

Supreme Court Battle

The move against Onnoghen

The implications and why it matters



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Introduction

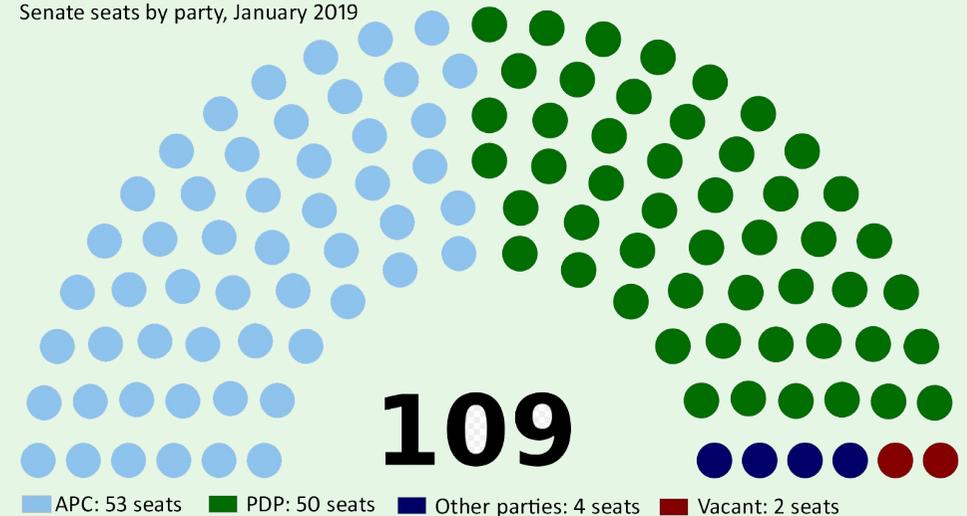
On Friday, 25 January, 2019, President Muhammadu Buhari suspended the Chief Justice of Nigeria (CJN), the Honourable Justice Walter Nkanu Samuel Onnoghen, pending the completion of his trial at the Code of Conduct Tribunal, CCT. President Buhari announced the suspension at the Council Chamber of the Presidential Villa, Abuja. He said the suspension was as a result of an Order of the CCT issued on 23 January, directing the suspension of the Chief Justice of Nigeria, from office pending the final determination of the case against him at the CCT relating to his alleged breach of the Code of Conduct for Public Officers. The President immediately swore in Justice Ibrahim Tanko Mohammed as the acting CJN. Mohammed, who hails from Bauchi state, is the most senior justice on the Supreme Court after Onnoghen.

In a swift reaction, the Nigerian Bar Association issued a statement unequivocally rejecting and condemning “this attempted coup against the Nigerian Judiciary and the evident suspension of the Nigerian Constitution by the Executive arm of the Federal Government,” and fixed an emergency meeting for Monday, 28 January.

The Senate President, and Speaker of the House of Representatives, both condemned the President’s move. It is worthy to note that in order to legally remove the Chief Justice, the other two arms of the government have to be in agreement on the issue, so a two-thirds majority is needed at the Senate. At this point, the President’s All Progressives Congress (APC) does not have the numbers needed in the Senate.

Buhari’s move has also received wide condemnation by civil society groups and has been harshly criticised in print and social media as an excessive

Senate seats by party, January 2019



and illegal use of executive power and a play from the President’s time as a military leader. The United States, the United Kingdom, and the European Union have all criticised it in strong terms, casting doubt on the credibility of next month’s general elections. It is extremely rare for a CJN to be removed from office - it has only happened once – when Murtala Muhammad removed Chief Justice Teslim Elias in 1975, shortly after a military coup brought him to power.

Legal Implications

The most important questions to ask in this situation are: what does the Nigerian Constitution of the Federal Republic of Nigeria (as amended), which is the grundnorm of Nigeria say about suspension of the CJN; who has the powers to suspend the CJN and a Judicial Officer in Nigeria; and was due process followed in this case?

Section 292(1)(a) of the Constitution provides that the CJN, and indeed any of the heads of the other superior courts of record established by the Constitution, shall not be removed from office or appointment before his age of retirement except , by the President or Governor as the case may be, acting on an address supported by two-thirds majority of the Senate or House of Assembly of the State, praying that such Judicial Officer 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 for contravention of the Code of Conduct.

Section 292 (1)(b) on its part states that in any other case, i.e. in the case of other Judicial Officers, not being the head of the other superior courts of record established by the Constitution, by the President or, as the case may be, the Governor acting on the recommendation of the National Judicial Council (NJC) that such Judicial Officer 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 for contravention of the Code of Conduct.

From the above constitutional provisions, the removal of the CJN before his age of retirement can only be effected by the President where he is acting on an address supported by two-thirds majority of the Senate. It is therefore instructed that the President did not remove the CJN from office in this case, but merely purported to have suspended him. There is however nowhere in the Constitution where the powers to suspend the CJN is donated to the President.

The NJC is the body conferred with the power to recommend to the President or Governor of the State, the removal of a Judicial Officer from office and to generally exercise disciplinary control over such a Judicial Officer. The Constitution defines a Judicial Officer to include Chief Justice of Nigeria. It is also the NJC that is vested with the power to suspend a Judicial Officer including the Chief Justice of Nigeria. Regulation 24 of the extant Judicial Discipline Regulations 2017, issued pursuant to Part 1 of the Third Schedule to the Constitution, provides that prior to taking a final decision on the report of an investigating Committee into a complaint against a Judicial Officer, the NJC shall have power to suspend such Judicial Officer. In the event of an interim suspension, the NJC shall notify the office holder of the suspension, the reasons for it and if the suspension is not immediate, the time when it comes into effect; notify the office holder of the factors that will be taken into account in determining when the suspension will end; and inform the office holder of any action required by the Council.

Legal Implications

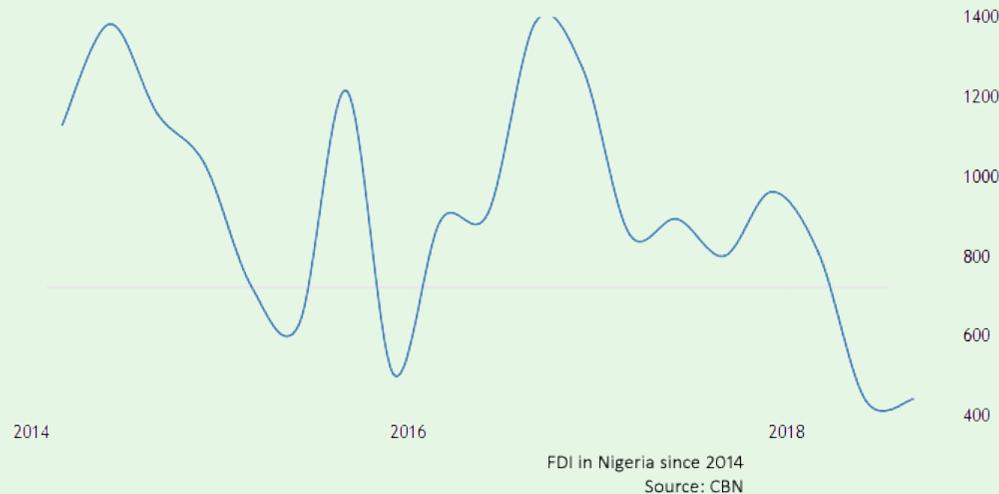
In this case, the President placed reliance on an ex parte Order of the CCT of 23 January, which was granted: in the face of an objection challenging the competence of the CCT from deciding the case and which meant that the CCT had no powers to determine any application and/or make any orders except to decide its jurisdiction; in the face of several Orders of other superior courts of record, including the Court of Appeal restraining the CCT from further proceedings in the case; and despite the fact that an interlocutory application seeking essentially the same reliefs had been served on the CJN, and adjourned for hearing by the CCT.

The only conclusion from the above is that an Order of the CCT directing the President to suspend the CJN is unknown to the Constitution and cannot be superior to the Constitution. Consequently, the move by the President predicated on such a substantially and procedurally flawed Order is unconstitutional and illegal. Same is antithetical to the basic tenets of democracy, rule of Law and greatly undermines the judiciary of Nigeria. Due process has not been complied with in the purported suspension of the CJN, which has made the well-meaning Nigerians to question the motives of the President. It can be seen that the motives of Mr. President are fully political and in full force to influence the appointments of the election tribunal.

Economic implications

President Buhari's action has had the effect of creating a constitutional crisis as he went against Section 292 of the 1999 Constitution in undertaking this action, and admitted as much in his speech justifying the suspension when in paragraph 9, he admitted, "The real effect has been a stalling of the trial of Justice Onnoghen, helped along by lawyers who insist that these orders, whether right or wrong are technically valid, and must be obeyed till an Appellate Court says otherwise. No doubt, that it is the proper interpretation, but is it the right disposition for our nation?"

By this admission, Buhari has inadvertently blown the rule of law out of the water, something we should not be surprised about given that on 28 August, 2018, in a speech to the Nigerian Bar Association no less, Buhari said that, "rule of law must be subject to national interest", a position that most observers completely disagree with.



President Buhari's actions in standing the rule of law on its head will have effects both on Nigerian politics, and the economy, for a long time to come, and these effects will be worse if his actions are allowed to stand. The most obvious effect on the economy is uncertainty.

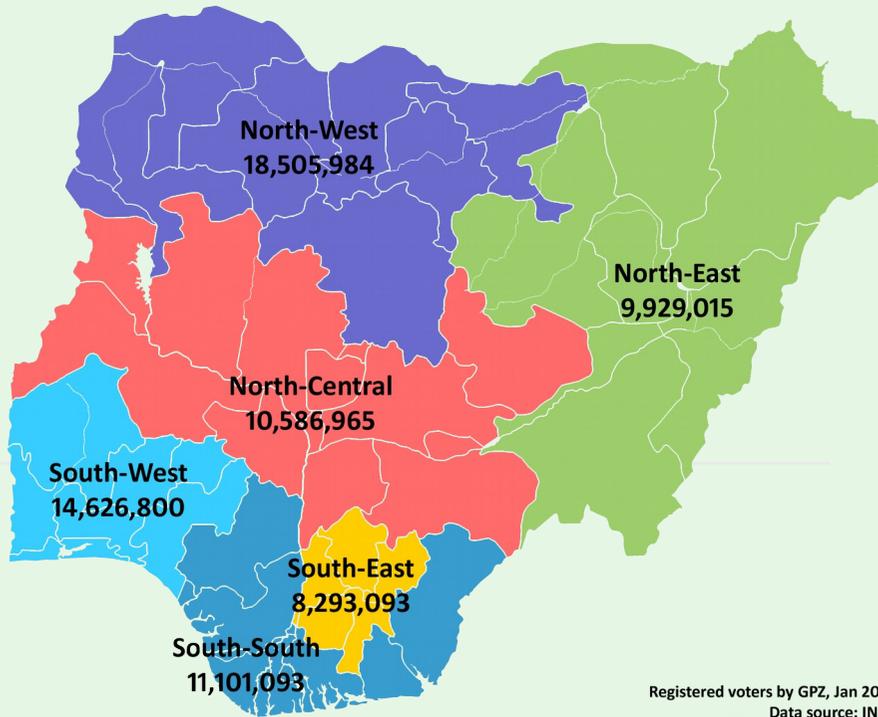
Despite all our hubris, most international observers and investors saw the risk of some type of constitutional deadlock or crisis during this election season as very low. Nigerians traditionally behave in funny ways during elections, so investors, especially portfolio investors factor that into their risk analyses, and always prepare to jump out as elections approach, then jump back in after a new government is inaugurated. With Buhari's move against Onnoghen, that is no longer the case. In the near term, there will be no immediate impact because we were already in wait and see mode, and Nigeria, going by the declining numbers of the past three years, is not really a palatable investment destination. The recent report that Ghana overtook Nigeria in FDI inflows further buttresses this point. In reality, when the dust settles post-election, Buhari's actions would mean that whoever is running Nigeria will have a much harder task convincing anyone to bring their money into the Nigerian economy.

The judiciary is already mobilising for what will turn out to be a debilitating strike for Nigeria as well as all courts will be shut and lawyers will effectively not provide government related services if the strike is to go through. The judiciary is vital because if foreign investors cannot rely on a coequal branch of government to grant reprieve for injuries done to their businesses, they are less likely to invest in our economy.

Geopolitical implications

Pushback from South-South

It is clear that Buhari has discounted votes from the country's South-South geopolitical zone in the upcoming election and the timing of the CJN's removal may be to have a friendly face in place at the Supreme Court should an Election Tribunal need to be established. For the South-South, there is little recourse at this time, save for militants to return to the creeks and resume their nefarious activities. Clearly, the President is willing to take that risk, but it is important to note that the Nigerian state no longer has a monopoly of violence within its borders, and will not be able to contain the anarchy that could ensue.



The usually vocal Afenifere Yoruba sociopolitical group has been silent so far. This is likely because of geopolitical calculations in the South West Towards 2023. With this in mind, it is unlikely that the group or any of the South West political elite will come out to condemn this in any strength.

Possible election postponement

We believe that as of this moment, an election postponement is unlikely because the President will be fairly comfortable with his chances at this point. With less than three weeks to Election Day, it appears that President Buhari is moving all the chess pieces to assure himself of electoral victory, irrespective of what the opposition and perhaps the Nigerian people do at the polls. It brings his response at the recent candidates' chat with journalist Kadaria Ahmed on what he would do if he lost into sharper relief – the President does not believe there is a chance that he can lose the elections.

International reaction

With Donald Trump busy with a vocal opposition in Washington and Theresa May knee deep in delivering an increasingly fractious Brexit, it appears that there is little the Anglo-American powers will do much more than issues statements against Mr Buhari's actions, as they did on Saturday, 26 January, the day after the event. Continental European powers are dealing with internal issues while the African Union is powerless to interfere. At this point, Mr Buhari believes that only the electorate can determine his future.

There is also the wider context of the global balance of powers to consider. Nigeria, like most African countries, has pursued a closer economic partnership with China, with President Buhari visiting Beijing twice and the world's second largest economy bankrolling big ticket infrastructure projects within the country. As a major source of hydrocarbon resources that has historically attracted investment from the West, this development that has spooked

Geopolitical implications

many observers in European and North American capitals. In addition, the ongoing migrant crisis in the Mediterranean and growing insecurity in the Sahel could easily become an exodus if the constitutional crisis occasioned by Onnoghen's ouster, situated within the context of a fragile politico-electoral situation, expands into a full political and security crisis, triggering mass Nigerian migration. It is not for nothing that the leaders of the United Kingdom, France, Germany, as well as the Canadian Governor-General visited the country in 2018.

Notwithstanding the above, it remains to be seen whether recent pronouncements on the Nigerian election by these international powers will mean anything. Pronouncements such as threats of visa denials and other punitive measures towards anyone who tampers with the election have been made. And it is clear that replacing the CJN a day before the electoral tribunal was to be constituted in what many agree is an illegal and unconstitutional manner falls squarely in the category of an attempt to tamper with the electoral process. Post electoral litigation has always been an integral part of Nigeria's electoral process, as Buhari himself has pointed out in the past. It remains to be seen if the international community will make good their words.

About SBM Intelligence

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Since 2013, we have provided data analytics and strategic communication solutions to clients across various sectors in Nigeria, Ghana, Cote d'Ivoire, the UK and France. In 2015 we became a partner to Stratfor, an American geopolitical intelligence firm that provides strategic analysis and forecasting to individuals and organisations around the world, including the various US departments and agencies like the Department of Defense (DoD) and the Federal Bureau of Investigations (FBI). Since the partnership came into effect, several SBM Intel generated reports have been published on Stratfor's website.

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