

**NIGERIAN BAR ASSOCIATION (NBA)
2019 ANNUAL GENERAL CONFERENCE**

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

(Being a Paper presented at the 2019 Annual General Conference of the Nigerian Bar Association (NBA), on August 25, 2019)

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

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**The President of the Nigerian Bar Association,
My Lords Present,
Senior Advocates of Nigeria, Benchers,
Chairman of Session, the Keynote Speaker and fellow panellists,
Learned Colleagues,
Gentlemen of the Press,
Ladies and Gentlemen.**

INTRODUCTION

There can be no better time to discuss a topic of this nature in the life of Nigeria than now. Which is why I salute the organizers of this opening plenary session for the choice of this topic, which is geared towards furthering the tenets of the rule of law and constitutional democracy.

THE CODE OF CONDUCT TRIBUNAL: AN APPRAISAL

- (i) The Code of Conduct Tribunal (“the Tribunal”) was established under Paragraph 15 (1) of the Fifth Schedule to the Constitution of the Federal Republic of Nigeria, 1999, as amended (“the Constitution”), as an organ to administer and ensure compliance with the Code of Conduct for Public Officers.
- (ii) By Paragraphs 18 of the Fifth Schedule, the Tribunal has the powers of adjudication, of making findings of guilt or acquittal and to impose punishments. This has clothed the Tribunal with the status of a quasi-judicial entity.
- (iii) By paragraph 15 (2), the Chairman of the Tribunal shall possess the qualification of a judge of a superior court of record.
- (iv) By paragraph 18 (4) and (5), an appeal against the decision of the Tribunal lies directly to the Court of Appeal.
- (v) The mode of appointment of the Chairman and members of the Tribunal is by the President acting upon the recommendation of the National Judicial Council.
- (vi) The President can exercise the power of removal where such is supported by an address of two-thirds majority of each House of the National Assembly.
- (vii) In practice, both the Code of Conduct Bureau and the Code of Conduct Tribunal are under the Presidency. This, in my view, is what has led to the seeming controversy as to the status, designation and functionality of the Tribunal, dangling as it were, between the Executive and the Judiciary. What then exactly is the status of the Tribunal? Let us embark upon a foray into the independence of the judiciary.

Similar provisions as stated above are also replicated in sections 20 to 23 of the Code of Conduct and Tribunal Act. Clearly therefore, whether or not there is or seem to

be a clash between judicial and executive powers in relation to the Code of Conduct Tribunal will best be appreciated when the undertake a proper analysis of the meaning of judicial independence.

THE CONCEPT OF JUDICIAL INDEPENDENCE

The fundamental concept of judicial independence came into being in England and Wales in 1701 with the enactment of the Act of Settlement. This statute formally recognized the principles of security of judicial tenure by establishing that High Court Judges and Lord Justices of Appeal hold office during good behaviour. Appropriate and formal mechanisms had to be in place before a judge could be removed. Since the Act of Settlement, it has only been possible to remove a senior judge from office through an Address to the Queen agreed by both Houses of Parliament. See section 292 of the 1999 Constitution of the Federal Republic of Nigeria for a similar provision on the removal of judicial officers from office.

The clash between judicial and executive powers has been a constant source of anxiety in all contemporary societies which are committed to the principles of the Rule of Law. It is this same anxiety that has induced such writers as John Locke and Montesquieu to conceive the idea that political liberty would be an illusion if powers were not demarcated and placed in different hands.

So far, it has been indicated that powers which may conveniently be described as legislative, executive and judicial, have been conferred on the administration and in some cases, power has been given “not even to known and ascertainable individuals, but to vast departments of the state, huge administrative organizations employing thousands of anonymous civil servants”. In other cases, power is vested on various tribunal or agencies established to execute the policies of the government.

For the purpose of this paper, the main focus is on the powers of the code of conduct tribunal which by discharging these powers and functions clashes with judicial powers rendering its constitutional authority almost ineffective. (See, *The Observance of the Rule of Law and Fundamental Human Rights* (1987) by T.O. Elias, Locke, *Second Treatise of Civil Government*, Ch. 12, 13, Montesquieu, *L’Esprit des Lois*, Book XI, Ch.6 and *Judicial Control of Administrative Process in Nigeria*, pg. 1 and 6 by B.U Eka, 2001).

THE CONCEPT OF SEPARATION OF POWERS

The concept of separation of powers is a model for the governance of a state. Under this model, a state's government is divided into branches, each with separate and independent powers and areas of responsibility so that the powers of one branch are not in conflict with the powers associated with the other branches.

The doctrine of separation of powers comes from the work of Montesquieu for the preservation of political liberty. While describing the doctrine of Separation of Powers, Montesquieu said:

“Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it and to carry his authority as far as it will go...To prevent this abuse, it is necessary from the nature of things that one power should be a check on another....When the legislative and executive powers are united in the same person or body....there can be no liberty Again, there is no liberty if the judicial power is not separated from the legislative and executive ...There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers”.

The whole purpose of the concept of separation of powers is to avoid a tyrannical government, a government that could make laws, enforce such laws and adjudicate over the breaches of such laws to suit its own purpose either politically, economically or socially, to the detriment of others.

The importance of the concept of separation of powers has in recent times been judicially emphasized in *Liyanage v. The Queen* (1967) AC 259 where the Judicial Committee of the Privy Council pointed out that there exists under the Ceylonese Constitution a tripartite division of powers – legislative, executive and judicial – and that it would be unconstitutional if judicial functions were allowed to be interfered with by the Legislature by means of an Act of Parliament. Again, in *Lakanmi v. Attorney General (Western State of Nigeria)* (1971) 1 UILR 201, the Supreme Court ruled that Decree No. 45 of 1968 was ultra vires since it was ‘nothing short of legislative judgment, an exercise of judicial power’. The court pointed out that in Nigeria there exist a division of powers – legislative, executive and judicial.

The concept of separation of powers is so fundamental and must be recognized. It is to define the powers of the legislature that the Constitution is written and the purpose is that such powers that are left with the Legislature be limited and that the remainder be vested in the Courts. It must be clearly stated that our Constitution is based on the concept of Separation of Powers – the Legislature, the Executive and the Judiciary and in the distribution of powers, the Courts are vested with the exclusive right to

determine justiciable controversies between citizens and between citizens and the state. These powers as vested by the Constitution are highlighted as follows:

a. **SECTION 4 – LEGISLATIVE POWERS**

By the provision of section 4 of the Constitution, the Legislative powers of the Federal Republic of Nigeria are vested in the National Assembly which consists of a Senate and a House of Assembly who have powers to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative list set out in Part 1 of the Second Schedule to the Constitution.

Also, the legislative powers of a State of the Federation shall be vested in the House of Assembly of the State to make laws for the peace, order and good government of the State with respect to any matter not listed in the Exclusive Legislative List.

b. **SECTION 5 - EXECUTIVE POWERS**

By the provision of section 5 of the Constitution, the Executive powers of the Federation is vested in the President and executive functions may be exercised by him directed or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation and shall extend to the execution and maintenance of the Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has for the time being, power to make laws.

c. **SECTION 6 – JUDICIAL POWERS**

By the provision of section 6 of the Constitution, the judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation and for a State and each court have all the powers of a superior court of record as follows:

- a. The Supreme Court of Nigeria,
- b. The Court of Appeal,
- c. The Federal High Court,
- d. The High Court of the Federal Capital Territory Abuja,
- e. The High Court of a State,
- f. The Sharia Court of Appeal of the Federal Capital Territory, Abuja
- g. A Sharia Court of Appeal of a State,
- h. The Customary Court of Appeal of the Federal Capital Territory, Abuja,

- i. A Customary Court of Appeal of a State.

From all of these constitutional powers, the role of the courts therefore is to ensure that powers are exercised within the statutory and constitutional limits and this is achieved through the general principles of construction which they employ as was stated by Oputa, J.S.C thus:

“...The Courts should never grow docile or apathetic and should never abdicate their constitutional responsibility of being Guardians of the Constitution as well as Guardians of the Sovereignty of our people. The Doctrine of Separation of Powers is necessary in a written Constitution. The carefully guarded balancing of powers among the three branches of government should be maintained by the courts not abdicating their proper and constitutional role. When the courts fail to exercise independent super-intendency role, things will surely fall part, leading to injustice”. See Oputa J.S.C, The Place of the Judiciary in the Third Republic – a Commentary – All Nigerian Judges Conference, Abuja, 1988.

THE CODE OF CONDUCT BUREAU

First and foremost, a **code of conduct** is a set of rules outlining the social norms, religious rules and responsibilities of and/or proper practices for an individual in an organization, agency or establishment.

In the context of this paper, **Code of Conduct Bureau (CCB)** was established by section 153 of the 1999 Constitution and is the pioneer anti-corruption agency set up by the Federal Government of Nigeria with the primary responsibility of checking corrupt practices in the Nigerian public service and has been doing so since 1989 with the following mandates:

- a. To establish and maintain a high standard of public morality in the conduct of government business and,
- b. To ensure that the actions and behavior of public officers conform to the highest standards of public morality and accountability.

Pursuant to paragraph 11 of Part 1 of the Fifth Schedule to the 1999 Constitution (as amended), every public officer is required to submit to the Code of Conduct Bureau a written declaration of all his properties, assets and liabilities and those of his/her spouse (if not a public officer) and his unmarried children under the age of eighteen years. Any Statement in such declaration that is found to be false by any authority or person authorized in that behalf to verify it shall be deemed to be a breach of the Code of Conduct Bureau.

FUNCTIONS AND POWERS OF THE CODE OF CONDUCT BUREAU & THE CODE OF CONDUCT TRIBUNAL

a. FUNCTIONS OF THE CODE OF CONDUCT BUREAU:

By virtue and pursuant to section 3 of the Code of Conduct and Tribunal Act, CAP 15, Laws of the Federation, 2010, the functions of the Bureau shall be to –

- a. Receive assets declarations by public officers in accordance with the provisions of the Act,
- b. Examine the assets declarations and ensure that they comply with the requirements of the Act and of any law for the time being in force,
- c. Take and retain custody of such assets declarations; and
- d. Receive complaints about non-compliance with or breach of this Act and where the Bureau considers it necessary to do so, refer such complaints to the Code of Conduct Tribunal established by section 20 of this Act in accordance with the provisions of section 20 to 25 of this Act.

Provided that where the person concerned makes a written admission of such breach or non-compliance, no reference to the Tribunal shall be necessary.

B. POWERS OF THE CODE OF CONDUCT TRIBUNAL:

By virtue and pursuant to section 23 of the Code of Conduct and Tribunal Act, CAP 15, Laws of the Federation, 2010, the Tribunal have to impose punishment as follows:–

- (i) Where the Tribunal finds a public officer guilty of contravening any of the provisions of this Act, it shall impose upon that officer any of the punishments specified under subsection (2) of this section.
- (ii) The punishment which the Tribunal may impose shall include any of the following –
 - 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.
- (iii) The punishments mentioned in subsection (2) of this section shall be without prejudice to the penalties that may be imposed by any law where the breach

- of conduct is also a criminal offence under the Criminal Code or any other enactment or law,
- (iv) Where the Tribunal gives a decision as to whether or not a person is guilty of a contravention of any of the provision of this Act, 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.
 - (v) Any right of appeal to the Court of Appeal from the decision of the Tribunal conferred by subsection (4) of this section shall be exercised in accordance with the provisions of the rules of court for the time being in force regulating the powers, practice and procedure of the Court of Appeal,
 - (iv) Nothing in this section shall prejudice the prosecution of a public officer punished under the section or preclude such officer from being prosecuted or punished for an offence in a court of law,
 - (v) The provisions of the Constitution of the Federal Republic of Nigeria, 1999 relating to prerogative of mercy, shall not apply to any punishment imposed in accordance with the provisions of this section.

STATUS, NOMENCLATURE AND DESCRIPTION OF THE CODE OF CONDUCT AND TRIBUNAL ACT AS IT AFFECTS PUBLIC OFFICERS UNDER THE PRESIDENCY:

By their very nature, the code of conduct tribunal is in the form of a committee, board and panel who are primarily appointed to deal with corrupt practices in the Nigerian public service and expectedly, should forward their recommendations to a competent court of record to pass judgment.

Thus, tribunals presiding over cases of corrupt public servants and passing judgment thereon, usurps the powers of the court. This is because by its composition, only the Chairman is required to be a legal practitioner, so that it is possible for people not trained in the profession of law, to be sitting in judgment over matters for which they have no legal competence or expertise. Going by the principles stated in the case of *Madulolu v Nkemdilim*, the competence of the presiding officer in any court or tribunal goes to the issue of jurisdiction.

CONFLICT OF POWERS BETWEEN CODE OF CONDUCT TRIBUNAL AND THE DOCTRINE OF SEPARATION OF POWERS

The clash of powers between the tribunal and the courts violates the principles of separation of powers which can only be dichotomized by streamlining the powers of the tribunal with conducting investigations and filing reports or recommendations,

leaving the courts with the duty of pronouncing judgments and applying appropriate sanctions or punishment.

The judiciary is an independent organ of the government which requires no interference from the executive or the legislature. The major problem as I see it stems from the lumping together of the Code of Conduct Bureau, which ordinarily is an agency of government, with the Code of Conduct Tribunal, which should be a judicial body, performing judicial functions. Or else how do we clothe non-lawyers with powers of pronouncing guilt upon citizens.

PERFORMANCE AND ENFORCEMENT OF JUDICIAL POWERS FREE FROM EXECUTIVE OVERSIGHT FUNCTIONS

It is vital that each judge is able to decide cases solely on the evidence presented in court by the parties and in accordance with the law. Only relevant facts and law should form the basis of a judge's decision. Only in this way can judges discharge their constitutional responsibility to provide fair and impartial justice;

It is vitally important in a democracy that individual judges and the judiciary as a whole are impartial and independent of all external pressures and of each other so that those who appear before them and the wider public can have confidence that their cases will be decided fairly and in accordance with the law.

When carrying out their judicial function they must be free of any improper influence. Such influence could come from any number of sources. It could arise from improper pressure by the executive or the legislature, by individual litigants, particular pressure groups, the media, self-interest or other judges, in particular more senior judges.

As well as in fact being independent in this way, it is of vital importance that judges are seen to be both independent and impartial. Justice must not only be done – it must be seen to be done. It was for this reason that the House of Lords in the Pinochet case in 1999 held that a decision it had given had to be set aside and the appeal before it heard again by a panel of different Law Lords.

It had come to light after the original decision that one of the Law Lords might have given an appearance that he was not independent and impartial because of a connection with a campaigning organisation which was involved in the case. In those circumstances, and even though there was no suggestion that the Law Lord was not in fact independent or impartial, the decision could not stand. Justice demanded that

the appeal be heard again before a panel of Law Lords who had and gave the appearance to reasonable well-informed observers that they were independent and impartial.

Whilst an independent and impartial judiciary is one of the cornerstones of a democracy, Judicial independence does, however, mean that judges must be free to exercise their judicial powers without interference from litigants, the State, the media or powerful individuals or entities, such as large companies. This is an important principle because judges often decide matters between the citizen and the state and between citizens and powerful entities. For example, it is clearly inappropriate for the judge in charge of a criminal trial against an individual citizen to be influenced by the state. It would be unacceptable for the judge to come under pressure to admit or not admit certain evidence, or to pass a particular sentence. Decisions must be made on the basis of the facts of the case and the law alone.

This requirement that judges be free from any improper influence also underpins the duty placed on them to declare personal interests in any case before it starts, to ensure that there is neither any bias or partiality, or any appearance of such. It is important that both in civil and criminal cases, decisions in the courts are made in accordance with the law and are not influenced by such external factors.

THE WAY FORWARD: INDEPENDENCE OF THE COURT AND JUDICIAL OFFICERS FROM THE OVERSIGHT FUNCTIONS OF THE CODE OF CONDUCT BUREAU

Nigerians have before now canvassed the need to strengthen the judiciary and position it as the ultimate interpreter of the Constitution and defender of the rights of the Nigerian people. They have identified a number of problems facing judiciary, including poor funding, lack of infrastructure, overlapping jurisdiction between Federal and State High Courts, over-centralization of the control of the judiciary at the Federal level and the procedure for the appointment and removal of judicial officers. In this regard, the following suggestions are proffered:

1. All members of the Code of Conduct Tribunal should be judicial officers or legal practitioners.
2. The mode of appointment should be retained, that is by President on the recommendation of the National Judicial Council.

3. The Code of Conduct Tribunal should be totally separated from the Code of Conduct Bureau and be totally removed from the Presidency.
4. The procedure for discipline and removal of its members should follow that of judicial officers, under the National Judicial Council.
5. Decisions of the Code of Conduct Tribunal should be final with a right of appeal directly to the Court of Appeal.
6. The Code of Conduct Tribunal should, in line with the 4th Alteration to the Constitution, be allowed independence and control of its own funds, as a first line charge on the Consolidated Revenue Fund.
7. The Code of Conduct Tribunal should be allowed a measure of independence to make its own rules of proceedings.
8. There should be a merger of the Code of Conduct and Tribunal Act and the Fifth Schedule to the Constitution in relation to the establishment and powers of the Tribunal.

REFERENCES AND CASE CITATIONS:

- a. Act of Settlement, 1701
- b. The Observance of the Rule of Law and Fundamental Human Rights (1987) by T.O Elias, Locke, Second Treatise of Civil Government, Ch. 12, 13, Montesquieu, L’Esprit des Lois, Book XI, Ch.6 and Judicial Control of Administrative Process in Nigeria, pg. 1 and 6 by B.U Eka, 2001
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- f. Governor of Lagos State v. Ojukwu (1986) 1 NWLR (Pt. 18) 630

