***
> ***(b) Council of State;***
> ***(c) Federal Character Commission;***
> ***(d) Federal Civil Service Commission;***
> ***(e) Federal Judicial Service Commission;***
> ***(f) Independent National Electoral Commission;***
> ***(g) National Defence Council;***
> ***(h) National Economic Council;***
> ***(i) National Judicial Council;***
> ***(j) National Population Commission;***
> ***(k) National Security Council;***
> ***(l) Nigeria Police Council;***
> ***(m) Police Service Commission; and***
> ***(n) Revenue Mobilisation Allocation and Fiscal Commission.***
>
> ***(2) The composition and powers of each body established by subsection (1) of this section are as contained in Part 1 of the Third Schedule to this Constitution."***

As earlier noted, Part 1 of the Third Schedule to the Constitution of the Federal Republic of Nigeria, 1999 provides for the composition and powers of the Code of Conduct Bureau as follows:

> ***"A - Code of Conduct Bureau***
>
> ***1. The Code of Conduct Bureau shall comprise the following members:***
> ***(a) a Chairman; and***
> ***(b) nine other members, each of whom, at the time of appointment,***

shall not be less than fifty years of age and subject to the provisions of section 157 of this Constitution shall vacate his office on attaining the age of seventy years[11].

2. The Bureau shall establish such offices in each state of the Federation as it may require for the discharge of its functions under this Constitution.

3. The Bureau shall have power to:

(a) receive declarations by public officers made under paragraph 12 of Part I of the Fifth Schedule to this Constitution;

(b) examine the declarations in accordance with the requirements of the Code of Conduct or any law;

(c) retain custody of such declarations and make them available for inspection by any citizen of Nigeria on such terms and conditions as the National Assembly may prescribe;

(d) ensure compliance with and, where appropriate, enforce the provisions of the Code of Conduct of any law relating thereto;

(e) receive complaints about non-compliance with or breach of the provisions of the Code of Conduct or any law in relation thereto, investigate the complaint and, where appropriate, refer such matters to the Code of Conduct Tribunal;

(f) appoint, promote, dismiss and exercise disciplinary control over the staff of the Codes of Conduct Bureau in accordance with the provisions of an Act of the National Assembly enacted in that behalf; and

(g) carry out such other functions as may be conferred upon it by the National Assembly[12].

4. The terms and conditions of service of the staff of the Code of Conduct Bureau shall be the same as those provided for public officers in the civil service of the Federation[13].”

[11]See also Section 1 of the Code of Conduct Bureau and Tribunal Act

[12]See also Sections 3 – 19 of the Code of Conduct Bureau and Tribunal Act

[13]See also Section 4 of the Code of Conduct Bureau and Tribunal Act

What can be gleaned from the above provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) are that the Code of Conduct Bureau (CCB) is empowered to receive declarations of assets by public officers and retain custody of the declarations[14]. The Bureau is also empowered to examine the asset declarations and ensure compliance with the requirements of the Code of Conduct Bureau and Tribunal Act and other relevant laws, including the Constitution[15]. It may also receive complaints about non-compliance with the Code of Conduct or a breach of the code by any public officer, in which case, the CCB might consider referring such a complaint to the Code of Conduct Tribunal (CCT)[16].

The rules established by the Act and the 1999 Constitution relate to false and anticipatory asset declaration, conflict of interests;[17] prohibition on the maintenance and operation of foreign bank accounts;[18] restriction on loans, gifts or benefits[19] and bribery[20]. Public officers are also mandated to submit to the CCB, a written declaration of all their properties, assets and liabilities and those of their unmarried children under the age of twenty-one. The declaration must be done immediately after taking office and at the end of every four years or at the end of a term of office, as the case may be. For non-elective serving officers, this must be done within thirty days upon receipt of the asset declaration form from CCB or as may be specified by the agency[21].

The reason for this declaration is for easy identification of corrupt public officers as well as the assets acquired through corrupt means[22]. The Constitution provides that any property or assets acquired by a public officer after the official declaration, which appears to be outside his or her earnings or income and is not in line with the Code, would be deemed to have been acquired in breach of the Code unless the contrary is proved. The declaration of assets form, therefore, makes it easier to track the fruits of corrupt acts.

The Code of Conduct Tribunal (CCT) is the tribunal where public officers found to have contravened any of the provisions of the Code of Conduct

[14]See Section 3(c) of the Code of Conduct Bureau and Tribunal Act
[15]See Section 3(b) of the Code of Conduct Bureau and Tribunal Act
[16]See Section 3(d) of the Code of Conduct Bureau and Tribunal Act
[17]See Section 5 of the Code of Conduct Bureau and Tribunal Act
[18]See Section 7 of the Code of Conduct Bureau and Tribunal Act
[19]See Sections 10 and 11 of the Code of Conduct Bureau and Tribunal Act
[20]See Section 12 of the Code of Conduct Bureau and Tribunal Act
[21]See Section 15(1) of the Code of Conduct Bureau and Tribunal Act
[22]See Section 2 of the Code of Conduct Bureau and Tribunal Act which provides for the Aims and Objectives of the code.

are tried. The relevant provisions of the 1999 Constitution (as amended) provides for the composition of the tribunal. Paragraphs 15 to 18 of Part I of the 5th Schedule to the 1999 Constitution as amended, provide that:

> ***"15. (1) There shall be established a tribunal to be known as Code of Conduct Tribunal which shall consist of a Chairman and two other persons.***
>
> ***(2) The Chairman shall be a person who has held or is qualified to hold office as a Judge of a Court of record in Nigeria and shall receive such remuneration as may be prescribed by law.***
>
> ***(3) The Chairman and members of the Code of Conduct Tribunal shall be appointed by the President in accordance with the recommendation of the National Judicial Council.***
>
> ***(4) The National Assembly may by law confer on the Code of Conduct Tribunal such additional powers as may appear to it to necessary to enable it more effectively to discharge the functions conferred on it in this Schedule.***
>
> ***16. (1) The tenure of office of the staff of the Code of Conduct Tribunal shall, subject to the provisions of this Code, be the same as that provided for in respect of officers in the civil service of the Federation.***
>
> ***(2) The power to appoint the staff of the Code of Conduct Tribunal and to exercise disciplinary control over them shall vest in the members of the Code of Conduct Tribunal and shall be exercisable in accordance with the provisions of an Act of the National Assembly enacted in that behalf.***
>
> ***17. (1) Subject to the provisions of this paragraph, a person holding the office of Chairman or member of the Code of Conduct Tribunal shall vacate his office when he attains the age of seventy years.***

(2) A person who has held office as Chairman or member of the Code of Conduct Tribunal for a period of not less than ten years shall, if he retires at the age of seventy years, be entitled to pension for life at a rate equivalent to his last annual salary in addition to other retirement benefits to which he may be entitled.

(3) A person holding the office of Chairman or member of the Code of Conduct Tribunal shall not be removed from his office or appointment by the President except upon an address supported by two-thirds majority of each House of the National Assembly praying that he be so removed for inability to discharge the functions of the office in question (whether arising from infirmity of mind or body) or for misconduct or for contravention of this Code.

(4) A person holding the office of Chairman or member of the Code of Conduct Tribunal shall not be removed from office before retiring age save in accordance with the provisions of this Code.

18. (1) Where the Code of Conduct Tribunal finds a public officer guilty of contravention of any of the provisions of this Code it shall impose upon that officer any of the punishments specified under sub-paragraph (2) of this paragraph and such other punishment as may be prescribed by the National Assembly.

(2) The punishment which the Code of Conduct Tribunal may impose shall include any of the following -

(a) vacation of office or seat in any legislative house, as the case may be;

(b) disqualification from membership of a legislative house and from the holding of any

public office for a period not exceeding ten years; and

(c) seizure and forfeiture to the State of any property acquired in abuse or corruption of office.

(3) The sanctions mentioned in sub-paragraph (2) hereof shall be without prejudice to the penalties that may be imposed by any law where the conduct is also a criminal offence.

(4) Where the Code of Conduct Tribunal gives a decision as to whether or not a person is guilty of a contravention of any of the provisions of this Code, an appeal shall lie as of right from such decision or from any punishment imposed on such person to the Court of Appeal at the instance of any party to the proceedings.

(5) Any right of appeal to the Court of Appeal from the decisions of the Code of Conduct Tribunal conferred by sub-paragraph (4) hereof shall be exercised in accordance with the provisions of an Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal.

(6) Nothing in this paragraph shall prejudice the prosecution of a public officer punished under this paragraph or preclude such officer from being prosecuted or punished for an offence in a court of law.

(7) The provisions of this Constitution relating to prerogative of mercy shall not apply to any punishment imposed in accordance with the provisions of this paragraph."

Section 20(1) and (2) of the Code of Conduct Bureau and Tribunal Act; Cap. C15 LFN, 2004 provides thus:

"(1) There is hereby established a Tribunal to be known as the Code of Conduct Tribunal in this Act referred to as "the Tribunal".

(2) The Tribunal shall consist of a Chairman and two other members."

However, none of the provisions reproduced above provides for the quorum of the tribunal in their sitting, to confer jurisdiction on the tribunal. This was an issue over which there has been disagreement in the past. The Supreme Court laid the matter to rest in the case of **DR. OLUBUKOLA ABUBAKAR SARAKI v. FEDERAL REPUBLIC OF NIGERIA**[23] where the apex court held Per ONNOGHEN, J.S.C (as he then was) as follows:

"I agree with the submission of learned senior counsel for the respondent and the lower court that... such provision is clearly absent in Paragraph 15(1) of the 5th Schedule to the 1999 Constitution, as amended. The said Paragraph and Section 20 (1) and 2 of Cap. C15 of LFN 2004 equally did not contain any expression relating to the composition of the Tribunal in the exercise of its jurisdiction.

To determine the quorum of the Code of Conduct Tribunal as established, one has to look at Section 28 of the Interpretation Act which, by operation of Section 318(4) of the 1999 Constitution as amended,"...shall apply for the purpose of interpreting the provisions of this Constitution".

It is important to note that a resort to the provisions of the Interpretation Act is not for the purpose of filling in a lacuna but of interpretation of the provisions of Paragraph 15(1) of the 5th Schedule to the 1999 Constitution, (supra) and Section 201(1) and (2) of Cap C15 of LFN 2004 which established the Code of Conduct Tribunal as consisting of the Chairman and two other members. In other words, what do these provisions

[23](2016) 3 NWLR (Pt. 1500) 531 at 574 to 575

mean for the purpose of the tribunal exercising its jurisdiction?

The answer is as provided by Section 28 of the interpretation Act thus, inter alia:

"Notwithstanding anything contained in any Act or any other enactment, the quorum of any Tribunal, commission of inquiry (including any appeal Tribunal established for the purpose of hearing any appeal arising therefrom) shall not be less than two (including the Chairman)..."

From the above provision, it is clear that any sitting of the Code of Conduct Tribunal presided by the Chairman and one member, as was the case herein, is valid."

The powers of the tribunal are clearly spelt out in the Code of Conduct Bureau and Tribunal Act and in the Constitution. The powers include; the trial of public officers who are found to have breached the relevant provisions of the Act and the constitution and imposing the necessary sanctions, if found guilty. The punishments which the Tribunal may impose are also provided as follows:

a. vacation of office or any elective or nominated office, as the case may be;

b. disqualification from holding any public office (whether elective or not) for a period not exceeding ten years; and

c. seizure and forfeiture to the State of any property acquired in abuse or corruption of office[24].

It is important to note that from the earlier referred provisions of the Constitution, a person convicted and sentenced by the Code of Conduct Tribunal cannot be granted prerogative of mercy under the Constitution of the Federal Republic of Nigeria 1999 (as amended).[25] Also, by virtue of the provisions of the Constitution, the fact that a person has been tried for

[24]See Section 23(1) of the Code of Conduct Bureau and Tribunal Act and Paragraphs 12 and 21 of the Code of Conduct Tribunal Practice Direction, 2017

[25] See also Section 23(7) of the Code of Conduct Bureau and Tribunal Act

breach of the code of conduct does not preclude such a person from being tried in the regular court in relation to the same transactions.[26]

The aims and objectives of the Tribunal shall be to establish and maintain a high standard of morality in the conduct of Government business and to ensure that the actions and behaviour of public officers conform to the highest standards of public morality and accountability[27].

On the status of the tribunal and the nature of the proceedings before it, vis-à-vis regular courts, the appellate courts have rejected the proposition that the tribunal is merely an administrative agency for public officers. While determining the validity of a charge brought before the CCT against the then-Vice President, Atiku Abubakar, in 2007, the Court of Appeal described the CCT as a court vested with specific duties by the Constitution with its trial procedures akin to criminal trials. The Court of Appeal held in ***Attorney General of the Federation & 2 Ors. V. Alhaji Atiku Abubakar*** (2007) 8 NWLR (pt.1035) 117 at 150, per Aboki, JCA that:

> ***"In the administration of justice, the features which distinguish a criminal trial proceeding from a civil trial are arrest, arraignment, the charge, plea, conviction, sentence, and prerogative of mercy. In the instant case, an examination of the powers of the Code of Conduct Tribunal and its trial procedure rules shows the trappings of a criminal trial."***

In 2016, the Supreme Court – while determining the appeal of Senator Bukola Saraki, on the validity of the charge against him at the CCT – stated that the CCT is empowered to administer both administrative and criminal sanctions. Justice Onnoghen, who delivered the lead judgment in Saraki's appeal, described the CCT as a tribunal with quasi-criminal jurisdiction. Distinguishing the CCT from other Courts created under Section 6 of the Constitution, Onnoghen stated:

> ***"I should not be understood as saying that the Code of Conduct Tribunal is a court of superior record or jurisdiction with relevant inherent powers and sanctions but that as a quasi-criminal Tribunal/Court, it has the necessary powers to put into effect its***

[26]Section 23(6) of the Code of Conduct Bureau and Tribunal Act

[27] See Section 2 of the Code of Conduct Bureau and Tribunal Act

mandate of ensuring accountability, probity, transparency, etc of public officers in public office."[28]

It was on this basis that the tribunal's power to order arrest of defendants before it was upheld. If the provisions of the Code of Conduct were strictly adhered to and enforced, they would go a long way to check corruption. In the case of assets declaration, there would be a comparison of the assets of public officers between the period of their assumption and departure from public service. The burden would be on the officials themselves to explain cases where the values of newly-acquired assets would appear to be beyond the legitimate earnings of the officials.[29]

How can we make both the CCT and CCB more effective and efficient in carrying out the mandate of reducing graft and enhancing integrity in public office? This paper has attempted to clear the misconception that the CCT is under the control of the executive arm of government as the it has been shown that only the CCB alone and not the CCT was created under Section 153 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Also, the mode of appointment of the chairman and members of the CCT clearly shows that the tribunal is not intended to be an appendage of the executive arm of government or a tool in the hands of the executive arm. The provision of the Constitution for the appointment of the chairman of the Code of Conduct Tribunal are similar to those provided for under Sections 231, 238 and 250 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The appointments to the office of the chairman and members of the CCT are by the President on the recommendation of the National Judicial Council[30]. Furthermore, appeals from the CCT lies to the Court of Appeal and ultimately to the Supreme Court just like in other criminal cases where parties have right of appeal to the Court of Appeal and the Supreme Court. However, the scepticism of at least a section of the public as to the independence of the CCT deserves attention and there is the need to make both the CCT and the CCB completely independent and free from any form of undue influence by the executive and also the other arms of government.

ARE THE CHAIRMAN AND MEMBERS OF THE CCT JUDICIAL OFFICERS AND WHO EXERCISES DISCIPLINARY POWERS OVER THEM?

[28]See ***Saraki v. FRN*** (2016) 3 NWLR (Pt. 1500) 531 at 579

[29] See http://www.financialnigeria.com/code-of-conduct-tribunal-and-bureau-in-need-of-independence-blog-426.html assessed on 9th August, 2019

[30]See Paragraph 15 (3) of Part I of the Fifth Schedule to the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Section 20 of the Code of Conduct Bureau and Tribunal Act

One major question that was thrown up earlier in 2019 during the trial of the former Chief Justice of Nigeria, Justice Walter Onnoghen was – who exercises disciplinary powers over the chairman and the members of the Code of Conduct Tribunal and to whom are they accountable? Petitions were written against the chairman of the CCT to the National Judicial Council (NJC) and the Federal Judicial Service Commission (FJSC). In his response to the said petitions, the CCT chairman stated that he is not accountable to the NJC or the FJSC as he is not a judicial officer as contemplated under Section 318 of the 1999 Constitution. The CCT chairman was said to have further stated that he is only accountable and can only be disciplined by the Presidency[31].

Section 318 of the 1999 Constitution defines judicial office as:

"Judicial office means the office of the Chief Justice of Nigeria or a Justice of the Supreme Court, the President or Justice of the Court of Appeal, the office of the Chief Judge or a Judge of the Federal high Court, the office of the Chief Judge or Judge of the High Court of the Federal Capital Territory, Abuja, the office of the Chief Judge of a State and Judge of High Court of a State, a Grand Kadi or Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja, a President of Judge of the Customary Court of Appeal of the Federal Capital Territory Abuja, a Grand Kadi or Kadi of the Sharia Court of Appeal of a State, or President or a Judge of the Customary Court of Appeal of State; and a reference to a judicial officer" is a reference to the holder of any such office;"

It is clear that the office of the Chairman or members of the CCT is not mentioned in the provision of the Constitution reproduced above. One can therefore conclude, and safely too, that the Chairman and members of the Code of Conduct Tribunal are not judicial officers. One may be tempted to ask that if the Chairman and members of the CCT are not judicial officers, are they members of the Executive?

While it is conceded that the CCT chairman and the members are not judicial officers and therefore cannot be disciplined by the NJC or the FJSC the next question that agitates one's mind is; are the chairman and

[31] See https://punchng.com/onnoghen-cct-chair-snubs-query-says-i-report-only-to-presidency/ visited on 15th August, 2019

members of the CCT actually appointable and removable solely at the discretion of the Presidency? In respect of the removal of the chairman or members of the CCT, Paragraph 17 (3) of Part I of the 5th Schedule to the 1999 Constitution (as amended) which has earlier been quoted above, provides that:

> ***"(3) A person holding the office of Chairman or member of the Code of Conduct Tribunal shall not be removed from his office or appointment by the President except upon an address supported by two-thirds majority of each House of the National Assembly praying that he be so removed for inability to discharge the functions of the office in question (whether arising from infirmity of mind or body) or for misconduct or for contravention of this Code."***

We must however not be quick to conclude that the President can remove the Chairman or members of the CCT upon the address of two-third majority of each House of the National Assembly *simpli citer* as provided by the above cited portion of the Constitution. We must bear in mind that the National Judicial Council (NJC) plays a prominent role in the appointment of the Chairman and members of the CCT. Just as judicial officers are recommended to either the President or Governor as the case may be, for appointment, the Chairman and members of the CCT are also recommended to the President by the NJC for appointment. The person recommended must also be qualified to hold office as a Judge of a Court of record[32]. In ***Elelu-Habeeb v. A.G, Federation***[33] the Chief Judge of Kwara State was removed by the Governor of Kwara State on the address supported by two-third majority of the State House of Assembly in accordance with Section 292 (1) (a) (ii) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Delivering the lead judgment of the Supreme Court, Onnoghen, JSC (as he then was) held:

> ***"This is because the combined effect of these provisions of the Constitution has revealed very clear intention of the framers of the Constitution to give the National Judicial Council a vital role to play in the appointment and removal of judicial officers by the Governors and Houses of Assembly of the State. In the result, I entirely agree with the two courts below that having regard to***

[32] See Paragraph 15 (2) and (3) of Part I of the 5th Schedule to the 1999 Constitution as amended
[33] (2012) 13 NWLR (Pt. 1318) 423

these relevant provisions of the 1999 Constitution, the Governor of Kwara State and the House of Assembly of the State cannot remove Chief Judge of Kwara State from office without the participation of the National Judicial Council in the exercise[34].”

Section 292 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides:

“292. (1) A judicial officer shall not be removed from his office or appointment before his age of retirement except in the following circumstances –

(a) in the case of -

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

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

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

(b) in any case, other than those to which paragraph (a) of this subsection applies, by the President or, as the case may be, the Governor acting on the recommendation of the National Judicial Council that the judicial officer be so removed for his inability to

[34] See page 495

discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct."

It was in rejecting the argument that Section 292 (1) (a) which provides for removal of a judicial officer by the President or Governor in conjunction with the Senate or the State House of Assembly as the case may be on the one hand, is an alternative to Section 292 (1) (b) which provides for the removal of a judicial officer by the President or the Governor in conjunction with the National Judicial Council that the Supreme Court made the pronouncement earlier referred to.

From the above position of the Supreme Court, one would not be surprised if a chairman or member of the CCT is in future removed by the President upon an address by two-third majority of the two Houses of the National Assembly and such a person would contend that the National Judicial Council who played a prominent role in his/her appointment must also be involved before he/she can be validly removed, in line with the case of Elelu-Habeeb. This is because the provision of Section 292 (1) (a) of the 1999 Constitution is similar to Paragraph 17 (3) of Part I of the 5th Schedule to the 1999 Constitution (as amended) and the mode of appointment of judicial officers and CCT chairman and members are similar.

While we may have to await specific judicial pronouncement on whether the President and two-third of the two Houses of the National Assembly can remove the chairman or members of the CCT, it must be noted that unlike judicial officers, there is no provision for the supervision or discipline of the chairman and members of the CCT by the NJC and it is a general principle in law that he who appoints can also remove. In ***Elelu-Habeeb v. AGF***[35] the Supreme Court had earlier held that:

"It is quite plain from the provisions of paragraph 21 sub-paragraphs (c) and (d) of part 1 of the Third Schedule to the Constitution of the Federal Republic of Nigeria 1999, that the National Judicial Council is the body that had been assigned the duty and responsibility of recommending to the Governors of the States of the Federation suitable persons for appointments to the offices of Chief Judges of the States and other judicial officers in the States. In addition to its role in the

[35] Supra

appointment of Chief Judges of the States and other judicial officers, the same National Judicial Council is also empowered under sub paragraph (d) of paragraph 21 to recommend to the Governors of the States the removal from office of the Chief Judges of the States and other judicial officers of the States and also to exercised disciplinary control over such Chief Judges of the States and other judicial officers of the States.

Therefore, from these very clear provisions of the Constitution which are very far from being ambiguous, the governors of the States and the House of Assembly of the State cannot exercise disciplinary control touching the removal of Chief Judges of States or other officers in the States. Going back to section 271(1) of the 1999 Constitution, it is also glaringly clear that the National Judicial Council has been given a role to play in the appointment of Chief Judges of the States:

> ***"271(1) The appointment of a person to the office of Chief Judge of a State shall be made by the Governor of the State on the recommendation of the National Judicial Council subject to the confirmation of the appointment by the House of Assembly of the State."***

It can be seen here again, although the Governor of a State had been vested with the power to appoint the Chief Judge of his own State, that power is not absolute as the Governor has to share the power with National Judicial Council in recommending suitable persons and the State House of Assembly in confirming the appointment. It is in the spirit of the Constitution in ensuring checks and balances between the three arms of government that the role of the Governor in appointing the exercising disciplinary control over the Chief Judge of his State is subjected to the participation of the National Judicial Council and the House of Assembly of

the State in the exercise to ensure transparency and observance of the rule of law[36].....

The provisions of section 292(1)(a)(ii) of the Constitution above also deals with the power of the Governor to remove the Chief Judge of a State in conjunction with the House of Assembly of the State. Although it is true as argued by the learned senior counsel to the cross-appellant that the above section 292(1) made no provision for the National Judicial Council to play any role in the removal of a Chief Judge of a State, the fact that the council has a vital role to play in the appointment, removal and exercising control over a Chief Judge of a State under section 271(1) of the Constitution and also under paragraph 21 of part 1 of the Third Schedule to the same Constitution is not at all in doubt. Furthermore, the conditions specified under section 292(1)(a)(ii) of the Constitution for the exercise of the power of removal must be satisfied before such power can be validly exercise by both the Governor and the House of Assembly. This is because any exercise of power to remove a Chief Judge must be based on his:

1. Inability to discharge the functions of office or appointment

2. The inability to perform the function of his office could arise from infirmity of the mind or of body

3. For misconduct or

4. The contravention of the code of conduct

All these conditions or basis for the exercise of power to remove a State Chief Judge must be investigated and confirmed by credible evidence and placed before the Governor and the House of Assembly before proceeding to exercise their power of removal granted by the section of the Constitution. For example the ground of removal for inability to perform the functions of his office or

[36] See pages 293 to 294

appointment cannot be ascertained and confirmed by the Governor or the House of Assembly in the absence of any input from the National Judicial Council; under which supervision the chief Judges discharges his functions as judicial officer and which body also is directly responsible for exercising disciplinary control over the said State Chief Judge. It is not difficult to see that for the effective exercise of the powers of removal of a Chief Judge of a State by the Governor and House of Assembly, the first port of call by the Governor on his journey to remove a chief Judge of the state shall be the National Judicial Council which is equipped with the personal and resources to investigate the inability of the Chief Judge to discharge the functions of his office, the subject of disciplinary action of removal through the Committees of the Council and where the infirmity of the mind or body is involved, the services of a medical board to examine and submit appropriate report on the Chief Judge to be affected, could also avail the council in the process of investigation. It is for the foregoing reasons that I hold the view that in the resolution of the issue at hand, the entire provisions of the 1999 Constitution in section 153 (1) (i), (2), 271(1), 292(1)(a)(ii) and paragraph 21 of part 1 of the Third Schedule to the Constitution of the Federal Republic of Nigeria 1999 dealing with the appointments, removal and exercise of disciplinary control over judicial officers, must be read, interpreted and applied together in resolving the issue of whether or not the Governor of a State and the House of Assembly of a State can remove a Chief Judge of a State in Nigeria without any input of the National Judicial Council[37].”

The NJC has no constitutionally prescribed role to play in the supervision or discipline of a CCT chairman or member unlike the position in respect of judicial officers. It would therefore be safe to conclude that the chairman and members of the CCT are subject to the disciplinary powers of the two houses of the National Assembly who can look at any actions of the CCT chairman and/or members and may, with two-third majority recommend removal to the President.

[37] See pages 494 to 495

As said earlier, Section 153 (1) of the 1999 Constitution establishes certain Federal Executive Bodies such as Code of Conduct Bureau, National Judicial Council, Nigeria Police Council etc. However, the Code of Conduct Tribunal is not one of the executive bodies mentioned in section 153 of the 1999 Constitution. Paragraph 15 of Part I of the Fifth Schedule to the 1999 Constitution establishes the Code of Conduct Tribunal. The seeming confusion regarding the status of the Code of Conduct Tribunal stems from our inability to appreciate the difference between Code of Conduct Bureau as a federal executive body that is distinct from the Code of Conduct Tribunal. While the Code of Conduct Bureau is an executive body, the Code of Conduct Tribunal is not an executive body. The Code of Conduct Tribunal is an autonomous special body deliberately designed under the Constitution to be independent of any form of control either by the executive, the legislature or the judiciary. For instance, members of the executive, the legislature and the judiciary can be tried before the Code of Conduct Tribunal. Whatever may be the practice at the moment, there is nothing in the 1999 Constitution or the Code of Conduct Bureau and Tribunal Act which places the Code of Conduct Tribunal under the control of either the Presidency/Executive or the judiciary. The CCT is an autonomous tribunal which is completely insulated from the influence of any of the organs of government.

FEDERAL ATTORNEY-GENERAL'S POWER TO PROSECUTE AT THE CCT

Although investigations are to be carried out by the CCB, curiously, the Code of Conduct Bureau and Tribunal Act provides that cases prosecuted at the CCT must be instituted by the Attorney General of the Federation (AGF) or any officer in the Ministry of Justice, as may be authorized by the Attorney General of the Federation (AGF)[38]. The prosecutorial powers of the Attorney General at the CCT under the law can however be exercised whether or not there is a sitting Attorney General.[39]

It must further be noted that the Attorney General of the Federation still reserves his power under Section 174 of the Constitution, to discontinue proceedings without any explanations which invariably implies that such powers can be exercised by the Attorney General in respect of charges filed at the Code of Conduct Tribunal.[40]

[38] See Section 24 (2) of the Code of Conduct Bureau and Tribunal Act

[39] See ***Saraki v. FRN*** (2016) 3 NWLR (Pt. 1500) 531

[40] See ***Prince Abubakar Audu v. Attorney-General of the Federation*** (2013) 8 NWLR (Part 1355)…

It must be borne in mind that even the Attorney General of the Federation is among the public officers expected to observe the code of conduct prescribed by the Act and the Constitution.[41] We must however not forget that the Attorney General of the Federation reserves the power to enter a *nolle prosequi* even in offences that may be considered more severe than those that can be charged before the CCT. Such offences include offences that may attract capital punishment and very long period of custodial sentences. Thus, this challenge may not be peculiar to the operation of the Code of Conduct Bureau and Tribunal. Perhaps this brings to fore, once again, the imperativeness of the long standing proposition that the office of the Attorney General of the Federation should be separated from the office of the Minister of Justice to avoid the tendency of using the office to settle political scores.

Furthermore, while the law may need to be specifically tested on whether the Code of Conduct Bureau can file a charge at the CCT without recourse to the Attorney General of the Federation, I humbly hold the view that recourse need not be had to the office of the Attorney General in view of the Supreme Court decision in ***Olagunju v. FRN***[42]. Prosecutorial powers are generally not limited or restricted only to the Attorney General and his office.[43]

The Code of Conduct Bureau (CCB) should therefore be empowered by law to independently investigate and prosecute offences/breaches of the Code of Conduct, without recourse to the AGF.

There has been the contention as to whether a serving judicial officer should be subject to the jurisdiction of the CCT without first having recourse to the disciplinary powers of the National Judicial Council in line with the Court of Appeal decision in ***Nganjiwa v. FRN.***[44] The argument that judicial officers should first be dealt with by the National Judicial Council assumed a rather disturbingly confusing dimension during the recent trial of the immediate past Chief Justice of Nigeria, Onnoghen, CJN (as then was) at the Code of Conduct Tribunal. The confusion stemmed more from the fact that the Chief Justice of Nigeria doubles as the Chairman of the National Judicial Council and it would be difficult for a holder of an office to set in motion, the machinery of the law against

[41]See Paragraph 6 of Part II of the Fifth Schedule to the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Section 26 of the Code of Conduct Bureau and Tribunal Act.
[42] (2018) 10 NWLR (Pt 1627) 272 at 227 and 282
[43]See **FRN .v. Osahon**(2006) 5 NWLR (Pt.973) 361 at 406, **Comptroller of Prisons .v. Adekanye** (2002) 15 NWLR (pt.790) 318 at 329 and **FRN .v. Adewunmi**(2007) 10 NWLR (pt.1042) 399 at 427
[44](2018) 4 NWLR (Pt. 1609) 301

himself. The contention on this issue would however appear to have been settled by the Supreme Court in ***Ahmed V. Ahmed & Ors***[45] where it was held that:

> ***"...the said paragraph 12 provides as follows: 'Any allegation that a public officer has committed a breach of or has not complied with the provisions of this Code shall be made to the Code of Conduct Bureau.'***
>
> ***The foregoing provisions are clearly unambiguous and so construed literally mean that any breaches of any provisions of the said 5th schedule or matters of noncompliance with any provisions of the Code shall, (meaning that it is mandatory i.e. must) be made to the Code of Conduct Bureau that has established its Tribunal with the exclusive jurisdiction to deal with any violations of any provisions under the Code.***
>
> ***If I may emphasise, any violations shall be made to Code of Conduct Bureau. The provisions have made it mandatory to take any matters so covered by the 5th schedule (supra) to the Code of Conduct Bureau and not to any ordinary regular Courts as has been done in this instance.***
>
> ***If I may repeat, the Code of Conduct Tribunal has been established with the exclusive jurisdiction to deal with all violations contravening any of the provisions of the Code as per paragraph 15(1). This provision has expressly ousted the powers of ordinary regular courts in respect of such violations.***
> ***The Tribunal to the exclusion of other courts is also empowered to impose any punishments as specified under sub-paragraphs (2) (a), (b) & (c) of paragraph 18 as provided in sub-paragraphs 3 and 4 of paragraph 18 while appeals shall lie as of right from such decisions to the Court of Appeal.***
>
> ***Simply put, to tackle any violation of the Code starts before the Code of Conduct Bureau Tribunal to the Court***

[45](2013) LPELR-21143(SC), see also ***Saraki v. FRN*** (2016) 3 NWLR (Pt. 1500) 531 at 582 where Onnoghen JSC (as he then was) held that the CCBT Act "created the offences peculiar to the jurisdiction of the tribunal"

below on appeal and on a further appeal therefrom to this Court.

As can be seen, the lower Court exercises appellate jurisdiction over the Code of Conduct Tribunal and no more."

Notwithstanding the clear position of the law as enunciated by the Apex Court above, I will align myself with the suggestion that because of the sensitive nature of the office of judges and justices, whenever the Code of Conduct Bureau has evidence that any judicial officer is in breach of the Code of Conduct for public officers, the Bureau should first refer the matter to the National Judicial Council. In such circumstances, the National Judicial Council would have 30 days within which to consider the allegation against the judicial officer and if the National Judicial Council does not take any step within the 30 days, then charges may be filed against the affected judicial officer. Where the affected judicial officer happens to be the incumbent Chief Justice of Nigeria as in the case of Onnoghen, CJN, then a committee of at least 5 former justices of the Court of Appeal and/or the Supreme Court would be convened by the justice next in rank to the Chief Justice, the President of the Court of Appeal and the Chief Judge of the Federal High Court. The setting up of such a committee and the determination of allegations against the CJN must be within 45 days. If, in the case of the CJN or any other judicial officer, the affected officer is found by either the NJC or the committee not to have contravened the code of conduct, then such judicial officer shall be entitled to be tried in absentia at the Code of Conduct Tribunal but after his trial if he is found guilty and sentenced, he shall exercise his right of appeal within 30 days and the appeal must be heard and determined within 90 days upon filing. Throughout the period of the 30 days and 90 days, the said judicial officer may still continue to hold his office. If the Court of Appeal also finds the said judicial officer guilty, then the judicial officer must forthwith vacate his office.

An element in the assets declaration process, which has contributed to its ineffectiveness, is the lack of proper examination or verification of the assets listed in the declaration forms. It would be impossible to tackle corruption if the assets declaration forms of public officers are not verified. The verification process would require substantial reforms, including the use of ICT solutions for the CCB to adequately carry out this task.

Furthermore, the forms should be made more accessible to members of the public. It has become more of a moral act for the President, Vice-

President and other public office holders to publicly declare their assets. Every Nigerian citizen should have a right to access the declaration forms of public officers, whether elected or appointed. The CCB, using the provisions of the Constitution which empowers it to make copies of the asset declaration forms "available for inspection by any citizen of Nigeria on such terms and conditions as the National Assembly may prescribe"[46] had denied access to the said forms on application on the grounds that the National Assembly has not prescribed any term or condition. With the enactment of the Freedom of Information Act, one would expect that applications for access to assets declaration forms of elected officials would be granted by the CCB. However, such requests by civil organizations and individuals are often refused by the Bureau[47].

The CCB and CCT should not be subjected to the same malaise and challenges that have made successful prosecution of public officers in the regular courts a herculean task. The independence and reform of these agencies are key to ensuring they fulfil their statutory mandates. Indeed, probity among public officers in Nigeria will help to achieve far-reaching implementation of government policies and the delivery of public goods.

CONCLUSION

The Code of Conduct Tribunal is a potential veritable tool in the fight against corruption. It is intended to be an independent special body with no influence of the any of the three arms of government. It is different from the Code of Conduct Bureau created as an executive under Section 153 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It aimed at preventing a public officer from enjoying the fruit of his/her corrupt.

[46]See Paragraph 3 (c) of Part II of the Fifth Schedule to the Constitution of the Federal Republic of Nigeria 1999 (as amended)

[47]Op cit note 29